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# Institutional Law and Development Governance: An Introduction

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**Abstract:** This paper argues that the intersection of international institutional law and “law-and-development” studies provides a rich field of themes that help to understand inequality and agency in the global order. It sketches a first overview of how this field could be understood and analysed, describing characteristics, principles and scholarly approaches to the field, some structural features (institutions and finances) as well as central mechanisms and instruments. Dealing with the distribution of power, finance and knowledge, it is an obvious object for a variety of scholarly approaches, in particular critical legal and public law scholarship.

**Keywords:** international institutional law, accountability, development cooperation, World Bank

## 1 Introduction

International institutional law- and “Law and Development”-scholarship have not been close companions for most of the time. While institutional law scholarship mostly abstained from the particularities of the thematic fields in which institutions operate,<sup>1</sup> law and development scholarship has focused on particular regimes rather than on general instruments and institutional configurations. But this mutual indifference has waned since the early 2000s and a conversation between both fields started. Debates in international institutional law have broadened the scope of the field itself but also enriched research on law and development. Attention to the growing powers of international public

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<sup>1</sup> See only the standard-setting books by Henry Schermers and Niels Blokker, *International Institutional Law* (6th ed., Leiden: Brill Nijhoff Academic Publishers, 2018); Jan Klabbers, *An Introduction to International Institutional Law* (2nd ed., Cambridge: Cambridge University Press, 2009).

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authority boosted research on the legal premises of institutional configurations in global governance.<sup>2</sup>

This discussion of the law of global governance in turn has contributed to the literature on law and development. In fact, it has added a whole new branch to this field. The institutional law of development (or the law of development cooperation or institutional law of development and finance<sup>3</sup>) is an example of the pluralization of Law and Development-scholarship more generally<sup>4</sup> and emerged in the context of the overall legalization of politics observed.<sup>5</sup> It is today a separate area next to those branches focusing on human rights, economic aspects, environmental concerns or the Rule of Law-operations (to name but the most populated areas of Law and Development scholarship).<sup>6</sup>

The new branch focuses on the law of institutions that organize the transfer of funds and knowledge for development purposes (such as the World Bank, UNDP or domestic aid agencies) – often animated by normative questions of their limits of powers and accountability.<sup>7</sup>

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<sup>2</sup> Eyal Benvenisti, *The Law of Global Governance* (Leiden: Brill Nijhoff, 2014); Jan Klabbers and Tuko Piiparinen (eds.), *Normative Pluralism and International Law* (Cambridge: Cambridge University Press, 2013); Benedict Kingsbury, Nico Krisch and Richard B. Stewart, *The Emergence of Global Administrative Law* 68 *Law and Contemporary Problems* (2005), 15; Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing The Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', Armin von Bogdandy and others (eds.), *The Exercise of Public Authority by International Institutions* (Berlin: Springer, 2010).

<sup>3</sup> The terminology is clear neither with regard to the field of legal research nor to the respective policy area. The latter is variously called development or international cooperation, foreign aid or foreign assistance. To simplify matters, I will use these terms interchangeably here. On terminology also Philipp Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge: Cambridge University Press, 2013), p. 27.

<sup>4</sup> See David Trubek, *Law and Development: Forty Years after 'Scholars in Self-Estrangement'*, *University of Toronto Law Journal* (2014), 1.

<sup>5</sup> Martti Koskenniemi, *The Fate of International Law*, 70 *Modern Law Review* (2007), 1.

<sup>6</sup> To name but a few: Mary Robinson and Alston (eds.), *Human Rights and Development* (Oxford: Oxford University Press, 2005); David Trubek and Alvaros Santos (eds.), *The New Law and Economic Development* (Cambridge: Cambridge University Press, 2009); Michael J. Trebilcock and Mariana M. Prado, *What makes poor countries poor?: Institutional Determinants of Development* (Cheltenham: Edward Elgar, 2012); Anne Orford, *International Law and its Others* (Cambridge: Cambridge University Press, 2006); Joel Trachtmann and Chantal Thomson, *Developing Countries in the WTO Legal System* (Oxford: Oxford University Press, 2009); Brian Tamanaha, *On the Rule of Law* (Cambridge: Cambridge University Press, 2004); Stephen Humphreys, *Theater of the Rule of Law* (Cambridge: Cambridge University Press, 2010); Caroline Sage, Michael Woolcock and Brian Z. Tamanaha (eds.), *Legal Pluralism and Development* (Cambridge: Cambridge University Press, 2012).

<sup>7</sup> Laurence Boisson de Chazournes, *Partnerships, Emulation, and Cooperation: Towards the Emergence of a Droit Commun in the Field of Development Finance*, 3 *The World Bank Legal Review* (2011), 173; Daniel Bradlow and David Hunter (eds.), 'International Law and the

One might wonder what an institutional perspective and the focus on development cooperation adds to the field. In terms of the quantities of financial flows regulated, development cooperation funds (in comparison, for example, to trade and investments) seem almost negligible and its effects have been contentious. In terms of the impact of legal scholarship engaging for development and equality, one could also voice pessimism. Emmanuelle Jouannet, for example, has recently and poignantly reviewed the efforts of development thinking and law in the past decades, coming out rather skeptically.<sup>8</sup> And yet, inquiries into the institutional law of development provide important insights. For one, the concern for development has left a considerable institutional footprint on all levels of public authority. It is in particular a field where the interaction between the international and the individual is especially tangible and problematic. Most importantly, however, the powers of institutions in this field reach further than what is visible in stone and measurable in US-dollars or GDP. They transport ideas, concepts and languages, and thereby shape global society in profound ways. Understanding them also from a legal perspective is a necessary way to contain them and hold them accountable.

The following section will introduce this field of law and legal inquiry in three steps: (1) It will encircle the field by briefly highlighting four basic characteristics of legal regulation of development cooperation, discussing some methodological problems to approach it and introducing principles that help to better reflect and critique the field systematically. (2) It will sketch the general structures of the field (institutions, financial sources, formats of transfer), taking into account the profound transformation of these structures in current years. (3) Against this background, four specific instruments of the institutional law of development are presented to highlight how concretely law works here.

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Operations of the International Financial Institutions', *International Financial Institutions and International Law* (Alphen an den Rijn: Kluwer Press, 2010); Dann (2013), *supra* note 3, at; Kevin E. Davis, *Financing development*, NYU Institute for International Law and Justice Working Paper, no. 10 (2008); Celine Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (London: Routledge, 2011); Andrea N. Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of 'Judicial Spirit' in Public International Law* (The Hague: Eleven International Publishing, 2009); Laurence Boisson de Chazournes, 'Policy Guidance and Compliance: The World Operational Standards', Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000).

