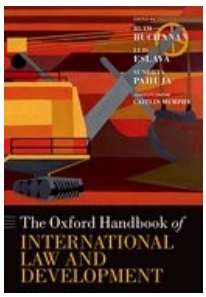

The Oxford Handbook of International Law and Development

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CHAPTER

2 The Law of International Development

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Abstract

This chapter studies the connection between law and development by focusing on its legal core: the law of development. It argues that we have to understand this body of law if we want to critically address questions about power asymmetries and agency, accountability, and human rights in the governance of development. To understand the law of development, the chapter sketches the broader historical, theoretical, and anthropological context arguing that development and modern law are central elements of a particular Western conception of modernity and complement each other in their (ostensibly) technical rationality. Against this background, the chapter explains the basic features of the law of development, including its actors and sources, general logic, and possible principles, and traces the evolution of this field since the 1950s. It shows how the law of development mirrors the changing dynamics of the global order, but is also a tool by which this order has been shaped, and may be reshaped.

Keywords: development, human rights, World Bank, development financing, development cooperation, TWAIL, Third World Approaches to International Law

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I. Introduction

Development and law share a close bond. While the idea of development has always been about reform, social transformation and ultimately denotes a governance project, law in all its technicality but also its pathos was and is a central tool to pursue that project. This chapter will study the bond between law and development and analyse the development project by centring on what we might call its legal core: the law of development. This is the body of law governing the actors, instruments, and processes that organise the transfer of funds and knowledge to the South for development purposes. Since the concept of development insinuates a basic deficiency of the South, the law of development addresses the very core of its (presumed) need, namely the transfer of funds and knowledge to cure the (presumed) deficit. Studying this body of law provides a central avenue to understand the normative framework of the governance of development and to address questions about power asymmetries, agency, accountability, and human rights, among others, in the governance of development. To analyse this body of law, a law-in-context approach is particularly well suited. Such an approach takes seriously the doctrinal structures of law, aims to understand them—and is at the same time historically informed, theoretically sophisticated, and able to understand the anthropological qualities of law and lawyering as much as the political economy of development.

To explain and adopt this approach, the chapter will proceed in three steps. Section II will provide layers of context, namely the historical, theoretical, and anthropological, to understand the connection between development and law, showing how the concepts of development and modern law are both each central elements of a particular Western conception of modernity and complement each other in their (ostensibly) technical rationality. In particular, anthropological observations on the qualities of law indicate how law is
p. 36 an essential instrument of the development project as a world-making project. Section III will map the ↳ scholarly context of studying the law of development. It will locate the study of this body of law in the broader context of law and development studies, relate it to approaches such as TWAIL and indicate different avenues of its analysis. In a third step, in sections IV and V, the chapter will turn to the law of development itself. Section IV will set out its basic features, including its actors and sources, general logic, and possible principles. In section V, I will trace the evolution of this field since the 1950s and show how the law of development mirrors the changing dynamics of the global order, but is also a tool by which this order has been shaped, and may be reshaped.

II. Conceptual and Factual Context: The Relationship between Development and Law

A. Understandings of 'Development'

There are two ways to conceptualise 'development'. One is to take 'development' as a concrete policy goal, pursued through a certain set of instruments and institutions, guided by an evolving understanding of 'development' as economic growth, sustainable development, human development,[1] and often through notions that devise ways to universalise (Western) concepts (such as statehood or individual rights).[2] From this perspective, achieving 'development' is a rather technical process, in which experts devise ways to a goal that is set by experts and their theories, often connected to the state's capacity (and preference) for long-term planning.[3] Economists, engineers, and agricultural or medical experts play a role as much as political scientist or institutional designers. The other way to understand development is epistemological and more critical. From this perspective, 'development' is not primarily about the substantive goal and how to achieve it but about who can define the goal and the path towards it.[4] The most important aspect here is the knowledge formation that shapes the process of defining 'development'. Development here is a
p. 37 standard mostly ↳ formulated by the West and to be achieved by the non-West. In this perspective, development is an epistemological and political project. It is a project of social construction—it is a worldmaking project.

It is easy to locate the two understandings of development in concrete historical contexts, especially when we understand it in the first, rather technically oriented perspective: it is a project emerging in the mid-twentieth century, coinciding with the final downfall of formal colonial regimes.[5] It refers to an institutional system and regulatory apparatus the stated goal of which was to reform the newly independent countries, i.e. to 'help' them 'develop'. The United Nations or the World Bank aimed to further 'development', and so did many international organisations (IOs) that developed specific programmes and rules to support this project (e.g. General Agreement on Tariffs and Trade preferences, common but differentiated obligations in environmental law). For many newly independent states 'development' became an important objective (some even understood themselves to be 'developmental states').[6] In a wide sense, the first perspective refers to the North–South dimension in any internationalised policy field and policy prescription that emerged from the 1950 and 1960s onwards: trade and investment, health and education, governance.

From the second, epistemological perspective, 'development' is an older and much larger project. Its beginnings are located in colonial times and in particular in the early nineteenth century, when the West started to consider itself to be set apart and above other models of sociopolitical and cultural formation.[7] Whereas until then, the world was characterised by a certain equilibrium between different power centres (China, Middle East, Europe), Western colonialism of the nineteenth and twentieth centuries began to assert the economic and cultural superiority of the West, and thereby to justify the domination and exploitation of other countries and peoples. The notion of 'development' and the development system as it emerged institutionally and policy-wise only around the formal end of colonialism may then be seen as the functional continuation of its 'civilising mission': the domination and exploitation of the South by the North in the name of social transformation. In this understanding, development is a project of governing the South. Taking this view of development, long before 'good governance' became an explicit set of policy prescriptions that were urged upon the countries of the Global South by development institutions, ideas of governing the world emanating from the North, were themselves shaped by the idea of development.[8]

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B. The Complementarity of Development and Law

Regardless of whether development is understood as a technical practice or epistemological project, law has played an important role in both. In fact, one can argue that there is a complementarity between modern law and the development project, especially when we connect this to a particular modern Western understanding of law as technique to regulate prospectively social behaviour. Law is used to advance the development project—but also shapes it through its particular internal logic and form and is therefore an important tool for its understanding, critique, and reform. This mutual relationship between development and law builds on the particular qualities of modern law that serve particular functions.

To understand what I mean, it is helpful to think of Max Weber's characterisation of law as rational and technical tool, central to enabling modern states to enact their political imperatives and guide a neutral and rational bureaucracy.[9] James Scott's description of the way the development project has historically been based on promoting techniques of 'seeing like a state' makes this connection powerfully visible.

More specific elements of legal techniques explain this link. There is, first, law's particular form of reasoning.[10] The particular formalism and technicality of law is used to translate complex factual (social, political, economic) questions into manageable 'legal' problems. Law provides procedural steps and argumentative devices to manage larger conflicts, and to detach them somewhat from the larger context. One such argumentative device and legal technique, which has particular relevance for the development project, is law's reliance on fictions. Law since Roman times operates with certain assumptions that are considered helpful to achieve certain results without being real. It can operate under the assumption of the 'as if', for example when we conceive of a corporation as (fictitious) legal person—or when we consider all states to be (formally) equal.

Another important element of legal technique is its perception and character as a mere problem-solving technology. With its formal and technical character, it is meant to provide means to an end. Law and legal work are not about the 'actual' end but simply a means to achieve an (otherwise set) end. Lawyers only use the means and are therefore not considered (or considering themselves) responsible for the ends. Lawyers are seen and see themselves as neutral experts, working with their instruments, techniques, and particular language, detached from the actual (political, economic, social) consequences of their work. In the context of the development project, this would also shield them from being suspected of being political ideologues.

Given these qualities, it is easier to see how law is able to perform particular functions in the development
p. 39 project. Three general functions typically assigned to law (to create order, ↳ to legitimate authority, to limit authority) are crucial for the functioning of the development project and based on the just mentioned qualities of law as instruments of governance. This begins with law's function to create order: the concept of development in its core is a world-remaking concept and law assigns to the state, to public institutions, or to 'the market', the task to shape the world accordingly—to reform economies and societies from 'underdeveloped' to 'developed', from poor and static to wealth-creating and dynamic, or to keep states and societies in a constant place of subordination and service.[11] Either way, the concept implies the need to govern societies and states. Law, in this particular technical-rational understanding, offers this ability to create order and govern—by prescribing order, stabilising behaviour, and creating authority.

Law is also considered a legitimate authority. Based on but also beyond a legitimate process of emergence, as well as shared values, law (in its liberal conception) is seen as detached from politics, as the neutral means to organise the world. The development project is about shaping the world in a certain way and needs support, justification, and hence legitimacy. The understanding of law as a technical and neutral instrument to simply achieve ends was and is key to provide such legitimacy (but also to cloak ideology and secure hegemony).[12]

But law cannot only legitimate authority—it also provides the means to limit and even to challenge such authority. It creates but thereby also limits competences. It is central to organise processes of voice and access. This way, law is not only a tool to govern but also provides a language of contestation, a language to formulate political claims in a neutral language, also for those contesting the ruling order.[13] This has been central to the area of law and development—not only in the past years, in which the dynamic of adoption of legal arguments by the marginalised has been seen a lot[14] but also in earlier phases.[15]

In sum, there is an inherent relationship and complementarity between the governing dimension of 'development' and the rational, technocratic side of law. 'Development' is a world-making and governance
p. 40 project, and 'law' (in its modern Western form) provides a ↳ central medium and mode to govern.[16] But it can help to question and reform it. A better understanding of the structures and logic of the law of development is therefore one precondition to (re)shape the development project.

