Development interventions are agreed by states and international organizations which administer public development funds of huge proportions. They have done so with debateable success, but, unlike the good governance of recipients, the rules applying to donors have hitherto received little scrutiny.

This analysis of the normative structures and conceptual riddles of development cooperation argues that development cooperation is increasingly structured by legal rules and is therefore no longer merely a matter of politics, economics or ethics. By focusing on the rules of development cooperation, it puts forward a new perspective on the institutional law dealing with the process, instruments and organization of this cooperation. Placing the law in its theoretical and political context, it provides the first comparative study on the laws of foreign aid as a central field of global public policy and asks how accountability, autonomy and human rights can be preserved while combating poverty.

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The Law of Development Cooperation

CAMBRIDGE UNIVERSITY PRESS
www.cambridge.org

ISBN 978-1-107-02029-0

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International Trade and Economic Law

The Law of Development Cooperation

A Comparative Analysis of the World Bank, the EU and Germany

Philipp Dann

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CONTENTS

Introduction

A Concept and context of development cooperation law

Development cooperation contains a promise. It is the promise of a global community, based on solidarity and built in fairness. But the reality of development cooperation often looks different. It poses seemingly insolvable problems of global governance in a postcolonial world. This book analyzes the normative structures and conceptual riddles of development cooperation. Yet, it is not a book about ethics or politics, but about law.

The book argues that development cooperation is increasingly structured by legal rules and hence no longer merely a matter of politics, economics or ethics. In focusing on the rules of development cooperation, it puts forward a specific and still rather unusual perspective. It is less concerned with good governance or the rule of law, which have become key words in development policy and legal approaches to the field. Instead, it focuses on the institutional law of development cooperation and hence on the rules dealing with the process, instruments and organization of this cooperation. The present study points out that development interventions are agreed upon by states and international organizations, which administer public development funds of huge proportions – with debatable success. But the rules applying to these organizations have hardly been a matter of interest. While good governance of recipients is discussed intensively, the good governance of donors is not. This book is intended to help close that gap.

Charting the law of development cooperation faces specific challenges. More than in almost any other field, it involves international actors (like the World Bank or the European Union) as much as national donors and recipients. The relevant laws organize an inherently inter- and trans-national cooperation and are set simultaneously though separately on an international and national level. The law of development cooperation is therefore fundamentally an area of international or even global (administrative) law.

It requires vertical comparison of national, supranational and international legal regimes to understand it. To this end, this study will focus on the relevant laws of the World Bank, the EU and Germany. It contends that beyond the obvious differences in the nature of these actors, there is convergence in the general structures of their laws organizing and structuring development cooperation. To understand converging as well as divergent elements and to analyze them critically is the aim of this book.

How to approach this task? As mentioned, the law of development cooperation is still a rather unusual topic. Section A of this introductory chapter will therefore first provide the context. In fact, it will describe three layers of context: it will briefly describe the history of development cooperation to understand where theory and policy debate stand today (I.1), it will introduce alternative legal approaches to explain what lawyers have focused on so far (I.2) and it will end by recognizing an institutional turn in development studies that supports the thesis and approach of this study (I.3). In a second step, the chapter will sketch the central thesis of this book: the proposal to focus on the transfer of official development assistance (ODA) as the abstract link between actors, procedures and instruments in order to develop a more systematic and transparent understanding of the normative standards of development cooperation (II.1). It will explain in more detail the definition of ODA in order to sketch the scope of inquiry (II.2) and, equally fundamental, explain the focus on ODA through the basic and political understanding of the development process (II.3). Finally, remarks on the approach and structure of the study (III) and on the language of development (IV) will complete this first main section.[1] The second main section will then examine some of the challenges and chances of studying the law of development cooperation, seeking first to explain why this area has been somewhat neglected (B.I), and then to propose that the inquiry into the law of development cooperation could bring positive benefits (B.II).

I. Development cooperation and the law: three layers of context

1. A (very) brief history of development cooperation

It is not by coincidence that development cooperation as a policy field and as organizational structure emerged at the beginning of the Cold

[1] A terminological remark at the very outset: there is no set notion for development cooperation itself. Instead, *foreign aid*, *foreign assistance*, *development aid*, *development assistance* and *development cooperation* are often used interchangeably among English-speaking writers. See *infra* A.IV. This study prefers the notion of development cooperation but will also use the other terms.

War. The two central powers of the time, the USA and the USSR, were keen to bind potential allies to their ideological camps. The USA as an imperial power without a colonial past was especially eager to create a new system of cooperation between richer and poorer nations, not least to advertise its own approach (and business) to the world.[2] Soon, new institutional structures emerged. The International Bank of Reconstruction and Development, created in 1945 and quickly baptized as "World Bank," began to provide funds not just to the war-torn states of Europe, but also to newly independent developing countries; the European Economic Community, created in 1958, immediately established a development fund; and also states created new institutions to deal with the field (the USA in 1960, Germany in 1961), if they did not have existing colonial structures (such as the UK and France). Altogether the new policy field was greeted with great optimism. The process of decolonization produced a large number of states which were eager to shed their colonial structures and reform their economic and political systems. The UN, which soon had a majority of new states, declared the 1960s as the "development decade." Last but not least, the financial dimension of the new field grew dramatically. By the early 1970s, public donors invested almost US$10 billion per year.[3]

And yet, early on, development cooperation met with criticism. Soon the organizational structures were considered too complex and often prone to disguised pressures and illegitimate influence.[4] Doubts were also raised on the effects that aid flows would have. Against the eager optimism of the modernization theory, though often without larger empirical data, critics questioned the overall and the long-term effect of aid. Before long, development cooperation was perceived by some as the "aid business" that rather served advisors and industries in the North instead of people in the South.[5] After the political momentum of the independent

[2] On the continuities between development and previous colonial policies, see G. Rist, *The History of Development: From Western Origins to Global Faith*, 3rd edn (London: Zed Books, 2008).

[3] The history of development policy, development theory and their connection to the institutional structures of development cooperation will be analyzed in detail in Part I below. On the great optimism of the early phase, see *infra* Ch 1.A. The numbers are based on OECD data, see: http://stats.oecd.org/ (last visited July 2013).

[4] L. Pearson, *Partners in Development: Report of the Commission on International Development* (New York: Praeger, 1969); H. Morgenthau, "A Political Theory of Foreign Aid," *The American Political Science Review*, 56 (1962), 301–9 at 301, 302.

[5] E.g. G. Hancock, *Lords of Poverty: The Power, Prestige, and Corruption of the International Aid Business* (London: Macmillan, 1989); W. Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (New York: Penguin Press, 2006).

Third World movement broke in the mid to late 1970s, the dynamism of donors also waned. The 1980s are often considered a lost decade for development efforts. When the Cold War ended and the ideological confrontation disappeared, the development system plunged into a deep crisis. Its legitimacy and purpose were at stake.

With the late 1990s, however, a renaissance and a rethinking began. The increasingly perceived globalization created a new sense for the possibility of inter- and transnational interaction, soon epitomized in the notion of global governance. A re-energized political will to engage with the problem of poverty manifested itself in the Millennium Development Goals (MDG) of 2000; the 2005 G-8 Summit at Gleneagles made development the main topic at this forum for the first time ever. There was also a renewed interest in theories of justice which became a much more widely discussed topic of social theory, philosophy and international relations.[6]

Parts of this renewed theoretical interest were deeply critical. The notion of development was profoundly questioned, not least by authors from the Global South. Inspired by postcolonial studies, a new school of post-development thinkers emerged. They laid bare the terminological violence that the language of development (and underdevelopment) can contain and rejected fundamentally the concept of development and its idea that the Global South should copy Northern paths.[7] Politically, however, foreign aid proved to be a promising tool for rising powers. New donors like China and Brazil emerged, using aid to build new alliances and offering new forms of aid.[8] Moreover, a variety of new flexible

[6] J. Rawls, *A Theory of Justice* (Harvard University Press, 1971); J. Rawls, *Justice as Fairness: A Restatement*, edited by Erin Kelly (Harvard University Press, 2001); J. Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999); T. Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995); M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983); C. Beitz, *Political Theory and International Relations* (Princeton University Press, 1979); M. Walzer (ed.), *Toward a Global Civil Society* (New York, Oxford: Berghahn Books, 1995); A. Sen, *Development as Freedom* (New York: Knopf, 1999); C. Barry and T. Pogge (eds.), *Global Institutions and Responsibilities: Achieving Global Justice* (Malden: Blackwell, 2005).

[7] A. Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press, 1995); W. Sachs (ed.), *The Development Dictionary: A Guide to Knowledge as Power* (London: Zed Books, 1992); S. Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge, New York: Cambridge University Press, 2011). For more on this, see *infra* Ch 2.B.IV.

[8] L. Song and J. Golley (eds.), *Rising China: Global Challenges and Opportunities* (Acton: ANU E Press, 2011); S.-L. de John Sousa, Brazil as an Emerging Actor in International Development Cooperation: a Good Partner for European Donors?, German Development Institute – Briefing Paper 5/2010 (2010). Available at www.die-gdi.de (under Publications – Briefing papers) (last visited July 2013).

instruments and private channels for aid emerged, which provided alternatives to the aid by Northern states and international financial institutions that had dominated the development system. One result of these new dynamics was a sharpened sense of self-critique among the "traditional" donors, which increasingly recognized the necessity of reforming the system, indicated by an intense discussion on "aid effectiveness."