<sup>8</sup> Emmanuelle Tourme-Jouannet, *What is a fair international society?* (London: Hart Publishing, 2013) pointing out that the domestic approach of law and development is copied and taken over by agencies that repeat mistakes of 1960 in rather crude technocratic replay while the global economic system regulated in international law is no less tilted and unjust as it used to be.

## 2 Encircling the Field and its Scholarship

### 2.1 Basic Characteristics of Development Cooperation Law

If one wanted to capture what it is that this new field deals with, four basic characteristics give a first understanding: its regulatory focus on transfers, its character as a cyclical process, the multi-level dispersion of its legal sources, and finally its operation in the context of asymmetric power and factual uncertainty.

Regarding the first characteristic, the fundamental mode of operation in development cooperation is one of organizing transfers. Development agencies and development agreements in principle engage in facilitating transfers of mainly two things: funds and knowledge. Traditionally, the center of attention is the provision of *funds*. Providing loans or grants and hence financing development is an essential task. At the same time, *knowledge* is an important object of transfer too. To provide advisory services, information or support capacity building is a central task of development agencies and of the law regulating them. The law of development cooperation is in principle structuring the mostly cyclical procedures of transferring funds and knowledge – and organizing to learn from such transfers for the future.

To be sure, this focus here on transfers is a heuristic abstraction. It serves the purpose of highlighting the basic logic that drives institutions in this field and their law. Development itself is, of course, a multi-faceted and multi-dimensional process that is driven by various activities and context factors. The point here is that development agencies and the law regulating them do not engage in these activities themselves but enable others to do so – by providing funds and/or knowledge. It is also true that development agencies engage in many more activities than transfers. But again, the argument here is that their principal, most characteristic task is that of organizing transfers. Surely, transfers come with costs. Either recipients have to repay loans; or they come in exchange for policy influence and reforms that align recipients with a model of free trade, private property, rule of law and liberal democracy (in this context mostly called good governance) as it is favored by mostly Western donors.

Second, development cooperation law structures in essence a cyclical process and hence contains a lot of procedural and “administrative” law. The process of organizing transfers can be described along five stages: (1) Country planning, i.e. setting a multi-year plan of activities for a given country, (2) budgeting, i.e. budgeting the allocation of funds for a country per year or planning period, (3) designing, negotiating and concluding agreements on

concrete intervention, (4) implementation of intervention, and (5) control of intervention – and planning again. The law of development cooperation also encompasses “constitutional” elements, providing institutional foundations, competences and general principles of their activities. Development cooperation law is hence concerned with setting the structures for the process of transfer by constituting the actors, delineating their powers and setting procedural rules as well as substantive standards for their doing.

This procedural approach of multi-year planning and then an iterative execution of these plans has been the dominant approach in the past decades. But it doesn't have to be this way. Market-driven, bottom-up or experimentalist approaches are also conceivable and practiced by mostly smaller or private-law-based actors.<sup>9</sup> They have not (yet?) altered the basic approach of the dominant aid agencies but surely deserve heightened attention also in legal scholarship.

The third basic characteristic of development cooperation law concerns its sources: It is multi-level law. Relevant actors in this field are set on all levels. There are international institutions (such as UNDP, World Bank), national bilateral departments or organizations (such as the American, British or German ministry of development cooperations, i.e. United States Agency for International Development (USAID), Department for International Development (DFID) or Bundesministerium für Wirtschaftliche Zusammenarbeit und Entwicklung (BMZ), respectively) and even supranational (the EU) – as well as, of course, the recipient/partner states. The law of development cooperation is laid down in and between these actors. It is to be found most importantly in the rules of donor agencies, i.e. their founding treaties and their secondary law<sup>10</sup> or national laws on development<sup>11</sup>; donors are setting unilaterally the rules of how they operate, which in consequence binds those who want their transfers. Development law is also laid down in bilateral agreements between donor and recipient, structuring legally the concrete interventions. There is finally a layer of multilateral declarations and soft law that is providing a normative framework within which actors cooperate. The best example here are the Millennium

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<sup>9</sup> William Easterly (ed.), *Reinventing Foreign Aid* (Cambridge, MA; London: MIT Press, 2008); Abhijit Banerjee and Esther Duflo, *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty* (New York City: Public Affairs/Hachette Book Group, 2011); Charles Sabel, Grainne de Burca and Robert O. Keohane, Global Experimentalist Governance, 44 *British Journal of Political Science* (2014), 477.

<sup>10</sup> See for example the World Bank Articles of Agreement and its Operational policies, or the EU's basic treaties and its regulations.

<sup>11</sup> E.g. Foreign Assistance Act 1961 (US); International Development Act 2002 (UK); Official Development Assistance Accountability Act 2008 (CA); Ley de Cooperación Internacional para el Desarrollo 1998 (ES).

Development Goals or the Paris Declaration which in 2005 set down five general principles on how donors and recipient countries should interact and reform their relations.<sup>12</sup>

Two further observations underline the particular multi-level and global character of law in this field: For one, the law and activities of these organizations are parallel to each other, not hierarchical. If the UN engages in an intervention, it doesn't legally bar any other actor. Development cooperation and its law is hence a *heterarchical* system. But at the same time, the content of development law across these levels and organizations follows a similar mode, as mentioned above: Any development agency (be it national, international or supranational) organizes the transfer of funds and knowledge through cyclical processes and with very similar formats of transfer (project and budget support, knowledge support). Over the years actors from different levels have learned from each other. Diffusion and cross-fertilization in particular between donor agencies have taken place, which has brought about a visible coherence in terms of instruments or procedures. It is interesting to note that innovation here has very often come from the international level, in particular from the law of the World Bank. In effect, today we can observe a "common law or *ius commune* of development cooperation" across actors and levels.<sup>13</sup>

The fourth characteristic of development law refers to its political economy, as it encounters two structural factual problems: one is the general uncertainty about the process of development. Many decades into the concerted effort of development, there are fundamental lacunae and profound disagreements about the effects of certain economic or regulatory instruments deployed and the appropriate ends and means of the process as such.<sup>14</sup> The other factual context is the asymmetry of partners in terms of power, funds, capacities, or knowledge, i.e. the inequality of those seeking and those giving transfer. It is true that the rise of emerging economies (such as China or India) has altered the balance in many cases. But this should not distract from the fact that many countries seeking transfers are still much weaker in terms of economic or political clout. Legal relations exist in the shadow of this hierarchy.

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<sup>12</sup> United Nations Millennium Declaration, UNGA Res 55/2 (September 18, 2000); Paris Declaration on Aid Effectiveness (2005), OECD Publishing, available at: <<http://dx.doi.org/10.1787/9789264098084-en>>, accessed March 3, 2015.