C. Factual Contexts of Development Law

Beyond this conceptual and anthropological complementarity of development and law there are two more factual and political aspects that shape the context in which development law operates.

First, there is the obvious and grave asymmetry of power and wealth between the actors involved. Development is (ostensibly) the very project in which fundamentally unequal actors (rich and poor, powerful and weak) cooperate in order to overcome exactly this inequality. This reality is glossed over in law by the fictional crutch of the assumption of formal legal equality. But this fiction of the 'as if' is also a tricky trap for legal technicians to ignore the factual realities of disparity and inequality, and the political economy of differing positions and interests. But this political economy is extremely relevant to understand how states and institutions behave, as structures of centre and periphery continue, partly translated in new configurations but still fundamentally shaping the dynamic of South–North relations.

The second contextual aspect is the fact that 'development' is not only an essentially contested concept but also simply an enigma. We do not know how to reach it. Instead, different political and ideological camps have different conceptions of the right path and definition of development. More concretely: the concept of 'development' is ideologically open. The USA as well as the Soviet Union or now China (capitalist and socialist, authoritarian and liberal) equally embraced it. It is open—even though it is true that it was mostly the liberal capitalist West that used it.[17] Ultimately, 'development' is an empty vessel, which is part of its allure and magic. For its legal analysis this could mean that it is even easier for lawyers in the field to hide behind the formal nature of the law; its (presumably) apolitical nature.

III. Scholarly Context: Placing the Study of the Law of Development

Before moving on to analyse the law of development and demonstrate how it rests on the understanding of development shown above, I briefly want to locate the scholarship on the law of development in the broader field of legal studies on development in three ways.

p. 41 First, it is important to be aware of the distinction between international and domestic—and the respective object of analysis. While the boundaries between international and domestic have blurred[18] and while I focus here on international development and its law, there is also law and legal scholarship dealing with the domestic pursuit of development[19] and increasingly its comparative dimension.[20]

Second, one can distinguish a broader field of 'law and development' from the 'law of development'. Law and questions of development intersect in *any* field of law, where it has a North–South dimension. In this wider sense, there is the South–North dimension of economic law, of environment law, of intellectual

property law, etc.[21] There is, however, a narrower field that is called a law *of* development. This is the law regulating the actors and processes of the cross-boundary development project, as described above.[22] This law regulates or emanates from international (public, private, or hybrid)[23] but also domestic actors (in the South as well as in the North), when they regulate this process[24] or structure South–South cooperations. This body of law has been analysed from various angles (e.g. as international institutional law, human rights, contract or project finance law, foreign relations law).[25] The development project, as explained above
p. 42 (section I) is here the central ↳ focus of the law, not just one angle (as in the wider sense).[26] In both frames ('law and development' or 'law of development'), law has been studied through different methodological approaches—in a doctrinal, internal sense or through more external perspectives applied to law, such as political economy, anthropology, or critical theory. Often these different approaches inform each other. With regard to the law *of* development, for example, it is interesting to observe that legal scholarship profited from anthropologists discovering the field,[27] and extended scholarship on law and global governance[28] only in their footsteps.

Finally, one can relate the scholarship on the law of development to three 'schools' or epistemic communities of legal scholarship, for which South–North relations and development have been central.[29] There is, first, the 'law and development movement', originating in the 1960s in the USA and advancing a rather pragmatic, bottom-up analysis of how law could be used to support 'development processes'.[30] This
p. 43 movement has originally been focused ↳ more on the domestic law dimension. Second, emerging at around the same time but located more in the field of international law was a French-language school of 'droit international du développement'.[31] This was more critical, demanding that basic principles of international law be rewritten to strengthen substantive justice and benefit developing countries. It was driven in particular by prominent authors from the Third World.[32] While these two schools originate in the 1960s, the third school emerged in the late 1990s: Third World Approaches to International Law (TWAIL). This aims to critically re-examine the structures and doctrines of international law in a longer historical trajectory, foregrounding the perspective of Third World and colonised societies.[33] Today, while the French tradition seems to have lost traction, 'law and development' and TWAIL exist side by side, showing different sensibilities but sharing a family connection. Scholarship on the law of development draws insights from all three of these schools.

IV. The Law of Development: Basic Features

The concept of development has always denoted a governance project that is intimately linked to law. The law of development, that is, the law governing the actors and processes that organise the transfer of funds or knowledge to the South for development purposes, can be regarded as the core of this project. The following section will describe and characterise this area of law. It will lay open the basic legal logic in this field, its main instruments, and its structure (section III). In a second step, it will analyse this legal field in its historical context and development, trying to capture how its structures have shifted over time (section IV).

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A. Actors and Sources of Law

The international development project is driven by a wide variety of actors—from the South, from the North, and from the international plane. Relevant actors in the South are primarily states, but increasingly also other governmental units, such as cities, to some extent also private NGOs or companies. These actors interact with international institutions (such as the AIIB,[34] UNDP, World Bank), national development agencies,[35] and private actors such as philanthropic foundations (such as the Gates Foundation) or commercial banks. This scenery is much more plural than it was until the 1990s due to the rise of China and other powers, which are now both recipients and funders in the development project (in particular, the BRICS countries). Since the 1990s, more and more private actors have also become central to the field (philanthropies, civil society organisations, but also private commercial banks) as well as hybrid, often multistakeholder platforms, including coalitions of public and private actors (such as GAVI).[36]

The law of development regulates the interaction between these actors with respect to development transfers and is to that end laid down by and between these actors.[37] In the South, legal sources are constitutional, administrative, or other laws that regulate the interaction with or concerning transferring partners.[38] The major part of development law, however, is to be found in the rules of donor agencies, i.e. their founding treaties and their secondary law,[39] or in national laws on development in donor states.[40]
p. 45 Effectively, donors ↳ are often unilaterally setting the rules of how they operate, which binds those who receive transfers. This applies to public agencies but also private ones, such as commercial banks, who set the terms of their engagement with lenders, including states.[41] Development law is also laid down in bilateral agreements between donor and recipient, structuring any given intervention. There is finally a layer of multilateral declarations and soft law that is providing a normative framework within which actors cooperate. The best examples here are the Millennium/Sustainable Development Goals (SDGs) or the Paris Declaration.[42] The sources of the law of development and their legal nature are hence very mixed. There are hard-law elements in the traditional sources (mostly international treaties, but also constitutional or statutory law), but there is also soft law and norms at the borderline of formal and informal (such as internal rules of IOs).[43]

In terms of actors, one more aspect is important, namely that there is no court. International development shares the basic feature and problem of most cross-boundary legal fields—missing an overarching legislature and not being reviewed by a general court.[44] Courts, however, are the heart of a legal system as a somehow autonomous sphere, creating and curating the law.[45] In development law, whatever is agreed upon, is only subject to the control of the parties,[46] especially since hopes that the World Bank's Inspection Panel could ↳ develop into a court have not really been fulfilled.[47] Domestic courts are largely blocked from
p. 46 an equivalent function by immunity clauses.[48]

B. Basic Characteristics and Underlying Logic

Four basic features characterise the law of development: its regulatory focus on transfers, its task to shape a cyclical process, its organisation by often unrepresentative institutions, and the multilevel dispersion of its legal sources combined with the similarity of its content. A fifth feature, the absence of a court, has already been mentioned.[49]

The fundamental mode of operation in development law is one of organising transfers. It evolves around facilitating transfers of mainly two things: funds and knowledge. Traditionally, the centre of attention has been the provision of *funds*. Providing loans or grants, and hence financing development, is and remains an essential task.[50] *Knowledge* is an important object of transfer too. To provide advisory services or support capacity-building is a central task of development agencies and of the law regulating them too. The law of development is in principle structuring the process of transferring funds and knowledge—and organising to

learn from such transfers for the future. A central legal tool for this purpose is a project agreement that set the terms for individual project support or general budget support (also known as structural adjustment).[51] These agreements are often only allowed to be concluded following some general terms that, for example, (as by the World Bank's safeguard policies) set the environmental or social standards to be fulfilled or allow for other types of conditionality.

To be sure, this focus on transfers is a heuristic abstraction. It serves the purpose of highlighting the basic logic that drives actions and institutions in this field and their laws. 'Development' is, of course, a multifaceted and multidimensional process, driven by various activities and context factors. The point here
p. 47 is that development agencies and the laws ↳ regulating them do not engage in the respective activities themselves (such as building a dam, providing constitution-writing advice, or combating a pandemic) but enable others to do so—by providing funds and/or knowledge. Hence, transfer is the central mode of operation—and as such a categorically different mode of operation than, for example, issuing allowances or prohibiting activities (such as granting permission to build, to trade or keep a trademark, outlawing higher customs, or developing weapons).[52] Of course, development agencies engage in many more activities than transfers. But again, the argument here is that their *principal*, most characteristic task is that of organising transfers.