2. Alternative approaches to law and development

A central element of this renaissance and reform was the law. Since the 1990s, law has been (again) ascribed a central role in development processes. The discussion returned to approaches that had already shaped the early, optimistic phase of development in the 1950s and 1960s. At that time, two schools had emerged that understood the role of law in the development process in very different yet complementary and telling ways: the francophone (and rather visionary) school of *international development law* (or *droit international du développement*) and the *law and development* movement, led by anglophone (and rather pragmatic) scholars.[9]

The (francophone) international development law sought to rewrite the principles of public international law in a way that would strengthen the idea of substantive justice and benefit developing countries. This rather deductive and teleological approach originated with the French scholar Michel Virally, who, in the context of decolonization in 1965, criticized the inadequacy of the principle of sovereign equality in light of the immense economic and social inequalities between developing and industrialized nations.[10] Virally and soon others proposed a broad review of the principles, institutions and rules of interstate relations which affected developing nations in order to reinterpret them toward the overall goal of fostering development and a more just world order.[11] This goal and the final aim of international law should become the dominant maxim of interpretation.

[9] An unusual collection of essays of both approaches can be found in P. Slinn and F. Snyder (eds.), *International Development Law* (Abingdon: Professional Books, 1987).

[10] M. Virally, "Vers un droit international du développement," *Annuaires français de droit international*, 11 (1965), 3–12 at 3, 4.

[11] G. Abi-Saab, "The Third World and the Future of the International Legal Order," *Revue égyptienne de droit international*, 29 (1973), 27–66; M. Flory, *Droit international du développement* (Paris: Presses universitaires de France, 1977); K. Hossain, *Legal Aspects of the New International Economic Order* (London, New York: Frances Pinter, 1980); A. Pellet, *Le droit international du développement*, 2nd edn (Paris: Presses universitaires de France, 1987); G. Feuer and H. Cassan, *Droit international du développement*, 2nd edn (Paris: Dalloz, 1991); M. Bedjaoui (ed.), *International Law: Achievements and Prospects*

A principal instrument of this approach is the idea of a duality of norms, in which, depending on context, industrialized and developing countries are not treated identically, but rather according to specific rules which do justice to their respective positions.[12] Another important tool soon became the right to development that was first formulated in the 1970s.

The more anglophone school of law and development, by contrast, pursued a more pragmatic or perhaps bottom-up approach and concentrated primarily on the role of municipal law as an instrument of development. Scholars here asked how domestic law rather than international law could foster development. They concentrated on the analysis of the laws of developing countries, often using comparative law or legal-transfer approaches to reform indigenous legal orders.[13] The central question of this approach, that is, how (domestic) law influences development processes, is also studied in other areas of legal study, particularly legal anthropology and sociology. They are a central part of a broader approach to law and development.[14]

While both schools lost momentum in the late 1970s and 1980s, probably because the grand visions and high hopes proved somewhat naïve,[15]

(Paris, Dordrecht: Martinus Nijhoff Publishers, 1991) (presenting many of the relevant scholars); a precursor to this approach is W. Friedmann, "The Changing Dimensions of International Law," *Columbia Law Review*, 62 (1962), 1147–65 at 1147; M. Bulajic, *Principles of International Development Law*, 2nd edn (Dordrecht: Martinus Nijhoff, 1993).

[12] For overviews see M. Kaltenborn, "Entwicklungs- und Schwellenländer in der Völkerrechtsgemeinschaft: Zum Stand und zu den Perspektiven des Entwicklungsvölkerrechts," *Archiv des Völkerrechts*, 46 (2008), 205–32 at 228, 229; A. Mahiou, "International Law of Development," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* [online edition] (Oxford University Press, 2008–) at margin no. 1.

[13] D. Trubek, "Toward a Social Theory of Law: An Essay on the Study of Law and Development," *Yale Law Journal*, 82 (1972), 1–50 at 1; M. Galanter, "The Modernization of Law," in M. E. Weiner (ed.), *Modernization: The Dynamics of Growth* (New York: Basic Books, 1966), pp. 153–65 at pp. 153; also A. Seidman (ed.), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (The Hague: Kluwer Law International, 1999). For a retrospective see D. Trubek, "The Rule of Law' in Development Assistance: Past, Present and Future," in D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge, New York: Cambridge University Press, 2006), pp. 74–94 at pp. 74.

[14] F. von Benda-Beckmann, ""Recht und Entwicklung" im Wandel," *Verfassung und Recht in Übersee*, 41 (2008), 295–308; F. von Benda-Beckmann, K. von Benda-Beckmann and M. Wiber, *Changing Properties of Property* (New York: Berghahn Books, 2006); M. Hobart (ed.), *An Anthropological Critique of Development: The Growth of Ignorance* (London: Routledge, 1993).

[15] D. Trubek and M. Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States," *Wisconsin Law Review*, 55

they both are enjoying a renaissance today. An offspring of the international development law school (though without the overall teleology and without the francophone dominance) can be seen in the variety of studies that address the position of developing countries in various fields of international law. They describe an established practice of dual norms, particularly in international economic,[16] environmental[17] and intellectual property law.[18] Law reform in developing countries, the hallmark of the law and development movement, was rediscovered by development agencies in the 1990s, first and especially by the World Bank as the largest and often agenda-setting donor organization. A political system based on the rule of law was now considered a necessary precondition for successful development. Broader still, responsive or good governance, human rights and the rule of law became key words in development policy. Though there is a sharp ideological divide between today's approach to law reform (by the World Bank and other donors) and the early activists in the 1960s,[19] these issues have become a prime area of legal research.[20]

One perspective, however, has hardly been analyzed – and that is the law governing the institutions and processes of development cooperation, and hence the object of the present study. There are only a few studies on

(1974), 1062–101 at 1062; J. Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (Madison: University of Wisconsin Press, 1980); resumptive B.-O. Bryde and F. Kübler (eds.), *Die Rolle des Rechts im Entwicklungsprozess* (Frankfurt am Main: Metzner, 1986) (therein, cf. especially the correspondent article by Bryde, pp. 9–36).

16 J. Faundez and C. Tan (eds.), International Economic Law, Globalization and Developing Countries (Cheltenham: Edward Elgar, 2010); M. Krajewski, Wirtschaftsvölkerrecht (Heidelberg: C.F. Müller, 2009), pp. 264; C. Thomas and J. P. Trachtman (eds.), *Developing Countries in the WTO Legal System* (Oxford University Press, 2009).

17 M. Bothe, "Environment, Development, Resources," *Recueil des Cours*, 318 (2005), 323–516 at 337; P. Cullet, *Differential Treatment in International Environmental Law* (Aldershot: Ashgate, 2003).

18 K. C. Shadlen, S. Guennif, A. Guzmán and N. Lalitha (eds.), *Intellectual Property, Pharmaceuticals, and Public Health: Access to Drugs in Developing Countries* (Cheltenham: Edward Elgar, 2011); H. Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (Oxford University Press, 2007); J. Watal, *Intellectual Property Rights in the WTO and Developing Countries* (London, The Hague, Boston: Kluwer Law International, 2001).

19 D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006); especially D. Kennedy, "The "Rule of Law," Political Choices and Development Common Sense," pp. 95–173 at p. 95.

20 Cf. the recently founded *The Hague Journal on the Rule of Law*; J. Gillespie and P. Nicholson, *Law and Development and the Global Discourses of Legal Transfers* (Cambridge University Press, 2012); M. Riegner and T. Wischmeyer, "'Rechtliche Zusammenarbeit' mit Transformations- und Entwicklungsländern als Gegenstand öffentlich-rechtlicher

the law of the World Bank – often by staff lawyers, only recently also by external observers.[21] The legal regime of the EU's development cooperation has been examined only from time to time.[22] Lately, the role of human rights has caught lawyers' attention.[23] The legal aspects of German development cooperation or that of other national donors, on the other side, have only rarely been addressed,[24] and there are almost no comparative studies of the field.[25]

Forschung," *Der Staat*, 50 (2011), 436–68 at 436; Y. Dezalay and B. Garth (eds.), *Lawyers and the Rule of Law in an Era of Globalization*, Law, Development and Globalization (Oxon, New York: Routledge, 2011); M. J. Trebilcock and R. J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham: Edward Elgar, 2008); K. Dam, *The Law-Growth-Nexus: The Rule of Law and Economic Development* (Washington, DC: Brookings Institution Press, 2006); T. Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006).

[21] See especially the writings of *general counsels* such as Aron Broches, Ibrahim Shihata and Andres Rigo Sureda. Among the more regularly writing external observers of the Bank are Daniel Bradlow, John Head, David Hunter or Sabine Schlemmer-Schulte. For an up-to-date overview of the law of the World Bank, see D. Bradlow and D. B. Hunter (eds.), *International Financial Institutions and International Law* (Alphen aan den Rijn: Kluwer Law International, 2010); also H. Cissé, D. Bradlow and B. Kingsbury (eds.), *International Financial Institutions and Global Legal Governance*, The World Bank Legal Review (Washington, DC: World Bank Publications, 2012), vol. III.