<sup>13</sup> This is the basic argument of my book, Dann (2013), *supra* note 3; for a similar argument see Boisson de Chazournes, *supra* note 7.

<sup>14</sup> Roger C. Riddell, *Does Foreign Aid Really Work?* (Oxford: Oxford University Press, 2007); David Dollar and Lant Pritchett, 'Assesing Aid: What Works, What Doesn't and Why?', World Bank Policy Research Report (Oxford: Oxford University Press, 1998); Dambisa Moyo, *Dead Aid: Why Aid is not working and How there is Another Way for Africa* (London: Penguin Press, 2009).

## 2.2 The Concept of “Development” – and the Role of Legal Scholarship

It is important to reflect upon the concept that is the backbone of the regime, i.e. “development”. It is not a neutral term describing a thematic area, like “environment” or “economic” as in environmental or economic law. Much rather it is in itself an essentially contested, ideological notion. How to approach such a loaded term – and how to take its contested nature into account when analyzing the relevant legal rules?

One important approach is through the engagement with theories of “development” and hence the intellectual history. Often, such histories start with *modernization theory*, which shaped development thinking since the 1940s and understood development as the remaking of developing countries and their economic development according to industrialized economies; the main focus here was (and for many still is) on economic development, measured mainly in economic growth.<sup>15</sup> Since the 1970s, awareness grew that development requires a much broader understanding that includes ecologic and social elements; the individual as actor and end of development became recognized. The notion of *sustainable development* captured this and human rights came to serve as a more appropriate measurement of development. The 1990s brought another turn with the concept of *good governance*. It highlights the importance of governmental structures for an understanding of development and stresses that transparent, accountable, rule-bound and hence foreseeable ways of public authority is key to development.

That would, however, be somewhat myopic. Instead, a longer historical horizon is necessary and a larger map of political and economic interests over time to grasp also the fundamental critique of the concept of development.<sup>16</sup> For postcolonial and post-developmental authors, the concept of development is rather a re-formulation of the civilizing mission that shaped the colonial quest of pre-1945. Already the language of the field continues the binary logic of colonial thinking, sorting the world in “developed” vs. “under-developed”, “givers” vs. “takers”. “Development” then is rather a disguise for an ongoing subjugation of the Global South and its core idea the inherent idea of re-making the South in the image of the North.

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<sup>15</sup> See John Martinussen, *Society, State and Market* (London: Zed Books, 1997).

<sup>16</sup> Gilbert Rist, *The History of Development* (London: Zed Books, 2008); Anthony Anghie, *Colonialism, Sovereignty and the Marking of International Law* (Cambridge: Cambridge University Press, 2004); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011); Arturo Escobar, *Encountering Development* (Princeton: Princeton University Press, 1995).

Against this background, the role of legal scholarship requires consideration.<sup>17</sup> Two approaches mark opposing poles and demonstrate the variety of directions: One is an approach of *critical distancing and deconstruction*. Given the contentious nature of the concept of development, many argue that it is more adequate to interrogate the “law” from an external, i.e. theoretical, historical and critical perspective that lays open the underlying structures of power and dependencies. Anything else would be an exercise in masking and succumbing. Another approach is that of a *pragmatic and doctrinal engagement*. This approach can point to the fact that the area surely is structured also by law that requires serious attention if it should function as (autonomous?) instrument of regulation and design.<sup>18</sup>

The approach taken here is a combination – and seeks synergies between the critical and the pragmatic, the doctrinal and the contextual engagement. It is acutely aware of the political economy of “development” and the historical and theoretical problems of the concept. It aims to understand and interpret rules in their broader cultural and political context. But it also recognizes the need to engage with the existing rules and structures in a pragmatic manner.

The understanding of “development” then here is procedural. It regards “development” as a political process about societal choices. There is no overarching goal to be achieved by economists, technocrats or lawyers but an ongoing process of contentious debate about choices. If at all there is a substantive core, it assumes that “development interventions” are about reducing inequalities between states, classes and individuals.

## 2.3 Principles

One approach of legal scholarship in a new field such as the law of development cooperation can be to propose principles. Principles, such as pre-caution in environmental law or most-favored nations in trade law, serve three main functions: They highlight general ideas and guiding notions of a field and thus help to systematize the legal material “around” these notions; thereby, they help to create a more transparent understanding of the legal field in

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<sup>17</sup> For an interrogation of the role and idealistic impetus of legal scholarship, see Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012); Luis Eslava and Sundhya Pahuja, *Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law*, 45 *Verfassung und Recht in Übersee: Law and Politics in Africa, Asia and Latin America* (2012), 195.

<sup>18</sup> Kevin Davis and Michael Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 *The American Journal of Comparative Law* (2008), 895.

general. Second, they provide internal (i.e. legal, not political or philosophical) yardsticks to evaluate norms in the field. Third, they rationalize collisions and conflicts between different values or interest that find their expression in these principles.<sup>19</sup>

Given that institutional law of development is approaching a largely under-researched field with an intransparent set of rules, it seems particularly advisable and important to suggest principles for the institutional law of development. There are two sets of principles on which such an endeavor can be based. For one, there are the more general principles of institutional law: participation, right to be heard, transparency and accountability.<sup>20</sup> These provide basic notions for an analysis of internal institutional rules in particular those that deal with the role of the individual vis-à-vis administrations and the in practice often blurry contours of administrative powers.<sup>21</sup>

Another set of principles refers more directly to the circumstances in the field of development cooperation. Five principles in particular have been proposed here<sup>22</sup>: *collective autonomy* as the basic concept behind sovereignty, self-determination and ownership, which reacts to the fact that states are important actors in development cooperation and their autonomy is a central (and legally founded) notion in the field; *human rights* (or individual autonomy), which highlights the fact that individuals are also important actors in the development process and their well-being the ultimate end of the process in general; *efficiency* as a more procedural notion, which highlights the fact that development interventions have to be justified also from the perspective of their outcomes and the demand that (in particular) public money has been spent efficiently; *accountability* to highlight that respect for and control of agreed rules beyond the

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**19** Marti Koskenniemi (ed.), 'General Principles', *Sources of International Law* (Farnham/London: Ashgate, 2000); Armin von Bogdandy, General Principles of International Public Authority: Sketching a Research Field, 9 *German Law Journal* (2008), 1909.

**20** Kingsbury, Krisch, Stewart (2005), *supra* note 2, at 37–42; Nico Krisch, *The Pluralism of Global Administrative Law*, 17 *European Journal of International Law* (2006), 247; but see also the critical take on such principles in Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 *European Journal of International Law* (2006), 187.