Once we attend to the centrality of transfers, we should also clarify that transfers are mutual and multidirectional. They are transactional. Either recipients have to repay loans or accept policy influence (be it a model of governance as demanded by mostly Western donors) or economic and political service (as demanded by all donors). Similarly, knowledge transfers have different directions and knowledge flows back and forth.

Finally, if transfer is the basic logic of the field, it is also its basic problem and (self-)delusion. Even though transfers are mutual, what makes them perfidious is that donors succeed in framing these development transactions as an act of altruism, solidarity, or philanthropy, when it is actually a very mutual, transactional process.[53] This altruistic facade has as much a legitimising as a devastating effect.

Second, development law structures, in essence, a cyclical process of transfers. As a result, it contains a lot of procedural law. The traditional process of organising (financial) transfers can be described along five stages: (1) country planning, i.e. setting a multi-year plan of activities for a given country; (2) budgeting, i.e. the allocation of funds for a country per year or planning period; (3) designing, negotiating, and concluding agreements on concrete intervention; (4) implementation of intervention; (5) control of intervention—and planning again. Legal regulation here starts with the rules on who can start a process and who participates for example with regard to Indigenous or other affected people (stages 1 and 3). It includes questions of how to organise the allocation of funds (CPIA; stage 2) but also rules on the evaluation of transfers, hence it includes access to information about these processes as much as evaluations and indicators (stages 4 and 5).[54]

This procedural approach of multi-year planning and then an iterative execution of these plans has been the dominant approach in past decades. But it has increasingly been complemented by other approaches. Market-driven, bottom-up, or experimentalist approaches are practised by mostly smaller or private law-
p. 48 based actors.[55] They have not ↳ (yet?) altered the basic approach of the dominant aid agencies but surely deserve heightened attention also in legal scholarship. Knowledge products and transfers are also often decoupled from longer planning processes and emerge in other procedures, but still in familiar ways.[56]

A third element is the mostly donor-driven structure of process and law. Development interventions are organised by a wide variety of institutions that can be of public, private, or hybrid nature, in the North, the South, and on the international plane. The law of development encompasses 'constitutional' elements, in the sense that it provides institutional foundations, competences, and general principles of their activities.

Development law is hence concerned with setting the structures for the process of transfer by constituting the actors, in particular development agencies, delineating their powers, and setting procedural rules as well as substantive standards for their doing.

A particular feature of many of these organisations is their precarious model of representation. In particular, the dominant public institutions of development, namely the development banks, have adopted a scheme of weighed voting in which 'donors' have more votes and representation than 'recipients'. Since development banks have dominated and shaped the field and its law, it is hence ultimately a donor-driven law.[57] Private actors (be they private banks or philanthropies) are mostly even less concerned with fair representation. Such skewed patterns of representation only reinforce the factual power structures and asymmetry between the protagonists. At the same time, the law of development increasingly provides mechanisms of accountability and contestation of the actions of these institutions, for example through complaint mechanisms or their obligations to disclose information.[58]

A short, fourth observation complements these basic characteristics of development law. The content of development law across levels and organisations follows a similar mode and logic. Over the years, actors from different levels have learned from each other. Diffusion and cross-fertilisation in particular between donor agencies have taken place, which has brought about a visible coherence in terms of instruments or procedures and has often been a copy of innovations from the law of the World Bank.[59]

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C. Principles as Frames of Normative Analysis and Evaluation

In the evaluation of development law, legal scholarship cannot pretend to be dealing with an apolitical, technical field of law. Context matters—power, dominance, and hegemony in an epistemological, as well as political or economic, perspective is central. But legal academics should also not give up on normative tools to analyse and evaluate the law. Law is not just instrumental but also provides a language of values and justice. It can provide standards to (legally) evaluate the law and this evaluation of the law can shift when new instruments and structures emerge.[60]

One tool of legal scholarship to do that is to develop and use principles. Principles, such as precaution in environmental law or most-favoured nation in trade law, serve three main functions: first, they highlight guiding notions of a field and thus help to systematise the legal material 'around' these notions thereby helping to create a more transparent understanding of the field in general. Second, they provide internal (i.e. legal, not political or philosophical) yardsticks to evaluate norms in the field. Finally, they help rationalise collisions and conflicts between different values or interest that find their expression in these principles.[61]

Given that the law of development is a field with a fairly opaque, and still barely studied, set of rules, it seems particularly important to use overarching principles here.[62] Five principles in particular have been proposed here:[63] (1) *collective autonomy* as the basic concept behind sovereignty, non-intervention, and ownership, which reacts to the fact that states are important actors in the development field and their autonomy is a central (and legally founded) notion. (2) *Human rights* (or individual autonomy), which highlights the fact that individuals are also important actors in the development process and their well-being is the ultimate end of the process in general.[64] (3) *Efficiency and adequate cooperation* as a third principle highlights the fact that development interventions have to be justified also from the perspective of their outcomes and resources to be invested efficiently and through adequate formats and procedures. (4) *Accountability* to highlight that respect for, and control of, agreed rules beyond the traditional legal notions of responsibility is particularly ↳ important.[65] And finally (5) '*development*' is the fifth principle, which captures the relative autonomy or heteronomy of a 'development agenda' (be this a focus on economic

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growth, sustainable development, or poverty reduction) —in contrast to 'development' as being a blank cheque and mere instrument and disguise of other state interests.[66]

Perhaps the most important of the three functions of principles is the principles' ability to help rationalise conflicts between different values or interests that find their expression in these principles. The principles relate to each other in many ways. They are sometimes complementary to one another, but more often conflict which each other. For example, the collective autonomy of recipient countries can conflict with the autonomy of donors; the development principle can contradict donor autonomy; human rights can restrict the autonomy of recipient states; efficiency can undermine autonomy. The question of how such conflicts are to be resolved is unavoidable. There are no general, binding rules for conflict resolution, nor is there a hierarchy among them. Instead, it is important to make transparent these conflicts, to endure and accept them to some extent—or to find specific solutions for individual cases.

V. The Law of Development: Its Evolution

The law of development is a mirror of the changing dynamics of the global order but also a powerful tool to shape it. The following section will capture how the law of development has evolved as an instrument in the hands of the development agencies—but also increasingly as a tool for the marginalised and the critics of development governance.

A. Formal Beginnings (1950 onwards)

The development system and development law emerged parallel to the process of formal decolonisation and the beginning of the Cold War.[67] It is a time when the USA eclipses European colonial powers as a dominant global force, empires fall apart, newly independent countries enter the world stage, and the Cold War creates an intense struggle between East and West for allies.[68] 'Development' is a new concept that attracts all political sides in its promise and vagueness and is slowly translated into an institutional and legal
p. 51 system. Quickly replacing colonialism as the central concept of global order, it is understood ↳ mostly through the lens of modernisation theory and considered a rather technical, economic process.

The emerging institutional structure of the development system (and its law) is the result of an intense struggle between Cold War powers.[69] The United Nations becomes a central platform of the South–North debate, but the West led by the USA manages to draw central responsibility for 'development' to a mix of public institutions that it dominates, in particular the World Bank, the EU, and domestic agencies. Outside the UN, which creates a number of new programmes to organise 'development', these new, Western-driven institutions are characterised by hybridity and institutional inequality.[70] They are driven by an economic as much as a political agenda. In their organs they eschew the principle of sovereign equality but accord voice by financial power. Private actors do not play a significant role at the time.

The emerging law of development is the law of, and connected to the activities of, these institutions and at its core is a law of project finance. It is based mostly on formal treaties, in particular the founding treaties of the new funding organisations and the project agreements concluded between donor and recipient country. Founding treaties mostly prescribe that financed projects have to be narrow in scope and distinct.[71] The Articles of Agreement of the World Bank even prescribe that it should not be influenced by politics. In a procedural perspective, the role of the states is particularly protected (e.g. the application principle for proposals).

Looked at through the lens of the normative principles introduced above, the dominant normative guidepost in this early phase is the principle of collective autonomy. States act based on formal consent—at

least in law and with the exception of unequal representation in the developing banks. Much of the law is also geared to comply with the principle of efficiency. Human rights or the principle of individual autonomy do not play any relevant role yet. A substantive idea of development is hardly fleshed out in law; the principle of development is hence irrelevant.[72]

B. Managerial Turn (1975 onwards)

During the mid-1970s, development law took a pronounced turn parallel to the shift in the dynamics of the global order. Shocked by the oil crisis and the adoption of the New International Economic Order in the UN, Western powers start developing instruments to stabilise their position.[73] This is fuelled by a ground-
p. 52 shifting reorientation of the roles ↳ of the state and the market that is beginning to take shape. In increasingly influential economic thinking, the role of the state is attacked as inefficient, corrupt, and politicised, while markets are promoted as neutral frames to deliver growth and wealth. The globalisation of markets gains steam, while the Communist approach of planning falters. 'Neoliberal' ideas that are inspiring Northern governments are exported to rule the world, unencumbered by the Soviet Union.[74] Global governance emerges as international law takes a managerial turn.[75]

The institutional set-up of the development system does not change very much in this phase. It is not an era of institution-making but of agenda-shaping. Western-led institutions (particularly the World Bank and IMF) begin dominating ideas and programmes of development governance, while the role of the UN stalls.[76] A central element of how the World Bank in particular became the dominant development agency is based on its ingenious use of law. The Bank introduces new formats of transfer and instruments, which are increasingly encompassing in scope, less formal in their legal nature, and copied by other institutions.