[22] J. Becker, *Die Partnerschaft von Lomé: Eine neue zwischenstaatliche Kooperationsform des Entwicklungsvölkerrechts* (Baden-Baden: Nomos, 1979); K. Simmonds, "The Fourth Lomé Convention," *Common Market Law Review*, 28 (1991), 521–47 at 521; B. Martenczuk, "From Lomé to Cotonou: The ACP-EC Partnership Agreement in a Legal Perspective," *European Foreign Affairs Review*, 5 (2000), 461–87 at 461. For a recent overview see S. Bartelt and P. Dann (eds.), *Entwicklungszusammenarbeit im Recht der Europäischen Union – The Law of EU Development Cooperation: Europarecht-Beiheft Nr. 2* (Baden-Baden: Nomos, 2008).

[23] F. Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht (Berlin/ New York: Springer, 1998), vol. CXXXII; C. Pippan, *Die Förderung der Menschenrechte und der Demokratie als Aufgabe der Entwicklungszusammenarbeit der Europäischen Gemeinschaft*, Europäische Hochschulschriften (Frankfurt: Peter Lang Verlag, 2002), vol. MMMCDLX; L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press, 2005); S. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London: Cavendish, 2001); M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford: Hart Publishing, 2003).

[24] For more information see P. Dann, *Entwicklungsverwaltungsrecht* (Tübingen: Mohr Siebeck, 2011); S. Burall, J. M. White and A. Blick, *The Impact of U.S. and U.K. Legislatures on Aid Delivery*, Economic Policy Paper Series 09. Available at www.odi.org.uk/resources/docs/4652.pdf (last visited July 2013); and *infra* Ch 3.A.II.

[25] The few exceptions are S. Rubin (ed.), *Foreign Development Lending – Legal Aspects: The Papers and Proceedings of a Conference of Legal Advisors of National and International Development Lending and Assistance Agencies* (Leiden: Sijthoff, 1971); M. Pellens,

What is missing, then, is both a more general understanding of the legal field and a more detailed (and critical) analysis of the intricacies of their legal regimes. We know fairly little about how development interventions are legally agreed upon or whether and which legal criteria govern the distribution of funds. While there are studies on the human rights obligations of donors, there is precious little analysis on the accountability of development organizations (or recipients) or on the legal nature of conditionality. Development cooperation is fundamentally a political process of choice and contestation and yet we know little of the legal rules governing the participation in development processes or whether and how the autonomy and sovereignty of recipients and donors are brought into a balance. As put earlier: while the good governance of aid recipients is a major topic of legal research, the good governance of donors is not.

The present study will try to help close this gap by providing a comparative analysis of the institutional law of the World Bank, the EU and Germany and by proposing general principles for critically comparing and analyzing these laws. In this approach the study profits from the more general institutional turn in development studies – and the discussion on global governance.

3. The institutional turn in development studies

A third layer of context that is important for this study is what I would call "the institutional turn" in development studies. This turn has been taken by economists as well as political scientists. In economics, development studies used to be a field for development economists studying the economic causes of poverty and ways to overcome them.[26] Since the 1990s, however, scholars of institutional economics have discovered the field too. Some of them pick up on the law reform idea, follow the World Bank's lead and study the economic effects of good governance and rule of law in developing countries.[27] Others, however, and these are speaking more directly to the interest of this study, focus their attention on the structures

Entwicklungshilfe Deutschlands und der Europäischen Union: Rechtsgrundlagen und Verfahren bei der finanziellen und technischen Zusammenarbeit, Berliner Europa-Studien (Berlin: Verlag Dr. Köster, 1996), vol. IV; A. Rigo Sureda, "The Law Applicable to the Activities of International Development Banks," *Recueil des Cours*, 308 (2004), 13–249 at 13; Skogly, Human Rights Obligations; early, and compiling rather than arranging: W. Friedmann, G. Kalmanoff and R. F. Meagher, *International Financial Aid* (New York: Columbia University Press, 1966).

[26] M. P. Todaro and S. C. Smith, *Economic Development*, 10th edn (Harlow: Addison Wesley, 2009); P. Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (Oxford University Press, 2007).

[27] S. Voigt, *Institutionenökonomik* (Munich: W. Fink Verlag, 2002).

of the delivery of aid – and hence on the development administrations themselves. A number of thoughtful studies now analyze the incentive structures within development organizations, examine the strategic interplay of donors and recipients in aid relationships, or present experimental approaches to a marketplace for the delivery of aid.[28]

The same new interest in the institutional structures of development cooperation can be observed in the political sciences. Scholars here too have discovered the role of institutions and procedures in the delivery of aid. These scholars are more inclined to produce qualitative studies that take into account more of the concrete political, social and ideological circumstances of individual actors as well as being shaped by history and culture.[29] Political scientists are often also more attentive to the power structures that underlie development policy and global governance structures in general.[30]

This institutional turn is not just a matter of academic discourse, by the way, but has also shaped the policy discussions. Since the 2000s, the idea of "aid effectiveness" has been predominant here. In particular, the Organisation for Economic Co-operation and Development (OECD), supported by the World Bank, has driven a process to establish common standards that would reform how donors deliver aid and cooperate with recipients – strengthening a focus on results, demanding alignment with recipient country systems of accounting and administration and calling for more mutual accountability.[31]

Lawyers are only slowly joining this trend. They do so generally on the coat tails of the larger discussion on global governance.[32] A signature

[28] T. Killick, *Aid and the Political Economy of Policy Change* (London: Routledge, 1998); C. C. Gibson, A. Krister, E. Ostrom and S. Shivakumar, *The Samaritan's Dilemma: The Political Economy of Development Aid* (Oxford University Press, 2005); B. Martens, U. Mummert and P. Murrell (eds.), *The Institutional Economics of Foreign Aid* (Cambridge University Press, 2002); W. Easterly (ed.), *Reinventing Foreign Aid* (Cambridge: MIT Press, 2008); E. Duflo and A. Banerjee, *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty* (New York: PublicAffairs, 2011).

[29] C. Lancaster, *Foreign Aid: Diplomacy, Development, Domestic Politics* (University of Chicago Press, 2007); L. Whitfield (ed.), *The Politics of Aid: African Strategies for Dealing with Donors* (Oxford University Press, 2009); N. van de Walle, *African Economies and the Politics of Permanent Crisis* (Cambridge University Press, 2001).

[30] A. Leftwich, *States of Development: On the Primacy of Politics in Development* (Cambridge: Polity Press, 2000); C. J. Bickerton, P. Cunliffe and A. Gourevitch (eds.), *Politics Without Sovereignty: A Critique of Contemporary International Relations* (University College London Press, 2007); G. Hyden, "After the Paris Declaration: Taking on the Issue of Power," *Development Policy Review*, 26 (2008), 259–74.

[31] On this discussion and process, see *infra* Ch 2.C.III.1.

[32] The origins of the term global governance can be traced back to J. N. Rosenau, "Governance, Order, and Change in World Politics," in J. N. Rosenau and E.-O. Czempiel (eds.), *Governance Without Government: Order and Change in World Politics*

article by Benedict Kingsbury, Nico Krisch and Richard Stewart proposed to understand the emerging structures as a global administration that should be studied with recourse to the tools and sensitivities of (domestic) administrative law.[33] This implies a fundamentally different perception of international institutions not only as forums of states but as actors in themselves and affecting life and liberties of individuals. This approach was reinforced by others who stressed the public character of global governance and the ensuing need for accountability.[34] At the same time, the study of international organizations and international institutional law generally surged – analyzing the law-making powers of international institutions,[35] explaining the historical shifts in powers and procedures,[36] scrutinizing human rights,[37] conceptualizing the legal

(Cambridge University Press, 1992), pp. 1–29, at p. 1; J. Kooiman, "Findings, Speculations and Recommendations," in J. Kooiman (ed.), *Modern Governance: New Government-Society Interactions* (Thousand Oaks, CA: Sage Publications, 1993), pp. 249–62, at p. 249. The concept of "governance" was borrowed from economics, see O. E. Williamson, "The Economics of Governance: Framework and Implications," *Zeitschrift für die gesamte Staatswissenschaft*, 140 (1984), 195–223, at 195.Global governance is marked by four elements. First, it recognizes the importance of international institutions, but highlights the relevance of actors and instruments that are of a private or hybrid nature, as well as of individuals; governance is not only an affair of public actors. Second, global governance marks the emergence of an increased recourse to informality: many institutions, procedures and instruments escape the grasp of established legal concepts. Third, thinking in terms of global governance means putting as much emphasis on actors as on structures and procedures. Last, but not least, as is obvious from the use of the term "global" rather than "international," global governance emphasizes the multi-level character of governance activities: it tends to overcome the division between international, supranational and national phenomena.

[33] B. Kingsbury, N. Krisch and R. Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems*, 68 (2005), 15–62, at 15.