**21** On human rights generally as relevant yardsticks of review, Benvenisti (2014), *supra* note 2; Jochen von Bernstorff, 'Procedures of Decision-making and the role of law' Armin von Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions* (Berlin: Springer, 2009), 803.

**22** Dann (2013), *supra* note 3, at 219 with a more elaborate explanation of these principles and more references on each of them.

traditional PIL notions of responsibility is particularly important in the area of development cooperation.<sup>23</sup> And finally *development* is the fifth principle which highlights that even though there is no convincing substantive notion of development beyond the reduction of inequality, a procedural concept of development should inform all rules and institutions in their actions.<sup>24</sup>

Surely, these principles overlap, in particular where they underline the individual's role and expectation towards the legal regime. Participation and the right to be heard are specific human rights relevant in the institutional context generally as in the development context in particular; transparency is in my understanding a precondition and hence special element of accountability – and, as said above, also particularly important in the institutional law of development. The regime-specific principles in the second set go beyond this, however, and therefore seem more helpful: For one, they take into account the legally founded interests of more actors, in particular of states (through the principle of collective autonomy). Second, they highlight specific issues that are of special relevance here, in particular efficiency and development.

The most important function of the principles is the third function mentioned above: Principles help rationalize collisions and conflicts between different values or interest that find their expression in these principles.<sup>25</sup> The principles relate to each other in many ways, sometimes complementary, but more often contrary. The collective autonomy of recipient countries can conflict with the autonomy of donors; the duty of solidarity can contradict donor autonomy; human rights can restrict the autonomy of recipient states; efficiency can undermine autonomy. Further conflicts are conceivable. The question of how they are to be resolved is unavoidable. There are no general, binding rules for conflict resolution, nor is a hierarchy among them. Certainly, legally binding principles take precedence over those that are only structural (i.e. constructions of scholarship, not in the law itself), but there is no order of priority between the legal principles of collective and individual autonomy. Creating conflict resolution rules hardly seems possible, given the many different forms conflicts might take. Instead, it seems that specific solutions will have to be found for individual cases.

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<sup>23</sup> Dann (2013) *supra* note 3, at 445.

<sup>24</sup> Dann (2013), *supra* note 3, at 226. For an extensive account of the welfarist tradition in international law, see Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations* (Cambridge: Cambridge University Press, 2012).

<sup>25</sup> Dann (2013), *supra* note 3, at 297.

## 3 Structures in Transformation: Institutions, Finances, and Formats

Against this background of these more abstract features of the field, we can now look at its concrete institutional structures, financial sources and formats of transfer or financing instruments. What complicates this looks and at the same time makes it particularly interesting is that these structures have been undergoing a profound transformation in the past years. Roughly since the turn of the century, the system of development cooperation is morphing from an area mostly dominated by Western public administrations organizing financial transfers in barely coordinated ways – into a field in which a great variety of actors (public and private, “North” and “South”) operate, in which also the transfer of knowledge has become central, and which is increasingly shaped by competition between actors.<sup>26</sup> The reasons for this transformation are manifold: The rise of emerging economies such as China, the radically lowered communication costs through the internet, incredible amounts of private wealth in search of meaning, etc. Whatever it is: We are witnessing the emergence of new system of cooperation – and an important part of this transformation are its rules and regulations.

### 3.1 Actors and Interactions

The development system up to the 1990s was dominated by Western public donors, acting bilaterally as national donors and multilaterally through international organizations.<sup>27</sup> States set up specialized departments (USAID, DFID, BMZ, etc.) and so did the EU. On the international level, a special type of international organization was created to deal with the special task of development: development banks, such as the World Bank with a broad membership but dominated by donor countries; the same applies to regional development banks. Western donors organized themselves collectively but separated from recipients in the Development Assistance Committee (DAC) of the OECD, which provides information and helps to formulate coordinated rules.

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<sup>26</sup> Jean-Michel Severino and Oliver Ray, *The End of ODA: Death and Rebirth of a Global Public Policy*, Center for Global Development Working Paper, no. 176 (2009); Dirk Messner, Jing Gu and John Humphrey, *Global Governance and Developing Countries: The implications of the rise of China*, 36 *World Development* (2008), 274.

<sup>27</sup> Dann (2013), *supra* note 3, 158 ff.

The recipient countries, on the other hand, did not form lasting collective and separate structures. Certain attempts in particular vis-à-vis the European Union, which re-negotiates its development cooperation with a large group of countries every five years, did not bear fruit.<sup>28</sup> The most important universal and truly common organization was (and is) the UN. In particular since the 1960s (when developing countries gained a majority) it turned a major part of its attention and organizational structure to development questions. The UN surely has a global presence but seldom became a leading institution in terms of new policies or instruments, a role that was rather played by the World Bank.

Interaction between the actors in this traditional structure was characterized by high complexity, a lack of transparency and a continued failure to effectively coordinate their actions. Since the 1960s, the idea of coordinated action was called for on many levels (EU, UN) but it never really succeeded.<sup>29</sup>

This institutional setting has been profoundly transformed since about the year 2000. While the old structures have not vanished, they have been complemented by a number of new actors who might ultimately change the entire character of the development system. A first set of new actors are emerging economies.<sup>30</sup> The most prominent example is China, which has become important provider of financial and technical assistance itself. Other emerging economies such as Brazil or India invest into development policies mostly with regional reach; so did the Arab states already since the 1970s. None of them is integrated in the OECD-DAC as “Western club” and they generally do not subscribe to the Western model of providing aid against economic and political

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**28** E.g. the ACP Group, established 1975 through the so-called Georgetown Agreement, see Dann (2013), *supra* note 3, 212 *et seq.*

**29** Lester Pearson, *Partners in Development: Report of the Commission on International Development* (Santa Barbara, CA: Praeger, 1969); Jacob Kaplan, *International Aid Coordination: Needs and Machinery* (Eagan, MN: West Publishing Company, 1978); Dennis Whittle and Mari Kurashi, ‘Competing with Central Planning’, William Easterly (ed.), *Reinventing Foreign Aid* (Cambridge, MA; London: MIT Press, 2008); Kirsten Schmalenbach, ‘Netzwerke und Verwaltungsräume in der Globalen Entwicklungszusammenarbeit’, Philipp Dann, Stefan Kadelbach, Markus Kaltenborn (eds.), *Entwicklung und Recht: Eine systematische Einführung* (Baden-Baden: Nomos, 2014); Jörg Faust and Dirk Messner, ‘Entwicklungspolitik als Global Governance Arena’, Helmuth Breitmeier, Michèle Roth and Dieter Senghaas (eds.), *Sektorale Weltordnungspolitik: Effektiv, gerecht und demokratisch?* (Baden-Baden: Nomos, 2008).