Such deformalisation and politicisation emerges in different ways. For one, the Bank increasingly uses a second format of transfer that is not focused on concrete individual projects but aims at influencing the policy decisions of Southern states, the so-called structural adjustment, now budget support. With this, not building a dam but, for example, changing the privatisation policy of a country became the subject of development interventions. To this end, conditionality, i.e. conditioning the provision of funds or knowledge on prior compliance with demands, became a central tool (beginning in the late 1970s). At the same time, development banks start to regulate what they expect of the recipient, when funds in concrete projects are dispersed. They increasingly regulate the conditions of transferring funds or knowledge through so-called safeguard policies for environmental or social aspects or start to make human rights compliance a precondition for cooperation (and transfer). These increasingly wide-ranging and substantially or ideologically loaded tools are developed mostly through informal legal tools. In order to set new standards for transfers or conditionalities, development agencies increasingly turned to internal lawmaking and standard-setting (late 1980/1990s).[77] New instruments or new conditions were developed in internal or secondary institutional law and hence set in soft law. But there was not only an introduction of new, internal rules. The basic treaties, in particular the founding treaties of the Bank, were ↳ increasingly
p. 53 reinterpreted, ignored, or devalued to accommodate the new tools. Especially after the end of the Cold War, the reluctance to avoid overtly political areas and to use new instruments falls. For example, as (good) governance or rule-of-law promotions became a more and more important agenda for the agencies, treaty-based limitations were ignored, and mission creep became necessary and practised generally (1990s).[78]

In sum, what has been described as the rise of global governance regulation and the turn to managerialism, also very much takes place in development law. It mirrors the emergence of regulation in global affairs and the increasing influence of the market rationales and economic thinking.

The normative consequences of this shift in the instruments and ends of development law become visible when looked at through the lens of principles. The most obvious shift is the one with regard to the principle

of collective autonomy and the axiom of consent. The principle indicates to what extent the sovereignty of states is respected and was central in the first phase, in particular serving to preserve a balance between states in South and North, to some extent even protecting the newly independent states of the South. Since the 1980s, however, development law guards less and less the collective autonomy of the South but provides instruments that allow for the dominance of Northern states and the institutions they dominate (e.g. through the instruments of conditionality or safeguards). At the same time, and to some extent paradoxically, one can observe a certain rise in importance of the development principle. While development law was mostly instrumental or non-substantiated before, it is now increasingly turned to protect a certain idea of development (sustainability, good governance, poverty reduction). Human rights are still rather irrelevant and only slowly coming to play a more important role in this phase, partly introduced as conditionality and also through environmental and social safeguards. Efficiency plays a role for example in the internal law of the World Bank, which introduces evaluations. But this is rather the exception.

C. Pluralisation, Contestation, and Confirmation (1995 onwards)

But the triumph of the liberal West also contained the seeds of its undoing. Western hegemony of the global order lasts only briefly. In the late 1990s, and after September 11 (in 2001), the contestation of the West manifests itself in various aspects. China and other emerging powers (especially but not only the BRICS countries) become an increasingly important part of the global economy and demand a role in running the
p. 54 world.[79] But also within the West—and even in liberal legal scholarship—critical perspectives increasingly ↳ question the largely unchecked powers of international institutions.[80] At the same time, it becomes clear that law can be used not just by the dominant but also by the marginalised.[81]

This overall shift begins to shape the law of development starting with the institutional set-up. This phase witnesses a remarkable pluralisation of actors in the development system. Many of them critique and contest the Western-dominated system. There are on one hand the rising powers that demand a role in the existing institutions. They do not shy away from creating their own institutions, as they realise that the West is sharing power only reluctantly (especially the USA in the World Bank). The BRICS, led by an ever more assertive China, create the New Development Bank and the AIIB.[82] On the other hand, private actors are becoming central actors in the field—both those with philanthropic agendas and those with profit interests, i.e. private banks, who earn money through project finance.[83] This changes (not least importantly) who provides funding. While in the first decades ODA was the only significant source of funding, now private sources of funding surpass the amount given by states.[84] The increased importance of private funding also leads to the emergence of a number of 'blended finance' instruments that combine public and private funding.[85] They often use the general trust attached to public funding to attract and secure private funding. Finally, civil society organisations become a much more vocal and influential set of actors.

In terms of instruments and formats of transfer, indicators and other knowledge products emerge as
p. 55 increasingly important instruments in development governance.[86] While ↳ providing know-how has always been an important dimension of development work, since the late 1990s indicators emerge as new instruments to collect, use, and diffuse information. The Millennium Development Goals of the UN and the World Bank's Doing Business Indicators are the most prominent set of indicators. At the same time, demand for public transparency increased, leading to a new set of public disclosure policies adopted by development agencies. Development law shapes these instruments and is an important object of these knowledge products.[87]

Other changes follow. The rise of new powers, such as China and India, also leads to an increased pressure on agencies to accommodate their role as recipients and as dominant powers. A new set of safeguard policies in the World Bank does that.[88] All in all, the legal nature of these new instruments is mostly

informal. The use of secondary, internal institutional law continues. Knowledge products, even though of immense effect and authority, are hardly framed legally at all.

Another important aspect of how development law has shaped development governance since the mid-1990s is how it is used for contestation in the very procedures and institutions of development interventions. Civil society since the 1970s, and in more globalised transnational fashion since the 1980s, mobilised against development interventions that violated the livelihood of many communities.[89] A central tool in the rising chorus of protests since then were human rights and human rights language. It was increasingly mobilised to express the demands of affected and to counter development agencies. One aspect of this was the demand to allow for those affected by interventions to be heard. This claim was made by many but became especially powerful in combination with the demand for respect for Indigenous peoples.[90] This led to one of the major legal and institutional innovations in development law, namely the creation of complaint mechanisms that give affected individuals the chance to hold development agencies accountable. The first such mechanism was the Inspection Panel, introduced at the World Bank in 1993. Since then, almost all other agencies have followed.[91] Other effects of these demands were the increasing attention to
p. 56 rights of ↳ participation and voice in development planning and intervention,[92] as well as the adoption of disclosure policies.[93]

In sum, and interestingly, the institutional and rights-based contestation takes place through law. It is not a rejection of the system or of law, but its confirmation. Law very much confirms its role as central technique and language to translate political ambitions into governance guidance.

Analysed through the lens of principles, the most important shift here is the emergence of human rights as a relevant force. The idea that individuals (even vis-à-vis IOs such as the World Bank) have socio-economic and political procedural rights, and that these rights matter, began shaping development law. This is a counterpoint to the collective autonomy of states (donors and recipients alike) and their collective agents, i.e. development agencies. In effect, this meant that the importance of the principle of collective autonomy was further diminished. At the same time, there is an increased relevance of the development principle, as measuring and evaluating the effects of development interventions (in particular, through indicators) became increasingly important. Less the political or economic interest of a donor state but the effect of interventions to the stated goals of a development intervention began to matter. This went hand in hand with growth in the relevance of the principle of efficiency.

D. Digital Transformation, Experimentation, Reflexivity (since 2015)

The next major shift in the global order has been hard to miss. Since the mid-2010s, the hegemony of the (neo)liberal West has declined rapidly as its leaders gave up on liberal multilateralism (USA under Trump, UK after Brexit). Confrontation instead of collaboration began to dominate relations between the USA, China, and Europe. This shift played out at the same time as the realisation was dawning of the transformative effects of data and digitalisation (for better or worse). Both digitalisation and the decline of the liberal West also majorly affected development governance, though we are only at the beginning of understanding its effects in development law.