[34] A. von Bogdandy, P. Dann and M. Goldmann, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities," *German Law Journal*, 9 (2008), 1375–400; see also P. Dann and M. von Engelhardt, "Legal Approaches to Global Governance and Accountability: Informal Lawmaking, International Public Authority, and Global Administrative Law Compared," in J. Pauwelyn, R. Wessel and J. Wouters (eds.), *Informal International Lawmaking* (Oxford University Press, 2012).

[35] J. Pauwelyn, "Informal International Lawmaking: Framing the Concept and Research Questions," in Pauwelyn, Wessel and Wouters, *Informal International Lawmaking*; A. von Bogdandy, P. Dann and M. Goldmann, "Developing the Publicness of Public International Law," in A. von Bogdandy, R. Wolfrum, J. von Bernstorff, P. Dann and M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Heidelberg: Springer, 2010), pp. 3–32; J. E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005).

[36] J. von Bernstorff, "Procedures of Decision-Making and the Role of Law in International Organizations," *German Law Journal*, 9 (2008), 1939–64.

[37] M. Koskenniemi, "Human Rights Mainstreaming as a Strategy for Institutional Power," *Humanity*, 1 (2010), 47–58; G. A. Sarfaty, "Why Culture Matters in International

contours of indicators and evaluations as new instruments of global governance[38] and generally providing a much more contextualized and critical understanding of these actors.[39]

Global governance studies signify the institutional turn. They signal that institutions matter. They are driven – beyond their curiosity about new phenomena – by a double impulse. On one side, they have a neo-functionalist or managerial streak. They perceive the ordering of the emerging world society as a big puzzle that is challenging but can be managed by well-thought-out technocratic processes. On the other side, they are driven by a concern about legitimacy and accountability.[40] New actors come with new powers that are so far hardly matched by the structures to hold them accountable. This may refer to human rights concerns with regard to the actions of the Security Council, to the power to influence public policy debates through OECD studies, or – closer to home – to the pressuring of developing states by the International Monetary Fund or the World Bank.

This leads back to development cooperation and its law. Lawyers and legal analysis are slowly taking note of this field. The present study makes a conceptual proposal on how to approach and study the relevant laws – in order to make the exercise of public authority more transparent and ultimately more effective and accountable.

II. The law of development cooperation: a conceptual proposal

1. The law of development cooperation as the law of ODA transfer

Development cooperation is a central field of global public policy. The abject poverty of millions of people is an inacceptable stain on human

Institutions: The Marginality of Human Rights at the World Bank," *American Journal of International Law*, 103 (2009), 647–83.

[38] B. Kingsbury, K. Davis and S. E. Merry, "Indicators as a Technology of Global Governance," *Law and Society Review*, 46 (2012), 71–104; A. von Bogdandy and M. Goldmann, "Die Ausübung internationaler öffentlicher Gewalt durch Politikbewertung: Die PISA-Studie als Muster einer neuen völkerrechtlichen Handlungsform," *Heidelberg Journal of International Law*, 69 (2009), 51–102.

[39] See, for example, J. Klabbers, *An Introduction to International Institutional Law*, 2nd edn (Cambridge University Press, 2009); P. Sands and P. Klein, *Bowett's Law of International Institutions*, 6th edn (London: Sweet & Maxwell, 2009); B. Chimni, "International Institutions: An Imperial Global State in the Making," *European Journal of International Law*, 15 (2004), 1–37. A good indicator for the popularity of a research field is also the existence of specialized journals. Since 2004, there has been for the first time a journal dedicated only to this field, the *International Organizations Law Review*.

[40] A. Reinisch, "Securing the Accountability of International Organizations," *Global Governance*, 7 (2001), 131–49; R. W. Grant and R. O. Keohane, "Accountability and

society. There is no doubt that cooperation is an important path to change it. Such cooperation normally takes place through institutions – of different size and nature, of different vision and approach, but through institutionalized action. As just described, economists and political scientists have started to provide a fuller understanding of the structures and impact of such institutions.

The expertise of lawyers should be an important complement to studies of other disciplines. Lawyers are the technicians of power. They are especially qualified to dissect and explain the competences, decision-making procedures and substantive standards that apply here – and hence to provide transparency and a more systematic understanding. Law is naturally counterfactual but is the only accepted way to lay down the ideals and normative standards that everybody should comply with. Legal knowledge is therefore also central to ensure the accountability and legitimacy of development-aid institutions.

The study of the law of development cooperation faces hurdles, though. There is no lack of relevant legal rules, but a more systematic approach faces a challenge in the immense diversity of actors, instruments and themes in the field. There is bilateral and multilateral cooperation, financial and technical assistance, project aid and budget support – not to mention the various fields like health policies or governance reform.[41] Can such a diverse field really be analyzed from *one* angle and be thought of as one field of inquiry?

The present study indeed proposes to think of the law of development cooperation as *one* field. It suggests understanding it in reference to one shared element. This element is the category of ODA, as it is defined by the OECD. Development cooperation law can thus be described as the *law of ODA transfers*. It regulates the procedures, instruments and criteria by which ODA is awarded. This transfer normally takes place in four stages: first, the general budget decision to reserve a certain amount for ODA expenses; second, the multi-year planning for one country or one sector; third, the negotiation and agreement on a concrete development intervention (project or program); and fourth, the implementation of such intervention. Accompanying this process or retrospectively checking, there are also rules on oversight and control. The law of development

Abuses of Power in World Politics," *American Political Science Review*, 99 (2005), 29–43.

[41] For an overview see P. Haslam, J. Schafer and P. Beaudet (eds.), *Introduction to International Development: Approaches, Actors, and Issues* (Oxford University Press, 2009); T. Rauch, *Entwicklungspolitik* (Braunschweig: Westermann, 2009).

cooperation concerns and covers all of these phases and angles – alongside laws on the basic institutional set-up of donors, recipients and rule-making in this area. In that sense, one could say there is a "constitutional law" of development cooperation, covering the mandates, competences, institutional structures and rule-making powers of the relevant institutions, and an "administrative law" of development cooperation, covering the process described above with all its procedures, instruments and criteria of ODA transfer.[42]

There are two more elements to the conceptual proposal. These concern less the scope of inquiry than the approach to how to study it. First, given the immense variety and the need for transparency to better understand the field, it is necessary to study the relevant laws in a comparative perspective. Such an approach seems somewhat evident, though (of course) hardly mandatory to develop a more systematic overview and understanding of the field.[43] And second, this study proposes to use general principles as normative yardsticks and comparative guideposts for the study of development cooperation law. It argues that we can formulate such sector-specific principles on the basis of general international law and the concrete provisions in the field. Such an approach, however, also assumes that there is a certain autonomy of the law and legal standards of development cooperation.

The following sections will explain the concrete meaning of the ODA, clarify further the scope of inquiry, and explain its focus on public institutions.

2. The definition of ODA and the scope of inquiry

Like any definition, this focus on the transfer of ODA has an excluding as well as an including function. In order to understand its scope better, one has to take a closer look at its characteristics.

The category of ODA was introduced in 1969 by the OECD and is recognized today as the central definition of what is accepted as publicly funded development aid.[44] Its definition is based on a guideline which is adopted and routinely updated by the OECD's Development Co-operation

[42] On the constitutional law of development cooperation, see *infra* Chs 3 and 4 and on the administrative law of development cooperation, see *infra* Chs 5–9.

[43] For a more extensive explanation of the structures and specific approach of this study, see *infra* A.III.

[44] For more information on ODA in general, cf. OECD webpage www.oecd.org/dac/stats/; R. C. Riddell, *Does Foreign Aid Really Work?* (Oxford University Press, 2007), pp. 18–21. As early as 1970, the UN General Assembly used the category of ODA to put the claim for

Directorate.[45] It is addressed primarily to those ministers of OECD member states who report to the OECD on their countries' financial engagement in development. The guideline defines what expenditures can be registered as ODA as opposed to other international financial transfers.[46] The guideline and its ODA category aim to establish an objective and transparent standard for defining what activities will count as development aid and are thus "praiseworthy." Given its wide currency, the definition is central to creating a mutual understanding of the scope and financial volumes of development aid.

ODA is defined as "flows of official financing administered with the promotion of the economic development and welfare of developing countries as the main objective, and which are concessional in character with a grant element of at least 25 per cent."[47] The definition is built on three elements. First, it relates to the transfer of *public* funds. This excludes all development financing based on private donations or investments. ODA also includes only transfers by government entities, although these can include all kinds of local or central governments or agencies. Donor institutions fit this definition in all cases. Recipients and cooperation partners are generally developing countries, but may also be private organizations in these countries.[48]

The second component of the definition of ODA relates to the instrument, which is "assistance." This comprises all financial or monetary assistance, loans or grants that have at least a 25 percent grant character. This component highlights the financial basis of all development cooperation programs: a rather banal, yet nevertheless crucial component of development cooperation. The grant element can be present in all the various formats and structures that development aid can be delivered in (which are meticulously listed in the guideline). ODA as cooperation

financial support for developing countries into more precise terms. In Resolution 2626 (XXV), October 24, 1970, the GA for the first time called for economically advanced countries to progressively increase the "official development assistance to the developing countries" and to exert their "best efforts to reach a minimum net amount of 0.7 per cent of its gross national product at market prices by the middle of the Decade" (marginal number 43). This claim has remained unchanged until today.