**30** Alice H. Amsden, *The Rise of ‘the Rest’: Challenges to the West from Late-Industrializing Economies* (Oxford: Oxford University Press, 2003); Julie Walz and Vijaya Ramachandran, ‘Brave New World: A Literature Review of Emerging Donors and the Changing Nature of Foreign Assistance’, 273 Center for Global Development Research Paper (2011), available at: <[http://www.cgdev.org/files/1425691\\_file\\_Walz\\_Ramachandran\\_Brave\\_New\\_World\\_FINAL.pdf](http://www.cgdev.org/files/1425691_file_Walz_Ramachandran_Brave_New_World_FINAL.pdf)>, accessed March 3, 2015.

reforms that aim to mold them in the Western image. They rather focus on securing natural resources and geopolitical loyalty. Most recently there are plans to set up a separate development bank (“BRICS Bank”), which would provide an alternative to the World Bank and Western-dominated development banks.<sup>31</sup>

As important is the rise of new or partly re-engaged private actors. These include philanthropies, the most prominent example being the Melinda and Bill Gates-Foundation that invests 3.9 billion USD in 2014. But there are also many NGOs which increasingly use the internet, crowd-funding or idea-sharing to advance developmental goals. Next to them are private banks or wealth funds, which have (re-) discovered developing countries as good places to invest.<sup>32</sup>

The emergence of these new sets of actors is changing the modes of interaction in the development system in general. China and other emerging donors are putting increasing pressure on the traditional system, creating competition. The OECD has aimed to integrate them but with limited success. OECD and World Bank together have advanced agreements on better coordination through soft law, such as the Paris Declaration, in order to coopt new actors into the general system, again with only limited success as it concerns the integration of new actors. And the World Bank has started major reform to its internal law to accommodate the interests of countries like China. Hence, institutional competition in the development system has surely grown.

## 3.2 Financial Sources: ODA and Others

With the emergence of new actors, also the financial sources of development cooperation have changed profoundly. Up until the 1990s, public funds invested in development were the central source for the development system, measured

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31 Mariana M. Prado, *The BRICS Bank's Potential to Challenge the Field of Development Cooperation*, 47 *Verfassung und Recht in Übersee: Law and Politics in Africa, Asia, Latin America* (2014), 147.

32 Bill and Melinda Gates Foundation, *Gates Foundation Fact Sheet*, available at: <<http://www.gatesfoundation.org/who-we-are/general-information/foundation-factsheet>>, accessed March 5, 2015; on crowd-funding see Information for Development (infoDev) for The World Bank, *Crowdfunding's Potential for the Developing World* (Washington DC: The World Bank, 2013), available at: <[https://www.infodev.org/infodev-files/wb\\_crowdfundingreport-v12.pdf](https://www.infodev.org/infodev-files/wb_crowdfundingreport-v12.pdf)>, accessed March 5, 2015; on private banks and sovereign wealth funds Annalisa Prizzon, *Old Puzzles, New Pieces: Implications of the New Development Finance Landscape for Post-2015 Scenarios and for Partner Countries* (Giessen: NYU Development Workshop, 2013), available at <<http://www.iilj.org/wp-content/uploads/2017/02/Prizzon-Old-Puzzles-New-Pieces.pdf>>, accessed March 5, 2015.

in the OECD-developed category of Official Development Assistance (ODA).<sup>33</sup> But since turn of century, alternative sources are increasingly important and by now clearly outnumber ODA. Development cooperation is increasingly financed by money from private actors. There is first of all, foreign direct investment, which is larger than any other source. Also finances from private philanthropies have become much more important. Not for common purposes but a hugely important source are also remittances, i.e. the private transfers of the migrants to their relatives “back home”.<sup>34</sup>

These developments have challenged the focus on ODA and public donors. A broader view is necessary to grasp the financial resources that flow into development; ODA is only one and a smaller part of financial flows to the Global South. Consequently, the OECD has already revised the ODA category.<sup>35</sup> But ODA surely remains an important source, in absolute terms but also in a more substantive perspective: Only public donors will pursue common purposes and have an eye on causes that don't promise good returns. The financial crisis has demonstrated how volatile private investors (i.e. FDI) can be.

### 3.3 Formats of Transfer: Plans, Project and Budget Support, and Knowledge Products

A dynamic evolution and diversification is also taking place with regard to the formats that are used to transfer funds, knowledge or organize such transfers.<sup>36</sup> A central element of this evolution is the emergence of knowledge products, but also plans and budget support have changed in meaning.

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<sup>33</sup> On this category, Dann (2013), *supra* note 3, at 14–17; on its reform, *supra* note 32. The UN and developing countries since the 1960s demanded that 0.7 % of GDP industrial countries should be devoted as ODA. Traditionally, the US is the largest provider of ODA in absolute numbers, whereas the Scandinavian countries stood out in relative terms, investing between 0.5 to 0.9 per cent of the GDP into ODA.

<sup>34</sup> In 2010 workers' remittances amounted to a total of \$25 billion in LICs and \$300 billion in MICs, see Prizzon (2013), *supra* note 32, at 8.

<sup>35</sup> See OECD-DAC, *Scoping the New Measure of Total Official Support for Development (TOSD)*, DCD/DAC (2014) 35, available at: <[http://www.oecd.org/dac/financing-sustainable-development/DCD-DAC\(2014\)35-ENG.pdf](http://www.oecd.org/dac/financing-sustainable-development/DCD-DAC(2014)35-ENG.pdf)>, accessed at March 7, 2019.

<sup>36</sup> The terminology is difficult as different actors use different terms (and keep changing them). The World Bank is speaking of ‘financing instruments’ when it comes to project or budget support. But this doesn't cover non-financing instruments. The term ‘format of transfer’ is therefore used here as a general term for all instruments that serve to organize the orderly, focused and effective transfer of funds and knowledge.

At the beginning of the cycle of development interventions based on external transfers stands the *multi-year plan* which formulates tasks and focus area. These are normally set by the donor agency in different grades of coordination with the recipient.<sup>37</sup> Legally, these plans are mostly internal documents of donors, binding their staff but without external effect. Since the late 1990s, so-called Poverty Reduction Strategy Papers written by recipient state governments precede the donor plans. These were meant to provide recipient states with more “ownership” but also to hold them responsible for their compliance.<sup>38</sup> Most donors have adopted internal provisions that oblige them to set their plans only on the basis and within the framework of the PRSP.