The most important shift is the advent of big data and hence the potential availability of a different dimension and quantum of information about people, behaviours, and patterns. This ripples through the contours of development governance with respect to its relevant actors, uses, modes, and the role of the participants. The availability and use of data has triggered a new approach to development interventions in some quarters that is focused on developing more small-scale and experimental formats of interventions and seek to provide quick and limited, or local, reactions to problems rather than comprehensive, large-scale, and long-term planned ones.[94] It transplants a culture of experimentation into the development

p. 57 sphere, which ↳ had rather been dominated by bureaucratic planning.[95] The creation of prototypes to be tested rather than plans to be implemented is at the heart of this change and based on the availability of data to suggest and test such prototypes. The driving actors here are also different ones than in previous phases. To begin with, the collection of data and the process of making them legible is no longer the preserve of public or state institutions. Instead, private organisations often collect the data,[96] and help to understand them. Even though public institutions are also creating units that develop a special expertise and infrastructure to organise such processes (such as UN Pulse), non-state private actors are gaining importance. All in all, the collaboration of different actors or multistakeholder coalitions seem to be more appropriate to gather, understand, and use data rather than the single institution pursuing their mandate as before.[97]

The relevance of data goes along with another potentially profound shift in development governance that has been described as a move to more reflexivity.[98] It is based on the observation that development processes are increasingly organised through processes of adaption that draw on people reflecting on problems and creatively redesigning ways to reform them—instead of the mere transfer or transplantation of solutions used elsewhere. Such a new mode of reform is often based on the availability of data but also on a different understanding of the protagonists, most importantly the citizens and individuals. These are seen less as to be reformed and redirected but as partners in a process of reflection and reform. And, again, the institutional contexts of such processes are increasingly multistakeholder platforms and less often single (public) institutions.

Next to these data-driven changes, deformalisation is continuing to characterise the role of law and lawyers in public development institutions.[99] Economic thinking that focuses on evaluating and averting risks is shaping more and more the approach of lawyers in institutions; not the observance of existing rules but the using of law to (economically and politically) desired ends is shaping the work.

These shifts are only slowly manifesting themselves in legal forms. It is therefore not easy to capture them
p. 58 through the lens of principles. But a few first observations and assumptions ↳ can be made. Surely the relevance of collective autonomy further declines. States are only partly owning or providing the central resource of this phase (data), increasingly less in comparison to private actors. The individual, on the other hand, gets more voice (as a source of data and interlocutor in reflexive practices and testing prototypes) though their role is not (yet) conceived in human rights or individual rights terms.[100] The principle of efficiency probably gains the most here, since much more prominence is given now to ensuring certain outcomes of activities. If a prototype activity does not work or a proposal does not gain traction among a wider group, it is much more easily dismissed. The principle of development also gains but is not as much at the centre, as there is no clear content of a ‘development’ agenda here.

VI. Conclusion

Development always was a world-making concept and law always was a central instrument to pursue this. The (ostensible) technicality of modern law provides a somewhat congenial complement to the (ostensibly) technical project of development. The law of development, as sketched here, regulates a core element of it. Containing the rules governing the actors and processes that organise the transfer of funds or knowledge to the ‘deficient’ South for ‘development’ purposes, it provides a framework to analyse and critique these rules and address questions about power asymmetries or conditionality, accountability, or human rights in the context of development governance.

The latest developments in the global order and transnational society, however, have the potential to upend much of the development project and its law. In particular, three developments point to some fundamental shifts. There is, first, a certain shift of focus from North–South to global. Development policy and its law are

increasingly less about the South, and more about saving the planet. There is a growing awareness of global good and global vulnerability (climate, pandemics, populism). The adoption of the SDGs in 2015 can be seen as the moment in which problems were not only perceived of the South only but of every state and polity on the globe. Second, there is a shift from limited resources (financial funds or expensive ideas) to unlimited sources (data). In its early stages, development policy and law were about money and know-how that was overwhelmingly possessed by actors in the North. Now it could seem that data that promises profit also promises decisive ideas for improving the living conditions of people. Finally, we might observe a shift from transfer to adaptation—the importance of Western knowledge and ideals has diminished, and the role of individuals and organisations has changed profoundly.

These shifts could be seen as softening some asymmetries in the field—but might also simply generate new, equally problematic risks and dangers. There might simply be a new set of hegemonic powers, but with an ongoing dynamic of neocolonisation. This might follow less a liberal script focused increasingly on 'effective governance', and more explicitly on domination. Money still drives the world, and free data are
p. 59 already turned into private ↳ property. Data can be instrumentalised, and the need for legal guidance regarding data is obvious.

All of this points in one direction for sure—the ongoing need for critical legal analysis. The development project and the law have always existed in a mutually constituting and influencing relationship. To understand, reflect, and critique this relationship, critical and contextual legal scholarship is needed more
p. 60 than ever. ↳

Notes

1 Walt Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (3rd edn, Cambridge University Press, 2012); Amartya Sen, *Development as Freedom* (first published 1999, Oxford University Press, 2001); Amartya Sen, 'Capabilities and Human Rights' (2005) 6 *Journal Human Development* 151; World Commission on Development and Environment, *Our Common Future* (Oxford University Press, 1987).

2 Rose Parfitt, *The Process of International Legal Reproduction* (Cambridge University Press, 2019); Guy Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, 2017); Marie von Engelhardt, *International Development Organizations and Fragile States: Law and Disorder* (Springer 2018); for a critical look at the role of Western and often Weberian concepts, see Florian Hoffmann, 'Facing South: On the Significance of An/Other Modernity', in Philipp Dann, Michael Riegner, and Maxim Bönnemann (eds.), *The Global South and Comparative Constitutional Law* (Oxford University Press, 2020) 41.

3 James Scott, *Seeing Like a State* (Yale University Press, 1998); for an early profound critique of this practice, see Albert Hirschman, *Development Projects Observed* (Brookings Institution, 1967).

4 Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (2nd edn, Princeton University Press, 2012); Walter Mingolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton University Press, 2012).

5 Gilbert Rist, *The History of Development: From Western Origins to Global Faith* (trans. Patrick Camiller, 4th edn, Zed Books, 2014) 88ff.; Philipp Dann, *Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge University Press, 2013), Pt. I; Mark Mazower, *Governing the World: The History of an Idea* (Penguin, 2012) 293, 347ff.; Sinclair, *Reform the World*.

6 Meredith Woo-Cummings (ed.), *The Developmental State* (Cornell University Press, 1999); Luis Eslava, 'Developmental State', in Jochen von Bernstorff and Philipp Dann (eds.), *The Battle for International Law: South–North Perspectives on the Decolonization Era* (Oxford University Press, 2019) 71.

7 John Darwin, *After Tamerlane: The Global History of Empire Since 1405* (Bloomsbury, 2008) 198f., 209f.; Jürgen Osterhammel, *Unfabling the East: The Enlightenment's Encounter with Asia* (Princeton University Press, 2018).

8 Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); Florian Hofmann, 'International Legalism and International Politics', in Anne Orford, Florian Hoffmann and Martin Clark (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 954.

9 Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, vol. 1 (trans. Guenther Roth, Claus Wittich,

Bedminster Press, 1968) 244. On Weber's conceptualisation of law, see Rodger Brubaker, *The Limits of Rationality: An Essay on the Social and Moral Thought of Max Weber (Controversies in Sociology)* (Allen & Unwin, 1984); it is no coincidence that David Trubek, one of the leading thinkers of law and development, started out with intense studies of Max Weber, see David Trubek, 'Max Weber on Law and the Rise of Capitalism' [1972] *Wisconsin Law Review* 720; David Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 *Yale Law Journal* 1 see especially the section 'The Role of Law in the Development of the West: The Work of Max Weber', 11–16.

10 See Ralf Michaels and Annelise Riles, 'Law as Technique', in Marie-Claire Foblets et al. (eds.), *Oxford Handbook of Law and Anthropology* (Oxford University Press, 2020) 860.

11 See art. I of International Development Association (IDA) Articles of Agreement: 'The purposes of the Association are to promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world included within the Association's membership.'

12 For an example of this function of development law, see IDA's prohibition of considering political circumstances (art. V, s. 1(g)) and its use in avoiding sanctioning apartheid South Africa. On this episode, see Philipp Dann, 'The World Bank in the Battles of the "Decolonization Era" ', in Bernstorff and Dann, *Battle for International Law*, 278; Samuel Bleicher, 'UN vs. IBRD: A Dilemma of Functionalism' (1970) 24 *International Organization* 31; on the (ostensible) separation of politics and economics, see Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011).

13 The most important example of this function is surely fundamental rights in general but also in the development context.

14 Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 2 *World Bank Legal Review* 38; Peter Newell and Joanna Wheeler (eds.), *Rights, Resources and the Politics of Accountability* (Zed Books, 2006); Samuel Hickey and Diana Mitlin (eds.), *Rights-based Approaches to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009); Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 *Melbourne Journal of International Law* 27; Irene Hadiprayitno, *Hazard or Right? The Dialectics of Development Practice and the Internationally Declared Right to Development, with Special Reference to Indonesia* (Intersentia, 2009) 46ff.

15 Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2009) 11.

16 Generally, law is different but also complements other modes of governance, such as economics (through economic benefit), politics (through organising power and/or force: police and army) or culture and ideas (creating ideas, images, stereotypes). On the particular mode of governance advanced by the law of development (i.e. financing and managing transfers) more below.

17 See Chapters 15–17 in this volume.

18 The scholarship on *transnational* law and development is testimony to this.

19 It is impossible to capture the scholarship on this, but see as examples Diego Coutinho et al. (eds.), *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (Cambridge University Press, 2013); Benjamin Zachariah, *Developing India: An Intellectual and Social History* (Oxford University Press, 2012); Eslava, 'Developmental State'.