45 OECD, *DAC Statistical Reporting Directives*, DCD/DAC(2010)40/REV1 of November 12, 2010 (2010). Available at www.oecd.org/investment/aidstatistics/38429349.pdf (last visited September 2012). On the OECD as an institutions, see *infra* Ch 3.C.I.

46 These transactions fall in the category "Other Official Flows" (OOF), cf. Ibid., margin no. 38.

47 Ibid., margin no. 35.

48 Ibid., margin no. 33. For more on the selection of countries, see below Ch 3.B.

can take the form of project assistance or program assistance.[49] It can fund both technical and financial cooperation.[50] It can also be used for humanitarian or disaster relief, or to reduce indebtedness.[51] Finally, the category includes the entire spectrum of development activities, as long as they require financing and contain a grant element. Thus, although the province of development administrative law is extremely broad, the ODA definition can nevertheless be used to separate it from other development-related instruments that are not based on financial transfers. Examples of the latter include, for instance, market-access regulations or patent law regimes. The ODA definition is, therefore, critically important, since it distinguishes the law of development cooperation from other legal fields involved with support for developing countries – such as foreign trade law, patent law, the law of migration, or environmental law.

Finally, the category of ODA includes the "D" for development and thus specifies the goal which a payment must serve. The definition covers only those payments which serve the principal goal, in the words of the ODA Guideline, of the "economic development and welfare of developing countries." Clearly, this is the soft underbelly of the definition, so to speak, since the concept of development is malleable, somewhat holistic and not very precise.[52] The purpose of the definition is primarily to exclude payments which are clearly aimed at purposes unrelated to development: in particular, military assistance or purely private profit-oriented activities. Export credits and other investment-related support payments, thus, do not fall under the definition of ODA.[53] A notable recent discussion revolved around whether security is a precondition for development, which would argue in favor of classifying security-related measures as

[49] "Project aid" refers to activities that are temporally, spatially and functionally limited and aimed at achieving concrete outputs; "program aid," on the other hand, means either the pooling of different projects in a sector-wide approach (so-called SWAp) or a grant to a state's general budget (called budget support). For more information, see Riddell, *Does Foreign Aid*, pp. 18; 195; F. Nuscheler, *Entwicklungspolitik: Lern- und Arbeitsbuch*, 5th edn (Bonn: Dietz, 2004), p. 472); more on these instrument and their legal structures, *infra* Part III, Chs 6 and 7.

[50] For technical cooperation, see OECD, *DAC Statistical Reporting Directives*, Line I.A.1.2.

[51] On debt relief: Ibid., Line I.A.1.6; on humanitarian aid or civil protection: Ibid., Line I.A.1.5. Even though humanitarian aid and debt relief can, at least in part, be encompassed by the ODA definition and are therefore the subject matter of the law of development cooperation, the present analysis will not cover these topics. However, one could define humanitarian aid, in principle, as a special area of the law of development cooperation containing specific provisions (regarding EU law, cf. Art. 214 TFEU).

[52] On the concept of development in this study, see *infra* Intro.A.III. On different concepts of development, see *infra* Ch 1.A.IV, B.I.2, Ch 2.A.I.2 and specifically Ch 2.B.I–IV.

[53] See OECD, *DAC Statistical Reporting Directives*, Line II. and margin no.39.

ODA. These are indeed now recognized as ODA, albeit in a limited fashion.[54] There is also the discussion of whether ODA as a category might become irrelevant because of new donors and a generally changed landscape of development financing, in which ODA captures only a very limited extent of aid flows.[55]

Despite the difficulty of delimiting ODA in specific cases, in the present study the definition will be used as an abbreviation to obviate further discussion of the question of which aspects of cooperation between partners should be included in the law of development and which excluded.

3. The political nature of development as reason for the ODA focus

By concentrating on the transfer of ODA, this study chooses a particular focus. It concentrates on *public* actors and *public* funds. This focus grows out of an understanding of the development process as inherently contested and political in nature – and the recognition of the qualitative difference between private and public actors and their respective responsibilities in such a political process. This nutshell-credo has to be explained.

In the past sixty years, various concepts of development have been formulated. Many of them understand "development" primarily as an economic process and economic goal that is better achieved by technical experts than by (corrupt/short-sighted/ …) politicians.[56] The underlying understanding here is different. The present study understands development as an ongoing process of taking decisions about public choices

[54] Cf. Ibid., margin no. 39. On this discussion, including the recommendation to create an additional reporting category for "Official Security Assistance" M. Brzoska, "Extending ODA or Creating a New Reporting Instrument for Security-related Expenditures for Development?" *Development Policy Review*, 26 (2008), 131–50, at 131; on the role of security issues in the context of development cooperation more generally N. Woods, "The Shifting Politics of Foreign Aid," *International Affairs*, 81 (2005), 393–409, at 393; see also ECJ, Case-91/05 (ECOWAS), Judgement May 20, 2008.

[55] J.-M. Severino and O. Ray, *The End of ODA: Death and Rebirth of a Global Public Policy*, Working Paper Number 167 (2009). Available at www.cgdev.org/files/1421419_file_End_of_ODA_FINAL.pdf (last visited September 2012); T. Chahoud, *Southern Non-DAC Actors in Development Cooperation*, German Development Insitute – Briefing Paper 13/2008 (2008). Available at www.die-gdi.de (last visited July 2013); making a similar argument, C. Zilla and C. Harig, *Brasilien als "Emerging Donor": Politische Distanz und operative Nähe zu den traditionallen Gebern*, German Institute for International and Security Affairs – SWP-Studie S 07/2012 (2012), pp. 9; 19. Available at www.swp-berlin.org/fileadmin/contents/products/studien/2012_S07_zll_harig.pdf (last visited July 2013). On the changing landscape, *infra* at Ch 2.C.III.

[56] On these and other concepts of development, see *infra* Ch 1, and Ch 2.A.

to better the lives of those affected by poverty. It assumes that any decision about development interventions involves a wide variety of interests which may – naturally – conflict. These may be the interests of political parties in the developing country, of the government of this country, of the citizens concretely affected by the interventions or the societal process generally – and also interests of donors, to name just a few, very generic groups. "Development" is not, as postcolonial writers have rightfully stressed, a universal value. It involves a constant grappling with options that have profound implications for the people involved. It is about public choices and about the power to decide. It is about using and creating freedoms. It is political.[57]

Such a political concept of development is ultimately also a procedural concept of development. People concerned have to decide what option should be taken. A specific characteristic of development cooperation is, however, that such decisions take place in the context of often sharp imbalances of power. Recipients are normally economically and often politically weaker than donors. Affected citizens are often less influential than politicians, if not wholly excluded. Decision-making in development cooperation is therefore frequently in danger of undermining the autonomy and free will of the participants. They can be pressurized, they can lack information or the resources to fully explore the implications. It is therefore of central concern how the procedures of participation are designed. Formally structured and transparent procedures are necessary to mitigate imbalances; fair procedural rights are essential.[58]

Besides this political and procedural understanding of development, this study is based on recognition of the qualitative difference between private and public actors and their respective responsibilities. It assumes that public actors spending public funds are ultimately faced with different and higher standards of accountability and legitimacy than private donors or corporate actors – for good reasons: only public actors have the authority to unilaterally determine the fate of citizens. It is the special feature of public authority that comes with special obligations.[59] Also, public authorities act in the name of the public and the society that has constituted them. They do not serve a corporate goal or private

[57] The postcolonial perspective was recently laid out by Pahuja, *Decolonising International Law*; also A. Anghie, "Time Present and Time Past," *New York University Journal of International Law and Politics*, 32 (2000), 243–90. The participatory, political and liberal understanding of the process draws on Sen, *Development as Freedom*.

[58] M. Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization," *Theoretical Inquiries in Law*, 8 (2007), 9–36.

[59] Bogdandy, Dann and Goldmann, "Developing the Publicness of Public."

foundation's charter but have to be guided by the common interest of the public.[60] Public authorities spending public funds are therefore accountable to their societies and their collective understanding of how and on what to spend funds. This involves a broad variety of viewpoints. And this normally differs from, for example, a shareholder's logic. Finally, public actors are also accountable to different legal standards from private actors. Human rights, the rule of law and democracy are standards that apply first of all to public actors who normally (and not just traditionally) have much more power than private ones.

Some might argue that the difference between public and private actors has little meaning in a policy field that is more about spending money and creating opportunities than curbing freedoms. Public power, so they could argue, has to be tamed and limited only where individuals' freedom is at stake. However, it would be misconceived to flatten the difference between public and private-law standards in development assistance out of such thought. First of all, as will become apparent throughout this study, development cooperation does not just create opportunities but can also threaten individual freedom and collective autonomy. Involuntary resettlements or environmental risks are often part of development projects; not every developing country that needs funds agrees with, for example, the EU development policies that it is still pressed to implement. But, in any case, it would be too narrow to apply public law only in those constellations in which freedoms are curbed. There is also a public responsibility for enabling freedom that has to comply with general standards of law. Public power and authority have to be held in check in curbing as well as enabling settings.