Originally the central and still a very important format is *project support* (also called investment lending). Here, a donor agency is contributing funds or knowledge to a recipient country’s project, for example, the construction of a dam.<sup>39</sup> From a legal perspective, project aid is normally agreed in a bilateral project agreement between donor agency and recipient country that outlines the design of the project, assigns roles and responsibilities to different actors, in particular for the donor the payment in one or more tranches as project proceeds. The procedures of appraisal and negotiating projects are intensely regulated in the internal policies of the donors.<sup>40</sup> The advantages of project aid for the donors lie in the fact that it is fairly easy to control and hence to evaluate, contains a limited financial risks – and is also often quite visible, which makes it attractive to politicians. But there are also clear disadvantages: projects normally have a limited reach; they come with high administrative and transaction costs. From the recipient perspective, projects might come with fairly intensive control of lender, precise obligations and hence intrusion. This is less and less

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37 While the EU negotiates bilateral frameworks with the ACP-group since the 1970s, the World Bank sets its Country Partnership Frameworks unilaterally after consultations, World Bank Group, Directive on Country Engagement 2014, s 3 (2).

38 Tan (2011), *supra* note 7.

39 After WW-II, the focus of projects was mostly on sectors like infrastructure and energy (‘brick and mortar-phase of development cooperation’) but since 1960s/70s extended into more sectors, such as education (building / staffing schools), health policies (building / staffing hospitals, educating doctors) or even justice system (reforming court administrations).

40 World Bank OP/ BP 10.00, Investment Project Financing; Regulation (EU) 233/2014, Financing Instrument for Development Cooperation 2014–2020; Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung, *Leitlinie für die bilaterale finanzielle und Technische Zusammenarbeit mit Kooperationspartnern der deutschen Entwicklungszusammenarbeit* (Guidelines for the bilateral financial and technical cooperation) (Bonn: Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung, March 2007, available at: <<https://www.bmz.de/de/mediathek/publikationen/archiv/reihen/strategiepapiere/konzept165.pdf>>, accessed at March 7, 2019).

attractive for those recipients who have expertise and access to other sources of funding, such as China or India.

Also in reaction to these disadvantages, a second instrument became popular mainly since the 1980s: *budget support* or policy lending (originally called structural adjustment lending).<sup>41</sup> Here, donors finance not a concrete project but subsidize a sectoral budget of a recipient, e.g. the health budget, and leave recipient to decide how to spend it. This reduces transaction costs, has a broader impact and gives the political and perhaps democratic process in a country more influence, as the budget is normally controlled by parliament. Budget support comes, however, also with clear risk from a donor perspective: He has much less control and measurability. In order to compensate this, donors use the instrument of conditionalities to keep a grip on the intervention. This means that the donor agrees to provide the funds only under the condition of certain (prior-)actions by recipient. These prior actions can be far-reaching policy-reforms, such as privatization of certain markets (such as energy or water), liberalization of custom regimes, but also participation in political dialogues or other softer forms of engagement/control. In legal terms, budget support is again agreed upon in bilateral agreements. As important is the letter of intent from recipient in which the recipient “promises” to execute certain policy reforms that the donor has asked for.

From the very beginning, donors provided not only financial but also *technical support*, i.e. transfer of knowledge. This was originally connected to concrete projects (e.g. providing the engineering expertise to build a dam) and hence rather limited in its impact. Since the 1990s technical assistance or advisory work, however, has become increasingly wide-spread and more far-reaching. Donors, like the World Bank, now provide or actually suggest policy advice, for example, by helping to draft new laws on financial regulation. Such transfer of knowledge is much less regulated, although it can reach even deeper into the autonomy of recipient and might have wider impacts on the rights of citizens in recipient country. Their provision is also agreed upon in project agreements, but their regulation is hardly regulated.

A central problem of development cooperation has always been the control and evaluation of its actions. Since the 2000s, another knowledge instrument has developed and become particularly important: the instrument of *measurements and indices*. In particular the World Bank (but the UN too) has started to

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<sup>41</sup> Celine Tan, “Regulation and Ressource Dependency: The Legal and Political Aspects of Structural Adjustments Programmes,” Daniel Bradlow and David Hunter (eds.), *International Financial Institutions and International Law* (Alphen an den Rijn: Kluwer Press, 2010).

create indices that rank countries and actors on various criteria.<sup>42</sup> The most well-known indices are the Human-Development-Index of the UN and the Doing-Business-Index of the World Bank. These instruments are not connected to a specific (financial or knowledge) transfer but evaluate actors more generally and thereby pre-structure the perception of actors. This has immense impacts, as investors rely on such indices to decide about their activities, puts pressure on governments to compete along the criteria of such indices or determine allocation of funds in donor agencies. At the same time, these knowledge instruments are hardly regulated by law, even though they have a tremendous impact on those evaluated. They clearly are an exercise of (public) authority which calls for a better regulation by law.

## 4 Instruments and Mechanisms

Having set out principles, structures and formats, we can now turn to four concrete examples of legal instruments or mechanisms that are particularly important for the institutional law of development. These “deep drills” shall demonstrate how law concretely shapes development interventions. These four fall into different phases in the cycle of development interventions: Conditionality and safeguards concern mostly the agreement and implementation phase, indicators are relevant for all phases, while complaint mechanisms concern mostly the implementation phase.

### 4.1 Conditionality

In the context of development law, conditionality became a prominent topic with regard to structural adjustment lending (now budget support/policy lending) of World Bank and IMF in the 1980s. Often acutely needed payments were conditioned on the enactment of (often neoliberal) macroeconomic reforms that often had highly contentious contents and were nevertheless mostly to be accepted without any democratic process.<sup>43</sup> Ever since, conditionality is a

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<sup>42</sup> Kevin Davis and others (eds.), *Governance by Indicators: Global Power Through Classification and Rankings* (Oxford: Oxford University Press, 2012); Dann (2013), *supra* note 3, at 147–150; Michael Riegner, Towards an International Institutional Law of Information, 12 *International Organisations Law Review* (2015), 50–80.

<sup>43</sup> Tan (2010), *supra* note 41; Mary C. Tsai, *Globalization and Conditionality: Two Sides of the Sovereignty Coin*, 31 *Law and Policy in International Business* (2000), 1317.

central instrument of development law and one of its most contentious ones. Given the political, economic and historical context of actors in a development intervention, it is on one hand perceived as an instrument to exploit the weak position of recipients and abuse the asymmetries of power.<sup>44</sup> On the other hand, conditionality is a well-known instrument of contract or finance law to ensure compliance.<sup>45</sup> In development cooperation, in particular where cooperation is financed with public money, conditionality reacts to the expectation that public funds (i.e. tax payer's money) is not wasted but spent effectively. Its increased use here is also a reaction to the observation that compliance by developing countries is often weak.