20 See Pablo Ciocchini and George Radics (eds.), *Criminal Legalities in the Global South* (Routledge, 2019); Philippe Cullet and Sujith Koonan, *Research Handbook on Law, Environment and the Global South* (Edward Elgar, 2019) (esp. Louis Kotzé and Evande Grant, 'Environmental Rights in the Global South', ibid., 86); Dann, Riegner, and Bönnemann, *Global South and Comparative Constitutional Law*.

21 A good entry point (next to this volume) on the breadth of themes is provided by Koen De Feyter, Gamze Erdem Türkelli, and Stéphanie de Moerloose (eds.), *Encyclopedia of Law and Development* (Edward Elgar, 2021); Michael Trebilcock and Mariana Mota Prato, *Advanced Introduction to Law and Development* (Edward Elgar, 2014); as further examples, see Shawkat Alam et al. (eds.), *International Environmental Law and the Global South* (Cambridge University Press, 2016); Julio Faundez and Celine Tan (eds.), *International Economic Law, Globalization and Developing Countries* (Edward Elgar, 2012); Bhupinder S. Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 *European Journal of International Law* 1, 2; Joel P. Trachtman and Chantal Thomas, *Developing Countries in the WTO Legal System* (Oxford University Press, 2009).

22 For a basic characterisation, see section IV.B.

23 Such as the founding treaties and internal regulations of IOs (e.g. UN, World Bank, regional development banks), domestic regulation of bilateral institutions (such as the EU, Department for International Development (DFID), or US Agency for International Development (USAID)), regulation of private institutions such as private commercial banks (such as Equator Principles) or philanthropies.

24 In particular, national public law, regulating the respective competences of governments, national agencies, or parliaments in this process, see for example Philipp Dann and Michael Riegner, 'Parliaments', in De Feyter, Erdem Türkelli

and de Moerloose, *Encyclopedia of Law and Development*, 220; Kristina Daugirdas, 'Congress Underestimated: The Case of the World Bank' (2013) 107 *American Journal of International Law* 517; Urmila Soni (Govindjee), 'Cities', in De Feyter, Erdem Türkelli and de Moerloose, *Encyclopedia of Law and Development*, 24; regarding the German national legal framework of development cooperation, see Dann, *Law of Development Cooperation*, 167.

25 Scholarship in this area has mushroomed in the past years. See Daniel Bradlow and David Hunter (eds.), *International Financial Institutions and International Law* (Kluwer Press, 2010); Dann, *Law of Development Cooperation*; Kevin E. Davis, ' "Financing Development" as a Field of Practice, Study and Innovation' (NYU Institute for International Law and Justice Working Paper No 10, 2008); Samuli Seppänen, *Possibilities and Challenges of the Human-Rights Based Approach to Development* (Erik Castren Research Report, 2005); Celine Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Routledge, 2011); Andrea N. Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of 'Judicial Spirit' in Public International Law* (Eleven International, 2009); Laurence Boisson de Chazournes, 'Partnerships, Emulation, and Cooperation: Towards the Emergence of a Droit Commun in the Field of Development Finance' (2011) 3 *World Bank Legal Review* 173; Annamaria La Chimia, *Tied Aid and Development Aid Procurement in the Frame of EU and WTO Law* (Hart, 2013); Giedre Jokubauskaite, *Law and Accountability towards Affected People by Development Projects* (Cambridge University Press, 2020); Sinclair, *Reform the World*; Siddharth De Souza, *Designing Indicators for a Plural Legal World* (Cambridge University Press, 2022); see also 'International Law and Practice: Symposium on the World Bank Environmental and Social Framework' (2019) 3 *Leiden Journal of International Law* 457–559.

26 A particularly prominent theme in the literature is the rule-of-law project, which is in one sense part of the law of development in as much as development institutions organise rule-of-law programmes but also in its substance, however, it is only one policy prescription and one policy field and is hence a theme of law and development. On these two dimensions, Adrian Di Giovanni, 'Making the Link between Development's Regulation through Law and Law's Promotion through Development' (2016) 8 *Hague Journal on the Rule of Law* 101; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2012); Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge University Press, 2011) 6f.; Deval Desai, 'The Politics of Rule of Law Reform: From Delegation to Autonomy' (2020) *Modern Law Review* 1, esp. 2f.; De Souza, *Designing Indicators*.

27 Scott, *Seeing Like a State*; Yves Dezalay and Bryant Garth, *Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (University of Chicago Press, 2002); Tania Murray Li, *The Will to Improve: Governmentality, Development, and the Practice of Politics* (Duke University Press, 2007); Richard Rottenburg, *Far-Fetched Facts: A Parable of Development Aid* (MIT Press, 2009); Galit Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford University Press, 2012); Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge University Press, 2015).

28 Sabino Cassese (ed.), *Research Handbook on Global Administrative Law* (Edward Elgar, 2017); Eyal Benvenisti, *The Law of Global Governance* (Brill Nijhoff, 2014); Armin von Bogdandy, Matthias Goldmann, and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 *European Journal of International Law* 115.

29 See also David Trubek, 'Law and Development: 40 Years after Scholars in Self Estrangement—A Preliminary Review' (University of Wisconsin Legal Studies Research Paper No 1255, 2014).

30 Ibid., 3.

31 Michel Virally, 'Vers un Droit du Développement' (1965) 11 *Annuaires Français de Droit International* 3–12; Georges Abi-Saab, 'The Third World and the Future of the International Legal Order' (1973) 29 *Revue Égyptienne de Droit International* 27; Maurice Flory, *Droit International du Développement* (Presses Universitaires de France, 1977); Charles Chaumont, 'La Relation du Droit International avec la Structure Économique et Sociale' [1978] *Réalités du Droit International Contemporain* 2; Charles Chaumont, 'L'Ambivalence des Concepts Essentiels du Droit International', in Jerzy Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (Martinus Nijhoff, 1984)55; Kamal Hossain, *Legal Aspects of the New International Economic Order* (Frances Pinter, 1980); Alain Pellet, *Le Droit International du Développement* (2nd edn, Presses Universitaires de France 1987); Guy Feuer and Hervé Cassan, *Droit International du Développement* (2nd edn, Dalloz, 1991); Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects* (Martinus Nijhoff, 1991) presenting many of the relevant scholars; on this group, see Emmanuelle Tourme Jouannet, 'Charles Chaumont's Third-World International Legal Theory', in Bernstorff and Dann, *Battle for International Law*, 358.

32 Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier, 1979); Abi-Saab, 'Third World and Future of the International Legal Order'; Richard Akinjide and Taslim Olawale Elias (eds.), *Africa and the Development of International Law* (Martinus Nijhoff, 1988); R. P. Anand, *New States and International Law* (Vikas, 1972).

33 Anghie, *Imperialism, Sovereignty and the Making of International Law*; James T. Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 *Trade Law and Development* 26; Bhupinder S. Chimni, 'Third World Approaches to International Law: Manifesto' (2006) 8 *International Community Law Review* 3.

34 Asian Infrastructure and Investment Bank.

35 Such as the American, British, or German ministry of development cooperation, i.e. USAID, DFID, or Bundesministerium für Wirtschaftliche Zusammenarbeit und Entwicklung (BMZ) respectively.

36 GAVI, the Vaccine Alliance, previously Global Alliance for Vaccination and Immunization. On this pluralisation, see section IV.C.

37 Describing actors and legal sources this way is based on assumptions about law that I want to clarify. Most importantly, this analysis focuses on formal and mostly written law, not the normatively informed praxis of concrete projects or contestations surrounding those projects (the entanglement of normative and other logics in this field are described by Murray Li, *The Will to Improve*; Rottenburg, *Parable of Development Aid*). In that sense, the look is not anthropological or political primarily but legal. The analysis is nonetheless also contextual in that it looks at the context of formal law. Formal law encounters manifestations of legal pluralism. In fact, the law of development itself is as a field heterarchical or plural but also the legal systems it interacts with are often pluralistic. We know that international law is also contextual, understood by different protagonists in different ways (Anthea Roberts et al. (eds.), *Comparative International Law* (Oxford University Press, 2018)).

38 For example, see Daniel Bradlow, 'Op-Ed: Prudent Debt Management and Lessons from the Mozambique Constitutional Council' (Centre for Human Rights, University of Pretoria) <www.chr.up.ac.za/idlu-news/2206-op-ed-prudent-debt-management-and-lessons-from-the-mozambique-constitutional-council> accessed 25 November 2020; this variety of legal sources observed for urban governance (Michael Riegner, 'International Institutions and the City', in Helmut Aust and Anél du Plessis (eds.), *The Globalisation of Urban Governance: Legal Perspectives on Sustainable Development Goal 11* (Routledge, 2018) 51).

39 See e.g. the World Bank Articles of Agreement and its Operational policies, or the EU's basic treaties (e.g. Treaty on the Functioning of the European Union, arts. 208–11, for basic principles and competences) and its regulations (e.g. Council Regulation (EC) 233/2014 on establishing a financial instrument for development cooperation; Council Regulation (EC) 235/2014 on establishing a financing instrument for the promotion of democracy and human rights worldwide; both for the period 2014–20).