The public law approach taken here might also be questioned from the perspective of global governance studies. For many, the structures of global governance merely show that it does not make sense any more to distinguish between private and public, since they cooperate and merge in many instances. The insights of the global governance debate are certainly not lost on this study.[61] But these insights do not erase the differences just

[60] M. Loughlin, *Foundations of Public Law* (New York: Oxford University Press, 2010), p. 10; M. Loughlin, "Reflections on 'the Idea of Public Law'," in E. Christodoulidis and S. Tierney (eds.), *Public Law and Politics: The Scope and Limits of Constitutionalism* (Aldershot: Ashgate, 2008), pp. 47–68 at p. 49; C. J. Friedrich, *Constitutional Government and Democracy* (Boston: Ginn, 1950), p. 247; K. Loewenstein, *Political Power and the Government Process* (University of Chicago Press, 1957).

[61] It responds, actually, to all four characteristics of global governance mentioned above (fn. 32), as it considers more informal norms of interaction (including soft law and internal laws of international organizations), pays attention to procedural structures

mentioned between public and private. On the contrary, an approach that too easily equates private and public structures of cooperation runs the risk, as do many global governance approaches, of favoring a managerial approach to global affairs, promoting a rather technocratic understanding of structures and processes. In choosing a focus on public actors and public funds, this approach wants to avoid the dangers of such an understanding.

All of this is not to say that deepened legal analysis of other, private forms of development finance is not necessary. On the contrary, it would certainly also benefit the understanding and further reform of ODA transfer if we knew more about private forms of development cooperation and other forms of development finance. In that sense, I see great value in the recent proposal to study *all* legal rules concerning the financing of development, as put forward by Kevin Davies.[62] Such a law of development finances would analyze ODA transfers, but also private flows (such as remittances), commercial flows (such as loans offered at market rates) as well as the rules pertaining to foreign direct investment or sovereign debt – and hence would stress the immense variety of forms, actors and terms of financing.[63]

This proposal finds especially strong justification in view of the immense increase in instruments and actors that have provided financing for development purposes since the late 1990s. While public donors like the Western states or the World Bank clearly dominated the field until then, ever since we can observe the emergence of new donors not subscribing to the ODA definition (like China), private or hybrid public-private actors, or simply an abundance of new modes and instruments of financing such as micro-finance or climate-change financing.[64]

of rule-making and to the (global) multi-level interplay between donors, recipients and others, and considers the role of individuals and non-governmental organizations in these processes.

[62] K. E. Davis, *"Financing Development" as a Field of Practice, Study and Innovation*, New York University Institute for International Law and Justice Working Paper 2008/10 (New York, 2008), p. 174. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341291## (last visited July 2013); Cissé, Bradlow and Kingsbury, *International Financial Institutions*.

[63] C. G. Paulus, "What Constitutes a Debt in the Sovereign Debt Restructuring Context?" in A. Ligustro and G. Sacerdoti (eds.), *Problemi e tendenze del diritto internazionale dell'economia: Liber amicorum in onore die Paolo Picone* (Naples: Editoriale Scientifica, 2011), pp. 231–48 at p. 231; K. E. Davis and A. Gelpern, "Peer-to-Peer Financing for Development: Regulating the Intermediaries," *New York University Journal of International Law and Politics*, 42 (2010), 1209–68 at 1209.

[64] Easterly, *Reinventing Foreign Aid*; Duflo and Banerjee, *Poor Economics*.

At the end of the day, however, it seems premature (but greatly thought-provoking and hence enriching) to declare "the end of ODA," given the substantive amount of funds and institutional powers that still comes with ODA transfer.[65] There is clearly a need to be attentive to the concrete contexts and draw conclusions first within those. In this sense, development finance and the law of development cooperation are complementary not exclusive approaches.[66] This study just focuses on one important part of a broader field.

III. Structure and approaches of this study

The concrete structure and approach of the present study rests on three elements that also foreshadow the structure of the study: a contextualization (provided in Part I), the formulation of general principles (undertaken in Part II), and the comparative analysis of the legal regimes of the World Bank, European Union and Germany (attempted in Part III).

1. Contextualization

The first step to understanding the law of development cooperation is to understand the history and political economy of aid. Part I of this study will recount the origins of development cooperation and detail the genesis of its most important institutions and ideas. It seems especially important to understand the administrations which the law is supposed to govern, in particular the supranational and international administrations, which may be less familiar than regular national ones. Parallel to the political history of development cooperation, Part I will trace the history of ideas and of development policies. More than in other policy areas, development policy has seen a constant shifting in leading paradigms and ideas. Tracing the gradual changes in the concept as it slowly evolved into its present form is central also to understanding its legal regulation. Finally, the study will aim at understanding the practical problems of development cooperation, and will therefore survey the contemporary state of discussion in political science and economics, with a particular focus on institutional economics.[67]

[65] Severino and Ray, *The End of ODA*.

[66] Kevin Davies, too, underlines that despite them all furthering development processes, different instruments and actors have to be analyzed in their own context, for example, with reference to the commitments that they demand from the contracting parties, the standards which they uphold or the rules on liability that they involve. See Davis, *Financing Development*, p. 174, pp. 5–6.

[67] See in particular Ch 2.C.II, Ch 5.A and Ch 6.A.

2. Principles

Part II of this study will lay out what could be called the constitutional foundations of the law of development cooperation. It will describe the relevant institutions and the legal sources and frameworks within which these institutions operate.[68] But it goes beyond this analytical and descriptive presentation. The present study does not deny its roots in a continental European tradition of legal scholarship.[69] It attempts to provide a systematic understanding of the law of development cooperation and its doctrines. Part of this is its attention to basic notions, recurrent structures and potential tensions among concrete rules.[70] A classic element of such a systematic approach is to formulate general principles of the field at hand, here *sectoral* principles for the law of development cooperation.[71] While principles of public international law in general are helpful in this endeavor, general international legal principles are too broadly formulated to capture specific aspects of development cooperation. Therefore, the focus will be on determining specific principles of development cooperation law, namely development, collective autonomy and sovereignty, individual autonomy and human rights, and finally coherence and efficiency.[72]

Just a brief explanation of the functions of these principles: they mainly serve three purposes. First, they assist in systematization. By defining four principles (development, collective autonomy, human rights and

[68] See Ch 3.

[69] For a critical introduction, see A. Somek, "The Indelible Science of Law," *International Journal of Constitutional Law*, 7 (2009), 424–41; J. E. K. Murkens, "The Future of Staatsrecht: Dominance, Demise or Demystification?" *Modern Law Review*, 70 (2007), 731–58.

[70] From the German scholarship cf. E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee: Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung*, 2nd edn (Berlin: Springer, 2004), p. 2; C. Möllers, "§3 Methoden," in W. Hoffmann-Riem, E. Schmidt-Aßmann and A. Voßkuhle (eds.), *Methoden, Maßstäbe, Aufgaben, Organisation*, 3 vols. (Munich: C.H. Beck, 2006), vol. I, pp. 121–76 at margin nos. 35–9; M. Eifert, "Das Verwaltungsrecht zwischen 'klassischer' Dogmatik und steuerungswissenschaftlichem Anspruch," in C. Hillgruber, U. Volkmann, G. Nolte and R. Porscher (eds.), *Die Leistungsfähigkeit der Wissenschaft des Öffentlichen Rechts: Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Freiburg im. Breisgau vom 3. bis 6. Oktober 2007* (Berlin: de Gruyter, 2008), vol. LXVII, pp. 286–333 at pp. 286, 302–7.

[71] On the content, function and meaning of sectoral principles for the concept of international administrative law see M. Koskenniemi (ed.), *Sources of International Law* (Burlington: Ashgate, 2000); also A. von Bogdandy, "General Principles of International Public Authority: Sketching a Research Field," *German Law Journal*, 9 (2008), 1909–38.

[72] See *infra* Ch 4.B–E.

efficiency), one can better understand which functions the concrete rules serve, how they relate to each other and the principles, and where clusters (or gaps) of regulation are. Secondly, principles help evaluate the relevant rules. Although this is not about a sharp verdict on the legality or illegality of rules, principles help to normatively evaluate whether norms help implement or contradict relevant principles. This function is particularly relevant where it helps in comparing the normative preferences of different legal regimes of cooperation, and in this study especially of the World Bank, the EU and Germany. This leads to the third function fulfilled by the principles: they create transparency, especially in understanding tensions and trade-offs between values. This aspect is especially important in the area of development cooperation. Social science discussions of development cooperation frequently address these value conflicts, but tend toward staking out an absolute position based on one or another fundamental premise. To put it crudely, one is either for the protection of the sovereignty of recipient countries or for the right of donors to attach precise conditionalities to allocation of aid, either for human rights in development or for the more efficient and less participatory use of funds. But such either–or approaches are generally unsuited to a proper appreciation of the (often conflicting) normative situation. The better approach is to determine the points of conflict between simultaneously valid basic norms, and hence to furnish a practical basis for balancing them.