Looked at through the lens of the principles of development law, some of the contentious issues can be reformulated and directions of further fruitful inquiry be made out. Conditionality can collide with the collective autonomy of *recipient* states, which is pushed to accept certain demands. But they are also often introduced to safeguard the collective autonomy of *donors* and their demand to decide how money is spent. If donors demand radical reforms which endanger the livelihood of people, this can collide with the principle of human rights. The principle of accountability would demand more transparency.

Two problems are particularly alarming: For one, there is often no broader political discussion and agreement on conditions, as agreements are concluded by governments. More transparency and broader involvement of relevant constituencies, such as parliaments or civil society is missing. A better understanding also through the lens of domestic constitutional law of recipient countries of the mechanisms and pitfalls of such conditions would be desirable. Second, there are no limits for what a lender might include; conditions can cover any topic and have any intensity. While in domestic law there would be a morality clause that cuts conditions where they become unbearable (and courts to uphold those limits), nothing of this exists in international law.

## 4.2 Safeguard Policies

The notion of *safeguard policies* is taken from the law of the World Bank but the instrument is common to several donors. It refers to internal policies of the donor agency, which set substantive standards and procedural rules that have to be complied with before the donor can agree to give a loan. The Bank started to adopt such policies in the 1980s, beginning with regulating an environmental

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<sup>44</sup> Tan (2011), *supra* note 41, at 184; Dann (2013), *supra* note 3, at 417–424.

<sup>45</sup> Dann (2013), *supra* note 3, at, 358–361.

assessment, and has since extended their scope to various environmental and social concerns.<sup>46</sup>

The impact of these safeguard policies is far-reaching. They demonstrate that risks connected to the (extraterritorial) effects of transfer activities have to be taken seriously and set self-imposed<sup>47</sup> limits on what the concerned donor is allowed to do. Moreover, while they are internal Bank policies and hence directly binding only its own staff, they indirectly bind recipients, which have to comply with these policies in order to get a loan. Some countries have therefore simply modelled their laws on them. At the same time, Bank's safeguard policies initiated a process of inter-institutional learning or competition; first the IFC and later regional development banks have adopted similar instruments, often further developed it – so that the World Bank had been forced to reform its safeguards to keep up.<sup>48</sup> Interestingly, however, neither the European Union, one of the world's largest donors, nor many national donors have formally adopted similar, general and hence transparent substantive and procedural standards.

Again looked at through the lens of general principles, various conflicts are visible. As explicit rules on environmental and social protections they are important instruments to set transparent standards and ensure individual autonomy/human rights and accountability. From the angle of collective autonomy, however, they also raise concerns as they are limiting the autonomy of states to set and apply their own laws. This is connected to several questions; one concerns scope. Do safeguards apply to all formats of transfer (i.e. project and budget aid and knowledge transfers) or only to some? While World Bank applies them only to project aid, others have extended them to budget support and hence immensely increased their reach. And which substantive area do they cover – only environment and social or labor rights or also political rights? The broader their scope, the less flexibility recipient countries have to set their own

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<sup>46</sup> Ibrahim F.I. Shihata, *World Bank and the Environment: A legal Perspective*, 16 Maryland Journal of International Law (1992), 1; Charles Di Leva, 'International Environmental Law, the World Bank, and the International Financial Institutions', Daniel Bradlow and David Hunter (eds.), *International Financial Institutions and International Law* (Alphen den Rijn: Kluwer Press, 2010); Jose E. Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005).

<sup>47</sup> Jochen von Bernstorff and Philipp Dann, *Reforming the World Bank's Safeguards: A comparative legal analysis* (Tübingen: Universität Tübingen, July 2013), available at: <[http://www.jura.uni-tuebingen.de/professoren\\_und\\_dozenten/vonbernstorff/projekte/WorldBanksSafeguardsacomparativelegalanalysis.pdf](http://www.jura.uni-tuebingen.de/professoren_und_dozenten/vonbernstorff/projekte/WorldBanksSafeguardsacomparativelegalanalysis.pdf)>, accessed March 7, 2019.

<sup>48</sup> Philipp Dann and Michael Riegner, *The World Bank's Environmental and Social Framework and the Evolution of Global Order*, 32 *Leiden Journal of International Law* (forthcoming, 2019).

standards. A second question concerns the “density” of regulation. From the perspective of human rights, one is inclined to favor high standards of social and environmental protection. But this can also over-burden recipients with less capacity – or less willingness to accept demands. Many emerging economies are simply not willing to accept extensive regulation through development banks – and demand more flexibility and room to apply their own countries laws and systems of protection. Safeguards are then to the detriment of collective autonomy but also to the effectiveness of interventions, where project agreements are so cumbersome to follow that transaction costs are very high.

### 4.3 Indicators

The most recent instrument that has already had a profound impact on the development area and is emblematic of global governance more generally is indicators. Indicators are numerical standards to measure behavior (and situations) on the basis of statistical data.<sup>49</sup> In development policies they are used in a fairly simple mechanism: A policy declaration or loan agreement formulates aims expressed in numbers (e.g. reduce child mortality by two thirds) it then names quantifiable indicators as criteria for their achievement (e.g. under-five mortality rate, infant mortality rate, proportion of one year-old children immunized against measles) and sets a deadline to achieve the aim (e.g. end of 2015).

Examples for the use of indicators in the development area are abundant: The most prominent example are the sustainable development goals (SDGs) adopted in 2015. It is the most ambitious and visible agenda for development in decades, continuing earlier Millennium Development Goals set in 2000 – and operationalized through a set of indicators. Closer to the institutional law of development is the Paris Declaration of 2005, which uses the same mechanism to set and effectuate basic principles of how development institutions cooperate.<sup>50</sup> Principles such as ownership, harmonization or mutual accountability are broken down and measured in order to achieve more efficient development cooperation. Indicators are by now also used extensively in the internal regulations of donor organizations. For example, the World Bank deploys indicators to measure the situation and performance of recipient countries to determine how much of the budget should be allocated to them (Country Policy and Institutional Assessment/CPIA).<sup>51</sup> Indicators

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<sup>49</sup> Kevin Davis and others (eds.), *Governance by Indicators: Global Power Through Classification and Rankings* (Oxford: Oxford University Press, 2012); Dann (2013), *supra* note 3, at 147–150.

<sup>50</sup> Dann (2013), *supra* note 3, at 141–147.