40 For example, Foreign Assistance Act 1961 (USA); International Development Act 2002 (UK); Official Development Assistance Accountability Act 2008 (CA); Ley de Cooperación Internacional para el Desarrollo 1998 (ES).

41 The Equator Principles are example of private regulation. See John Conley and Cynthia Williams, 'Global Banks as Global Sustainability Regulators? The Equator Principles' (2011) 33 *Law & Policy* 542; Sheldon Leader and Luis Felipe Yanes, 'Levers for and Obstacles to Social Change: Bank Lending, the Law and the Equator Principles', in Daniel Bradlow and David Hunter (eds.), *Advocating Social Change through International Law* (Brill, 2019) 228.

42 United Nations Millennium Declaration, UNGA Res. 55/2 (18 September 2000); Paris Declaration on Aid Effectiveness (OECD Publishing, 2005) <dx.doi.org/10.1787/9789264098084-en> accessed 25 November 2020, which in 2005 set down five general principles on how donors and recipient countries should interact and reform their relations.

43 On the different shades of hardness and normativity, see for hard/soft law Jean d'Aspremont, 'Bindingness', in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar, 2019) 67, 74; for normativity inter alia of soft law, see Matthias Goldmann, 'Relative Normativity', in d'Aspremont and Singh, *Concepts for International Law*, 740.

44 While in some areas of international law courts have been created and actually play an important role (in particular, regional human rights courts, increasingly less in the WTO system, in parts law of sea), this is not the case in development law.

45 Hans Kelsen, 'The Law as a Specific Social Technique' (1941) 9 *University of Chicago Law Review* 75, e.g. at 88; for the international sphere, see Hans Kelsen, *Peace through Law* (first published 1944, University of North Carolina Press, 2002); on the international law theory of Kelsen, see Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen* (Cambridge University Press, 2014).

46 The absence of courts enables the dominance of non-legal sectoral logics, in particular the logic of the economic and political sphere. In every polity, different modes or logics of thinking or regulation compete. Also, in the domestic setting, law is not an overriding logic, but economic, social, or political considerations are to be balanced with those of the law. In the inter- and transnational development system law plays a much less important role in the balancing. Or to put it into a concrete example: in the World Bank as perhaps the most influential development organisation, law was always considered only an instrument to achieve economic ends—economists dominated the discussions, lawyers were considered enablers, not limiting. On the role of law in the institutional culture of the World Bank, see Galit Sarfaty, *Values in Transition: Human Rights and the Culture of the World Bank* (Stanford University Press, 2012); Dimitri Van Den Meerssche, 'Performing the Rule of Law in International Organizations: Ibrahim Shihata and the World Bank's Turn to Governance Reform' (2019) 32 *Leiden Journal of International Law* 47.

47 Fourie, *World Bank Inspection Panel*, 260; Natalie Bugalski, 'The Demise of Accountability at the World Bank' (2016) 31

American University International Law Review 1, 32, 35.

48 But see now *Budha Ismail Jam v International Finance Corporation* (2019) 586 US finding that the International Organizations Immunities Act 1945 (USA) affords IOs the same 'restrictive' immunity as foreign governments under the Foreign Sovereign Immunities Act 1976 (USA), and not absolute immunity, at 15. For a summary, background information, and discussion, see Chimène I. Keitner and Scott Dodson, 'Jam v International Finance Corp' (2019) 113 *American Journal of International Law* 805; Clemens Treichl and August Reinisch, 'Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals: The Case of Jam v International Finance Corporation' (2019) 16 *International Organization Law Review* 105. The importance of the existence of a court as law's curator and academia's interlocutor cannot be overstated with regard to the emergence and the identity of a legal field and its epistemic counterpart. Courts and court decisions are normally the central object of legal analysis and lawyers—but mostly missing here.

49 Section II.C.

50 Up until the 1990s, it was mostly public funds, defined by the OECD as official development assistance (ODA), that was used: Siobhán Airey, 'ODA', in De Feyter, Erdem Türkelli and de Moerloose, *Encyclopedia of Law and Development* 216. Since then, private funds and so-called blended finance have overtaken the relevance of public funds. See more below, section V.C.

51 Dann, *Law of Development Cooperation*, 355, 416; Michael Riegner, *Informationsverwaltungsrecht Internationaler Institutionen: Dargestellt am Entwicklungsverwaltungsrecht der Weltbank und Vereinten Nationen* (Mohr Siebeck, 2018) §§ 8, 10. For an overview in English, see Michael Riegner, 'Towards an Institutional Law of Information' (2015) 12 *International Organization Law Review* 50.

52 Similar Fleur Johns, 'Financing as Governance' (2011) 31 *Oxford Journal of Legal Studied* 391.

53 Jennifer Beard, *The Political Economy of Desire: International Law, Development and the Nation State* (Routledge-Cavendish, 2006); or for an alternative conception of transfers, see James Ferguson, *Give a Man a Fish: Reflections on the New Politics of Distribution* (Duke University Press, 2015).

54 Dann, *Law of Development Cooperation*, 361, 416; on the informational side, see Riegner, *Informationsverwaltungsrecht*, §§ 8, 10 (overview in English: Riegner, 'Institutional Law of Information').

55 See below, section V.D; Fleur Johns, 'From Planning to Prototypes: New Ways of Seeing Like a State' (2019) 82 *Modern Law Review* 833, 852; Deval Desai, 'Reflexive Institutional Reform and the Politics of the Regulatory State in the South' (Regulation and Governance, 29 June 2020) <doi.org/10.1111/rego.12336> accessed 25 November 2020, 10; William Easterly (ed.), *Reinventing Foreign Aid* (MIT Press, 2008); Abhijit Bannerjee and Esther Duflo, *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty* (Public Affairs/Hachette Book Group, 2011); Charles Sabel, Gráinne de Búrca, and Robert O Keoahne, 'Global Experimentalist Governance' (2014) 44 *British Journal of Political Science* 477.

56 Riegner, *Informationsverwaltungsrecht*, esp. 31ff. (overview in English: Riegner, 'Institutional Law of Information').

57 For a brief moment of hope to change this, namely EU–African cooperation in the early 1970s, see Dann, *Law of Development Cooperation*, 75.

58 Megan Donaldson and Benedict Kingsbury, 'Power and the Public: The Nature and Effects of Formal Transparency Policies in Global Governance Institutions', in Andrea Bianchi and Anne Peters (eds.), *Transparency in International Law* (Cambridge University Press, 2013) 502; Sanae Fujita, *The World Bank, Asian Development Bank and Human Rights: Developing Standards of Transparency, Participation and Accountability* (Edward Elgar, 2013).

59 Boisson de Chazournes, 'Partnerships, Emulation, and Cooperation'; Natalie Lichtenstein, *A Comparative Guide to the Asian Infrastructure Investment Bank* (Oxford University Press, 2018); Doron Ella, 'Balancing Effectiveness with Geo-Economic Interests in Multilateral Development Banks: The Design of the AIIB, ADB and the World Bank in a Comparative Perspective' (2020) 34(6) *Pacific Review* 1022; Shahar Hameiri and Lee Jones, 'China Challenges Global Governance? Chinese International Development Finance and the AIIB' (2018) 94 *International Affairs* 573; Matthew D. Stephen and David Skidmore, 'The AIIB in the Liberal International Order' (2019) 12 *Chinese Journal of International Politics* 61.

60 On the evolution of this field, see section V; Johns, 'From Planning to Prototypes'.

61 Martti Koskenniemi, 'General Principles: Reflexions on Constructivist Thinking in International Law', in Martti Koskenniemi (ed.), *Sources of International Law* (Ashgate, 2000) 359; Armin von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' (2008) 9 *German Law Journal* 1909.

62 For an example of using principles as analytical tool, see Philipp Dann and Michael Riegner, 'The World Bank's Environmental and Social Safeguards and the Evolution of Global Order' (2019) 32 *Leiden Journal* 537.

63 Dann, *Law of Development Cooperation*, 219; Riegner, *Informationsverwaltungsrecht*, esp. 169ff. For another set of principles that are particularly important for institutional law generally, see Benedict Kingsbury, Nico Krisch, and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 37–42; Nico Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *European Journal of International Law* 247; but see also the critical take

on such principles in Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187.

64 On human rights generally as relevant yardsticks of review, see Benvenisti, *Law of Global Governance*, 99ff., esp. 103ff.; Jochen von Bernstorff, 'Procedures of Decision-making and the Role of Law', in Armin von Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, 2009) 803.

65 Dann, *Law of Development Cooperation*, 445.

66 Ibid., 226. As an example of one way of conceiving the goal of international law in a substantive way, see Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations* (Cambridge University Press, 2012).

67 Jochen von Bernstorff and Philipp Dann, 'The Battle for International Law: An Introduction', in Bernstorff and Dann, *Battle for International Law*, 12f.; Rist, *The History of Development*, 88ff., 93; Odd A. Westad, *The Global Cold War: Third World Interventions and the Making of Our Times* (Cambridge University Press, 2007) 110, 152ff., 396.