3. Comparison

The third method deployed in this study is its comparative approach. Since this study searches for *general* legal structures that apply to many different organizations, a comparative approach seems almost necessary. Only such an approach can bring to light divergences in the particular legal regimes of the various actors and thus allow us to "decode" the general structures of development administrative law. This uses two dimensions of comparison: vertical and intra-disciplinary.

The vertical comparison means that the study will not focus on the law at one level (for instance, national law), but include supranational and international law.[73] It is hence a multi-level comparison. More specifically, the study focuses on the development cooperation law of the World Bank,

[73] Methodological reflections on this type of vertical comparison are rare but likely to gain more importance in the context of global problems, especially due to a rising interest of legal scholarship in issues of global governance. So far see H. F. Zacher, "Horizontaler und vertikaler Sozialrechtsvergleich," in B. von Baron Maydell and E. Eichenhofer (eds.), *Abhandlungen zum Sozialrecht* (Heidelberg: C.F. Müller, 1993), pp. 377–430 at pp. 422–4;

the European Union and Germany. A vertical perspective seems particularly appropriate for the context of development cooperation, since it involves not only cooperation between states, but also, characteristically, between international organizations (such as the World Bank or EU) and developing countries. The analysis of the law of these organizations may therefore furnish important insights.

If appropriate, the study will also engage in "intra-disciplinary" comparison, asking, for instance, whether categories and notions of administrative law can also be applied to international law. The reasons for this are simple. Development law deals with the transfer of public funds for common purposes and hence raises issues which are well investigated in national but hardly studied in international law. Domestic administrative law suggests promising comparative avenues of inquiry and terminology. This book will thus apply one of the central ideas that has shaped the discussion about global or international administrative law.[74]

IV. A word of caution on the language of development

There is another aspect that merits attention: the language of development cooperation. It is a political language. Theoreticians of social constructivism[75] (and fiction writers[76]) have shown how language affects our perceptions of reality. The terminology of development cooperation, in particular, has shown itself an exceptionally fruitful field for unmasking the politically laden connotations. Even the notion of development is highly contentious.[77] While it is obviously not a new term, it

also C. Schönberger, "§71 Verwaltungsrechtsvergleichung: Eigenheiten, Methoden und Geschichte," in A. von Bogdandy, S. Cassese and P. M. Huber (eds.), *Verwaltungsrecht in Europa: Wissenschaft* (Heidelberg: C.F. Müller, 2011), vol. IV, pp. 493–540 at pp. 513.

[74] See Kingsbury, Krisch and Stewart, "Emergence of Global Administrative Law"; E. Schmidt-Aßmann, "Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen," *Der Staat*, 45 (2006), 315–38; Bogdandy, Dann and Goldmann, *Developing*; M. Ruffert, "Perspektiven des Internationalen Verwaltungsrechts," in C. Möllers, A. Vosskuhle and C. Walter (eds.), *Internationales Verwaltungsrecht: Eine Analyse anhand von Referenzgebieten*. (Tübingen: Mohr Siebeck, 2007), vol. XVI, pp. 395–419; C. Tietje, *Internationalisiertes Verwaltungshandeln* (Berlin: Duncker & Humblot, 2001).

[75] P. L. Berger and T. Luckmann, *The Social Construction of Reality* (New York: Anchor Books, 1966).

[76] G. Orwell, *1984* (London: Secker and Warburg, 1949).

[77] Escobar, Encountering Development, p. 30; P. L. Berger, "Speaking to the Third World," in P. L. Berger and M. Novak (eds.), *Speaking to the Third World: Essays on Development and Democracy: Studies in Religion, Philosophy, & Public Policy* (Washington, DC: Aei Press, 1985), pp. 4–20 at p. 20.

has gained a new meaning and has become an almost inescapable notion since the post-World-War-II and decolonization era. In contrast to the notion of "civilizing," which had dominated the previous discourse, the highly suggestive term "development" was supposed to describe the humanitarian and (ideally) egalitarian endeavor of cooperation without the paternalistic (and Eurocentric) touch of the past, or at least fading, colonial age. Nonetheless, it continued to distinguish and discriminate. The term was therefore seen to suggest that non-developed countries are "backward," "infantile," or "retarded," and thus need the help of advanced or "developed" states to "grow" and "develop." It is therefore criticized for implying a certain set standard that has to be achieved, a certain goal to be considered as better and to be deserved, and thus masking an imperial or colonial project, since the set standard is that of the West.

The present study nevertheless uses the (almost inescapable) term but will not subscribe to any substantive meaning of it. As explained above,[78] it deploys a procedural notion of development. It understands development primarily as the political process in which the relevant participants decide on their understanding of development. It therefore stresses the inherently political nature of development cooperation. Its core lies here too in negotiation and decision-making. In terms of defining the scope of inquiry, it refers to the concept of ODA.

The terminological pitfalls continue with the fact that there is no set notion for development cooperation itself. Instead, "foreign aid," "foreign assistance," "development aid," "development assistance" and "development cooperation" are often used interchangeably. In Germany, by contrast, the 1990s saw a consensus emerge behind the term "development cooperation" instead of "development aid," since cooperation better suggested the element of an equal partnership.[79] One can ponder whether this has only been the stale success of political correctness or even the evil intent to cover up persisting inequalities. This study rather sides with those who understand language indeed as an important instrument in the construction of perception. Even though it might have an idealistic overtone, it is therefore justified to call the interaction what it should be: a cooperation among equal partners.[80]

[78] See *infra* Intro.A.II.3. [79] Rauch, Entwicklungspolitik, p. 12.

[80] On the term of "developing countries" and their categorization, see *infra* Ch 3.B and A. Greig, D. Hulme and M. Turner, *Challenging Global Inequality: Development Theory and Practice in the 21st Century* (Basingstoke: Palgrave Macmillan, 2007), pp. 48–52.

A notion that also changed connotations but should not be forgotten is that of the *Third World*. Today, this notion has a more negative tone, understood as cementing a hierarchical reading in which the Third World is behind or below the first (Western capitalist) and second (former Eastern communist) worlds. Used less and less, it is often replaced by the notion of the Global South. However, such a negative reading obscures the progressive and self-confident roots of the term. It was first coined by the French demographer and anthropologist Alfred Sauvy and popularized around the Bandung Conference 1955 of those states that did not want to play along the lines of the Cold War and constituted an alternative, free and non-ideological third way.[81] Dipping into the history of political ideas, the notion was introduced to be evocative of Abbé Sieyès's notion of the "third estate." In his famous pamphlet "*Qu'est-ce que le tiers-état?*", published just months before the outbreak of the French Revolution, Sieyès describes the non-aristocratic and non-clerical majority meant by the notion of the third estate as the actual and complete French nation and calls for its self-constitution and fair representation as the broad democratic majority. In so calling the group of newly independent countries of the south (and east), which easily form the majority of countries in the world, thinkers and politicians demanded just that: the fair and equal representation and treatment in world affairs. With this emancipatory meaning in mind, this study will use the notion too.

And there is another, final, aspect to the treatment of terminology and language here: international organizations and especially development organizations like the World Bank, OECD or UN also create their own languages.[82] They have the power to shape notions and coin phrases, such as "structural adjustment," "governance," "ownership" or "aid effectiveness." Often these notions conceal more than they reveal and hide the intentions of the instruments behind them. To shield itself, this study tries to preserve a somewhat autonomous language of scholarship. As far as possible, it will not take cues from organizations and political declarations but rather from scholarly practice – and, of course, the law.

[81] Alfred Sauvy, *L'Observateur* August 14, 1952; on the history of the term, see also Pahuja, *Decolonising International Law*.

[82] W. Easterly, *The Cartel of Good Intentions: Center for Global Development Working Paper No. 4*. Available at www.cgdev.org/content/publications/detail/2786/ (last visited September 2012).

B On studying the law of development cooperation: challenges and chances

I. Challenges: reasons for the reluctance of lawyers

If the law of development is an important field of law but has so far only rarely been studied by lawyers, the reasons for such reluctance should be considered. They could well indicate general doubts about the interplay of law and development cooperation – and could therefore help us to understand its challenges and tasks. Among the reasons, five stand out.

The most obvious objection against even the ability to legally regulate development aid might lie in its manifestly *political nature*. Development aid is traditionally awarded in a manner that serves the political goals of donors in their foreign policy. It is considered a tool of donors to shore up support, ensure economic benefits or quell opposition, but not as one used because of legal considerations.[83] On the contrary, the conduct of foreign policy is seen as a sovereign prerogative of every state. Strict duties to cooperate and especially to financially support have only found very limited application. Put more abstractly, one could say that development cooperation is guided by other rationalities than obedience to the law.[84]

Another aspect complements this first objection: the *inequality* between the participants. Law and especially public international law is based on the assumption of equality. This entails that legal persons meet, negotiate and bind each other as equals and, more specifically, as *free* equals. Equality in this sense contains the idea that equals do not and cannot coerce each other.[85] They are free to agree or disagree. In the context of development cooperation, it is exactly this that is in doubt. The factual inequality, especially in terms of economic strength, is an inherent part of the constellation. From inequality follows bondage. Recipients are

[83] Most eloquently argued by Morgenthau, "Political Theory of Foreign Aid."