<sup>51</sup> Riegner (2015), *supra* note 42, at 50.

are now also a typical instrument to measure behavior in concrete development projects and control compliance with safeguards (e.g. in the International Finance Corporation's/IFC performance standards).<sup>52</sup>

Indicators are a wide-spread instrument in development area for many, though not always good reasons. In particular, they suggest two advantages: For one, they seem to be especially helpful to make development interventions more effective and the responsible actors more accountable. They “simply” state what has happened (or not). They are therefore able to show progress on aims or the lack thereof. Second, they are assumed to be objective and non-political. And yet, it is obvious that these two advantages are highly problematic. They obscure the questions not just of who sets indicators and measures but also of whether measurement is possible or data are reliable. Indicators cloak political and contentious decisions in a disguise of objectivity. At the same time, they can also be conceived as enablers of political discussion across regimes.<sup>53</sup>

They also pose fundamental legal questions: Most fundamentally we might ask whether how they relate to law at all. This is not just a question of their source (indicators set down in law are law) but their mechanism. How do they relate to or square with norms, such as human rights? Can rights be quantified and hence translated into indicators? Another question concerns competences to set and the ability to check indicators. Informed by a more practical perspective one might inquire how to make sure to get right data.

#### 4.4 Complaint Mechanisms

A fourth area of innovation concerns the growing number and importance of accountability mechanisms in the institutional law of development. A number of new instruments and an institutionalization of external third-party control aim to increase mutual accountability and in particular to give voice to affected individuals.

Most prominent is the Inspection Panel of the World Bank. Set up in 1993, the Panel hears complaints of project-affected people claiming that the Bank has violated its own safeguard policies and can oblige the Bank to react.<sup>54</sup> A regular

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<sup>52</sup> Von Bernstorff and Dann (2013), *supra* note 47, at 18.

<sup>53</sup> For an interesting perspective on the positive and negative effects, see Rene Uruena, *Indicators as Political Spaces*, 12 *International Organizations Law Review* (2015), 1–18.

<sup>54</sup> S. Park, *Accountability as justice for the Multilateral Development Banks?: Borrower opposition and bank avoidance to US power and influence*, 3 *Review of International Political Economy* (2017), 1; Andrea N. Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of 'Judicial Spirit' in Public International Law* (The Hague: Eleven International Publishing, 2009).

case law has developed that spells out the boundaries of actions by the Bank. Almost all development agencies by now have similar institutions although they mostly lack transparent standards to check (such as the Safeguard policies) and their procedures are less formalized procedures (e.g. the EU Ombudsman).<sup>55</sup> Second, there is a trend in development law (of Western donors) to oblige recipient countries to provide for “grievance mechanisms” through which project affected can voice complaints as projects are going on. The third example of mechanisms that strengthen accountability of development actors are actually not complaint mechanisms in themselves but provide the basis for them: access to information policies that give individuals the right to see documents about development decisions.

The effects of these instruments lie in strengthening the role of the individual, pushing an element of an international rule of law. The reasons for this development are manifold, two should be highlighted: For one, development interventions pose risks to individuals (such as in involuntary resettlement situations). It is therefore only consequent to give those negatively affected a voice. At the same time (and this is particularly important), these complaint mechanisms serve a particular learning and knowledge-building function in the logic of development cooperation, since development cooperation is a cyclical system. Complaints therefore have not only the function of voicing dissent, but provide feedback and information and hence contribute (ideally) to a learning process.

Here again, legal scholarship has many questions to study. While there are by now several studies that provide overviews on the various instruments, it should be studied in more detail, who exactly gets heard by whom, about what and when. This calls for more interdisciplinary and empirical work on the use and effects of these instruments.<sup>56</sup>

## 5 Conclusion

The institutional law of development contains the promise of transparency and accountability – and eventually of effectiveness and respect for autonomy in development processes. These are hopes on law’s *effects*. More tangible is that

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<sup>55</sup> On the EU, see Kirsten Schmalenbach, ‘Accountability: Who Is Judging the European Development Cooperation?’, Sandra Bartelt and Philipp Dann (eds.), *The Law of EU Development Cooperation* (Europarecht-Beiheft No. 2, Baden-Baden: Nomos, 2008) 162; for an overview see also Dann (n 3), 445.

<sup>56</sup> For a critical perspective, see N. Bugalski, *The Demise of Accountability at the World Bank*, 31 *American University International Law Review* (2016), 1–35.

the institutional law of development is already an example and testing ground for research on global legal regulation – for various reasons:

Law and legal innovations are driven here primarily by international institutions, highlighting the increasing powers and potentials that such institutions wield and the great and sometimes bewildering variety of instruments and techniques that they use. It is also set on all levels of authority, hence a truly multi-level law. Finally, the law of development cooperation is a fruitful subject, because it is especially vulnerable to critical questions about the autonomy of law vis-a-vis other rationalities, such as politics or economy – and hence stimulating a contextual approach that seeks synergies between the doctrinal and the critical.

At the same time, development policies and their law are a fascinating mirror of the global order in general. One example for this role is the evolution of instruments in development cooperation as a mirror of the rise of and challenge to Western thought in the past 60 years. Development interventions began originally, in the early Cold War decades of the 1950s and 1960s rather discrete projects, affecting a limited geographical area and a fairly discrete group of people. Since the 1980s, new instruments such as budget aid and knowledge instruments were designed that have the potential to affect whole countries and polities. Taking the example of the privatization of water supply, a new policy or law here changes profoundly the way a society distributes one of its most fundamental resources. The emergence of such wide-impact-instruments coincided with the politicization of development policies. Starting in the late 1970s and dominating since the 1990s (Western) donors have injected more and more openly political dimensions and conditions to their work. What started with a limited insistence on respect for human rights (Uganda, late 1970s), evolved in the 1980s into a rather aggressive agenda of economic liberal reforms (Washington Consensus) and has ushered in the heydays of the liberal triumphalism and self-confidence of the 1990s in the good governance-agenda and hence a comprehensive blueprint of how polities are supposed to be organized. The architects of these changes, in particular the World Bank and OECD-DAC, were therefore then described as “globalizers” that spread their concept of development and good societies across the globe.<sup>57</sup>

Today, the 1990s seem already long ago and the liberal agenda is encountering increasing competition and rejection. It suffices to mention the newly founded Asian Infrastructure Investment Bank. Again, development law and its instruments are a mirror of this.<sup>58</sup> Studying the institutional law of development

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57 Ngairé Woods, *The Globalizers: The IMF, the World Bank and their Borrowers* (Ithaca, NY: Cornell University Press, 2006).

58 Looking into one such mirror, Dann and Riegner (2019), *supra* note 48.

hence promises to provide insights into the legal and political structures of this ongoing transformation of the global order.

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