68 Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (Oxford University Press, 2008) 75; Rostow, *Stages of Economic Growth*, 112; Escobar, *Encountering Development*, 55ff.

69 Philipp Dann, 'The World Bank in the Battles of the "Decolonization Era"', in Bernstorff and Dann, *Battle for International Law*, 278; Matthew Craven, Sundhya Pahuja and Gerrt Simpson (eds.), *International Law and the Cold War* (Cambridge University Press, 2019).

70 Thomas Dollmaier, 'Who Controls Multilateral Development Banks? A Legal Analysis of Institutional Control in Decisionmaking, Financing, and Accountability at the World Bank and AIIB' (unpublished PhD, on file with author).

71 Pahuja, *Decolonising International Law*, 17f.; Eric Helleiner, *Forgotten Foundations of Bretton Woods: International Development and the Making of the Postwar Order* (Cornell University Press, 2016); Dann, *Law of Development Cooperation*, 38.

72 For a brute realistic description at the time, see Hans Morgenthau, 'A Political Theory of Foreign Aid' (1962) 56 *American Political Science Review* 301.

73 Glenda Sluga, 'The Transformation of International Institutions: Global Shock as Cultural Shock', in Niall Ferguson et al. (eds.), *The Shock of the Global: The 1970s in Perspective* (Harvard University Press, 2011) 223; Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018); Westad, *Cold War*, 334, but esp. 357ff.

74 Hurrell, *On Global Order*, 111; Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford University Press, 2018) 119ff; see also Dieter Plehwe, Quinn Slobodian, and Philip Miroswki (eds.), *Nine Lives of Neoliberalism* (Verso, 2020).

75 Martti Koskenniemi, 'International Legal Theory and Doctrine', in *Max Planck Encyclopedia of Public International Law* (2012) paras. 28ff.; Joseph Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2004) 64 *Heidelberg Journal of International Law* 547, 549.

76 Ngaire Woods, *The Globalizers: The IMF, the World Bank, and Their Borrowers* (Cornell University Press, 2006).

77 Susan Park and Antje Vetterlein, 'Owning Development: Creating Policy Norms in the IMF and the World Bank', in Susan Park and Antje Vetterlein (eds.), *Owning Development: Creating Policy Norms in the IMF and the World Bank* (Cambridge University Press, 2010) 3, 9; concerning the World Bank, see Dann and Riegner, 'World Bank's Safeguards', 538.

78 Sinclair, *Reform the World*, 269; Van Den Meerssche, 'Performing the Rule of Law', 62.; Jochen von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations' (2008) 9 *German Law Journal* 1939, 1945f.; Marie von Engelhardt, 'Reflections on the Role of the State in the Legal Regimes of International Aid' (2011) 71 *Heidelberg Law Journal* 451, 462ff.

79 Pankaj Mishra, *Age of Anger: A History of the Present* (Allen Lane, 2017); Tanja Börzel and Michael Zürn, 'Contestations of the Liberal Script (SCRIPTS): A Research Program' (SCRIPTS Working Paper Series No. 1, Freie Universität Berlin, January 2020); for the development system, see Dann, *Law of Development Cooperation*, 138.

80 Kingsbury, Krisch, and Stewart, 'Emergence of Global Administrative Law' 27, 51; Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', in von Bogdandy et al., *Exercise of Public Authority*, 7ff.

81 Armin von Bogdandy and René Urueña, 'International Transformative Constitutionalism in Latin America' (2020) 114(3) *American Journal of International Law* 403, with an example at 424; Rene Urueña, 'Internally Displaced Populations in Colombia' A Case Study on the Domestic Aspects of Indicators as Technologies of Global Governance', in Kevin Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds.), *Governance by Indicators: Global Power Through Data* (Oxford University Press, 2012) 249; Sally Engle Merry, *The Seduction of Quantification: Measuring Human Rights, Gender Violations and Sex Trafficking* (Chicago University Press, 2016) 68, 161.

82 Chris Humphrey, 'From Drawing Board to Reality: The First Four Years of Operations at the Asian Infrastructure Investment Bank and New Development Bank' (Working Paper of the G-24 & Global Development Policy Center of Boston University, 2020) <doi.org/10.3929/ethz-b-000411422> accessed 27 November 2020; Ian Tsung-Yen Chen, *Configuring the Asian Infrastructure Investment Bank: Power, Interests and Status* (Routledge, 2021).

83 Elisa Van Waeyenberge, 'The Private Turn in Development Finance' (Financialisation, Economy, Society and Sustainable Development (FESSUD) Working Paper Series No. 140, 2016) <fessud.eu/wp-content/uploads/2015/03/The-private-turn-in-developing-finanace-Working-Paper-140.pdf> accessed 21 October 2020; Anke Schwittay, 'The Marketization of Poverty' (2011) 52 *Current Anthropology* 71.

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86 Kevin Davis, Angelina Fisher, Benedict Kingsbury, and Sally Engle Merry (eds.), *Governance by Indicators: Global Power through Data* (Oxford University Press, 2012) 1.; De Souza, *Designing Indicators*.

87 Riegner, 'Institutional Law of Information', 52–60.

88 Dann and Riegner, 'World Bank's Safeguards', 547.

89 Rajagopal, *International Law from Below*: 'Much of this resistance has been in the form of popular movements against the cultural, economic and political effects of modernization and development since the 1970s in the Third World' (165); see also 237, 247.

90 Giedre Jokubauskaite, 'The Concept of Affectedness in International Development' (2020) 126 *World Development* 126; Jochen Von Bernstorff, Andreas Hasenclever, and Jan Sändig, 'Affectedness in International Institutions: Promises and Pitfalls of Involving the Most Affected' (2018) 3 *Third World Thematics* 587, 593.

91 Fourie, *World Bank Inspection Panel*; Fujita, *World Bank*, 203ff. on the Asian Development Bank's inspection regulations; after the World Bank and the Asian Development Bank followed inter alia the Inter-American Development Bank in 1995, the African Development Bank in 1997, the European Bank of Reconstruction and Development in 1999 and the European Investment Bank in 2010, see e.g. Maeve McDonagh, 'Evaluating the Access to Information Policies of the Multilateral Development Banks', in Owen McIntyre and Suresh Nanwani (eds.), *The Practice of Independent Accountability Mechanisms (IAMs): Towards Good Governance in Development Finance* (Brill Nijhoff, 2019) 134, 136; for a critical take, see Natalie Bugalski, 'The Demise of Accountability at the World Bank' (2016) 31 *American University International Law Review* 1; Susan Park, 'Accountability as Justice for the Multilateral Development Banks? Borrower Opposition and Bank Avoidance to US Power and Influence' (2017) 24 *Review of International Political Economy* 776.

92 Francesca Bignami, 'Theories of Civil Society and Global Administrative Law: The Case of the World Bank and International Development', in Cassese, *Handbook on Global Administrative Law*, 333.

93 Donaldson and Kingsbury, 'Power and the Public'; Fujita, *World Bank*, 85.

94 Legal scholarship is only beginning to engage with these shifts. I rely here mostly on Johns, 'From Planning to Prototypes' describing new modes of governance at 848., conceptualising this mode as 'lean start-up governance' at 854.

95 On experimentation, see Gráinne de Búrca, Robert O Keohane, and Charles Sabel, 'Global Experimentalist Governance' (2014) 44 *British Journal of Political Science* 477, 482.; Orly Lobel, 'New Governance as Regulatory Governance', in David Levi-Four (ed.), *Oxford Handbook of Governance* (Oxford University Press, 2012)65; Jessica Cohen and William Easterly, 'Introduction: Thinking Big versus Thinking Small', in Jessica Cohen and William Easterly (eds.), *What Works in Development? Thinking Big and Thinking Small* (Brookings Institution Press, 2009) 7; Abhijit V. Banerjee and Esther Duflo, 'The Experimental Approach to Development Economics' (2009) 1 *Annual Review of Economics* 151.

96 Linnet Taylor and Ralph Schroeder, 'Is Bigger Better? The Emergence of Big Data as a Tool for International Development Policy' (2015) 80 *GeoJournal* 503, examples at 507ff.; Michael Riegner, 'Implementing the "Data Revolution" for the Post-2015 Sustainable Development Goals: Toward a Global Administrative Law of Information', in Laurence Boisson de Chazournes, Kevin Davis, and Frank Fariello (eds.), *The World Bank Legal Review—Financing and Implementing the Post-2015 Development Agenda: The Role of Law and Justice Systems*, vol. 7 (World Bank, 2016) 15.

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98 Desai, 'Reflexive Institutional Reform', 7.

99 Dimitri Van Den Meerssche and Geoff Gordon, '"A New Normative Architecture": Risk and Resilience as Routines of Un-Governance' (2020) 11(3) *Transnational Legal Theory* 267 4ff.; Deval Desai and Andrew Lang, 'Introduction: Global Un-Governance' (2020) 11(3) *Transnational Legal Theory* 219.

100 Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press, 2016).