[84] These are not just political; especially in the case of development cooperation one could easily refer to economic rationalities; but also other sectors can "develop" their own rationalities, such as science, technology, morality – or, as in our case, law. Among the more recent literature, see G. Teubner, "Altera Pars Audiatur: Law in the Collision of Discourses," in R. Rawlings (ed.), *Law, Society, and Economy: Centenary Essays for the London School of Economics and Political Science, 1895-1995* (Oxford University Press, 1997), pp. 149–76, especially p. 150; A. Fischer-Lescano and G. Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," *Michigan Journal of International Law*, 25 (2004), 999–1046.

[85] But on the dubious grounds of this claim in general, see B. Kingsbury, "Sovereignty and Inequality," *European Journal of International Law*, 9 (1998), 599–625.

often economically dependent on the donor's contribution and not free to decide and choose.[86] Hence, even the core constellation of development cooperation seems to militate against its adequate and legitimate regulation in law.

Development cooperation and law could, secondly, be considered a difficult combination because of the type of activity and *mode of operation* in question. Development cooperation is about spending money and (ideally) creating opportunities; it is not about curbing freedom. Law and especially public law, however, are (at least traditionally) thought of as limiting unchecked powers. It is most needed where liberties are under threat, not where opportunities are created. Of course, the way public authorities spend money is also to be regulated in law. Particularly in the welfare states of continental Europe this has been an important topic for lawyers. But it concerns a very specific understanding of the role of state and law in their protective capacity.[87] It is unusual and can therefore easily fall outside the scope of attention. This might explain why lawyers first picked up on the issue of development cooperation when the rights of affected people were at stake.[88] Here, the traditional threat of public power and modus of law can be found – and law can be applied.

A third reason could have contributed to the neglect. This could be called the structural disconnect in transnational decision-making. Law is best developed where those whose interests are at stake can raise their voices and inject their concerns in the law- and decision-making process, be it through legislatures or courts. This is not the case in the area of development cooperation.[89] There is a structural disconnect between those who might be adversely affected by development interventions and those who set the rules. In fact, there is a double disconnect: one is based on the internationality in the structure of foreign aid. If, for example, the

[86] For an empirical studies on this, see Whitfield, *The Politics of Aid*.

[87] See L. F. M. Besselink, F. Pennings and S. Prechal (eds.), *The Eclipse of the Legality Principle in the European Union* (Alphen aan den Rijn: Kluwer Law International, 2011), p. 40; G. Haverkate, *Rechtsfragen des Leistungsstaats: Verhältnismässigkeitsgebot und Freiheitsschutz im leistenden Staatshandeln* (Tübingen: Mohr Siebeck, 1983); more generally on different modes of operation H. Schulze-Fielitz, "§12 Grundmodi der Aufgabenwahrnehmung," in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle, *Methoden, Maßstäbe, Aufgaben, Organisation*, vol. I, pp. 761–838 at margin no. 39.

[88] Human rights in development cooperation is probably the only aspect that has found wider attention among lawyers, see Bartels, *Human Rights Conditionality*; Darrow, *Between Light and Shadow*; Pippan, *Förderung der Menschenrechte*.

[89] More on this especially in the chapter on accountability, see *infra* Ch 9 but also in the chapters on decision-making, see especially *infra* Ch 6.B.

German parliament and government decide whether to allocate funds in Mali, German voices would have to speak up, even though only their often rather remote financial or humanitarian interests are at stake. With respect to the recipient authorities that have to agree with the projects, one faces the second disconnect: individual citizens do not have a voice in the international agreements between Mali and Germany that decide about the interventions. Mali citizens who might be affected, for example, because they have to resettle, are not heard. In sum, internationality and the (non-individual/collectivist) structure of public international law have the effect that law- and decision-making and interest representation hardly overlap. Legal protection cannot be demanded by those who would need it. The call for legal regulation, again, is muffled.

Even if there are rules on development cooperation, however, their legal nature might contribute to the neglect of development cooperation in legal academia. Most of the applicable rules, existing in the municipal law of donor states and even more in the internal law of international donor organizations (such as the World Bank) could be characterized as *soft law*. They apply only internally and cannot be called upon in courts. Can we call them law at all? The following chapters will examine the bases and nature of development law.[90] We will see that many aspects of this legal regime consist of only partially formalized law: internal regulations of development administrations and "soft" multilateral agreements will be important sources. Their binding effect may be limited, or may stem from informal enforcement mechanisms. Nevertheless, informality does not necessarily equate with ineffectiveness. To the contrary, national and international law now recognizes the normative power precisely of informal law. To ignore the law of development cooperation simply because of its informality would be shortsighted; in fact, the mixing of formal and informal law can actually be seen as a characteristic feature of this area.[91]

Finally, and perhaps most fundamentally, one can doubt the legitimacy of any legal regulation of development cooperation. This objection might best be labeled as the postcolonial critique of development cooperation, including its law. This critique has two strands: one is postcolonial lawyers who conceive public international law *in general* as a problematic

[90] See *infra* Ch 3.A.–C.

[91] On the legal nature and various modes of application in international institutional law, see A. von Bogdandy, R. Wolfrum, J. von Bernstorff, P. Dann and M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Heidelberg: Springer, 2010).

structure with which Western powers ensure their dominance.[92] The other strand is concerned more specifically with the idea of "development," which is seen as the attempt to mask the old colonial project of subjugation in a new, seemingly humanitarian terminology. Building on both strands, a law of development cooperation can hardly be more than the law of donors that is masking continued inequalities and building a pretense of "partnership" where in fact it is only perpetuating a wrong regime and subjugation. Any law is then only a tool of masquerade. It should not be granted the legitimacy of calling it "law."[93]

In sum, these five considerations might explain to some extent why, rather practically, there has not been much attention from lawyers to the rules on development cooperation. Its political domination, the unusual mode of activity and the dearth of voices in the relevant organs of law-making are part of an explanation. These considerations and objections, more fundamentally, also raise doubts about the legitimacy of such a law. But then again, they also signal where central challenges of the law of development cooperation would lie: in its risk to autonomy, in its soft-law legal nature and in its doubtful legitimacy.

II. Chances: the promise of a legal regulation of development cooperation

Yet thinking about these challenges and the absence of attention also prompts some thoughts about the promises that the inquiry into the law of development cooperation could herald. One can reflect on the functions of law in general that actually urge lawyers to engage especially with a policy field like development cooperation. Three functions are most relevant.

Most fundamentally, law is about justice, the formulation of (counterfactual) ideals and hence about providing guidance on reform.[94] Legal rules of development cooperation can lay down goals and principles to ensure that the practice of development cooperation is more closely oriented toward them – despite competing priorities and rationalities.

[92] For example, Anghie, "Time Present and Time Past"; L. Eslava and S. Pahuja, "Beyond the (Post)Colonial: TWAIL and the Every Life of International Law," *Verfassung und Recht in Übersee*, 45 (2012), 195–221.

[93] More on this position, see *infra* Ch 2.B.IV.

[94] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996) (original: J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 5th edn (Frankfurt: Suhrkamp, 1998), pp. 166).

Development, collective autonomy and individual freedom are guiding principles of development cooperation which the law can integrate into the daily work of development administrations. Also, the guiding function of law should be mentioned.[95] Like law in general, development law can help to coordinate actors in the implementation of political priorities. Despite the problems sketched above, the realm of politics (especially of democratic politics) has to use the law to articulate its priorities. Implementation problems certainly call for the improvement of legal technique and institutional frameworks, but hardly for completely abandoning the enterprise of legal regulation.

Secondly, law can have the function of formalization. Formalization can help to protect weaker actors by subjecting the naked power politics of donors to rules of equality.[96] True, law can also be abused to legitimize raw power, as one sees in the vote-weighting rules of the World Bank. It can also be simply a smokescreen. Law thus has both negative and positive potential in this regard. Nevertheless, it can still offer genuine protection to smaller and weaker recipient states, especially since they may have no other instruments to protect their interests.

Finally, law and legal scholarship has a transparency function which is immensely important in development cooperation. Law's public nature enables participants to understand rules governing procedure, criteria and participation rights that might otherwise have remained largely hidden. Yet, the publicity of rules is only the first step. The task of legal scholarship is to help us to better understand the various rules, enable comparison and, not least, to evaluate and criticize the relevant norms. This function has, up to now, been completely neglected in the development arena. While many complain with good reason about the complexity of the development-aid bureaucracy,[97] it is astounding how little understanding there is among practitioners of development cooperation about the general legal framework in which they operate – to say nothing of their knowledge about other agencies with which they cooperate. Needless to say that transparency is the first step also to accountability.

In sum, there are good reasons to inquire into the law of development cooperation and at least to try to understand what it is. Development

[95] Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht*, pp. 18.
[96] Koskenniemi, "Constitutionalism," 9.
[97] W. Easterly, "Die Entwicklungsideologie west weiter," *Merkur*, 61 (2007), 1084–8 at 1084.

cooperation is without doubt a field that needs critical reflection. Knowledge on what should be the rule can only help. And in the long run: why shouldn't foreign aid also grow out of its politicized niche and become an autonomous legal regime that can be used to effectively check political (and even postcolonial) powers?