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"Beyond the 'Moments' of Law and Development:

Critical Reflections on the Contributions and Estrangements of Law and Development Scholarship in a Globalized Economy"

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Abstract

This paper aims to review and assess the contributions and limitations of law and development as a field of legal scholarship in relation to the constitution of the international economy and global economic governance. It seeks to reflect on the theoretical and methodological contributions of law and development theory and practice on the development of international legal scholarship, particularly in the rapidly evolving field of international economic law. The intersections of economic theory, jurisprudence and legal theory and the institutional practice of development agencies and international economic organisations which are the focus of law and development scholarship provide a useful interdisciplinary prism through which developments in the regulatory framework of the global economy can be studied. Mapping the ways in which what Trubek and Santos (2006) calls the three spheres of law and development – economic theory, legal theory and institutional practices (of bilateral and international organisations) – overlap enables us to chart, understand and, where necessary, contest, the shifts in development theory and policy and institutional practice that influence and shape legal reform and scholarship.

1. Introduction

Law and development scholarship has been widely defined as the study of the relationship between law and legal institutions and social and economic development, broadly defined (see Lizarazo-Rodríguez, 2017; Trebilcock and Prado, 2014; Trubek and Santos, 2006). As a field of knowledge, it can best be described less as a cohesive epistemological framework than a corpus of ideas and theories about the role of law in social, economic and political organisation. It is an arena of scholarship that is intimately bound up with institutional practice, predominantly that of bilateral and multilateral development agencies and international organisations but also, increasingly, that of private actors, including philanthropists, civil society organisations and transnational corporations and other commercial entities (Tamanaha, 2011: 210- 218; Trubek and Santos, 2006: 1).

An integral aspect of law and development studies have been its intimate relationship with the global economy and the regulatory framework which governs it. Specifically, law has been varyingly enrolled as a tool to support or resist the rules and institutions of international economic architecture in the name of development. However, despite their often complementary strands of research and praxis, there has remained a wide disjuncture between law and development scholars and scholars of international economic law. This paper attempts to resolve this traditional estrangement by drawing methodological and substantive connections between law and development studies and scholarship on the regulatory framework of the global economy.

This paper aims to review and reflect on the theoretical and methodological contributions of law and development theory and practice on scholarship in the rapidly evolving field of international economic law. The intersections of social and economic theory, jurisprudence and legal theory and the institutional practice of development agencies and international economic organisations which are the focus of law and development scholarship provide a useful interdisciplinary prism through which developments in the regulatory framework of the global economy can be studied. Mapping the ways in which the multifaceted spheres of law and development overlap enables us to chart, understand and, where necessary, contest, the shifts in development theory and policy and institutional practice that influence and shape scholarship and praxis.

Importantly, law and development studies provide us with the substantive and methodological tools to challenge formalistic and universalising narratives of IEL and to examine the constitutive and reproductive role of law in the global economy. Contextual and critical approaches to law and development, in particular, have enabled us to problematise the scope, nature and content of contemporary international economic law and develop broader and more holistic understandings of the relationship between law and the constitution of the global economy.

The paper argues that these critical traditions of the law and development movement stand as vital counterpoints to conventional hegemonic accounts of international economic law and have the potential to contribute significantly to the methodological and conceptual reorientation of the discipline. Specifically, engagement with the critical strands of law and development studies can overcome the problem of what I call the 'methodological otherness' of IEL scholarship (Tan, forthcoming) which continues to marginalise and exclude a heterogeneity of perspectives from its epistemological framework, including voices of precarity, vulnerability and inequality from different global and local constituencies (see Perrone and Schneiderman, 2018). Yet, in order to contribute effectively to this

methodological pluralisation, law and development studies also need to move beyond its own essentialist and totalising narratives of the relationship between law, the economy and society and reclaim itself as a site for epistemic contestation.

The rest of this paper is organised as follows: the next section recounts the multi-layered histories of law and development as a field of study and the location of scholarship on the law of the global economy within this lineage. Section Three examines the methodological challenges facing the contemporary study of international economic law and explores how law and development approaches can serve as useful tools to confront and reorient the formalism of international legal scholarship on the global economy. Specifically, it considers the role of law and development as a field of praxis in relation to the regulatory framework of the global economy and considers its usefulness in capturing the expansion and growing complexity of global economic relations but also in interrogating and challenging the dominant narratives that shape the scholarship and practice of the rules, institutions and practices that structure the international economic architecture. The final section concludes.

2. Encountering Law and Development[1] in the Global Economy

As a field of knowledge, law and development is a complex and multi-disciplinary landscape with a rich and varied history as Lizararo-Rodriguez maps in her extensive survey of law and development literature (Lizararo-Rodriguez, 2017). Rooted in the academy but often driven by and influencing international development policy and practice, the disciplinary contours of the law and development movement have thus been shaped not just by scholars working in the area but also by policymakers who apply these theories, and by those scholars who critically respond to both these epistemic and operational developments[2]. In many ways, law and development represents a reflexive praxis, with legal and economic theory engaged in interweaving dialogue and often dialectical conversation with institutional development policy and practice. This has resulted in an unsettled terrain of scholarship and practice that has encompassed a wide berth of disciplinary and methodological traditions which seek ultimately to understand (and critique) the relationship between law and the social, economic and political organisation of communities, states and markets (not necessarily in that order).

Despite the incongruence of the field, conventional narratives of law and development follow a standard chronological pattern, encapsulated in Trubek and Santos' categorisation of law and development studies into three crucial epochal 'moments', described by the authors as 'period[s] in which law and development doctrine has crystalized into an orthodoxy that is relatively comprehensive and widely accepted' (Trubek and Santos, 2006: 2). These 'moments' capture the widely recounted lineage of law and development orthodoxy that begins with the law and legal modernisation movement in late 1950s and 60s (the first moment), followed by the reformulation of law as a toolkit for the promotion of neoliberal markets in the 1980s (the second moment), and concludes with the revival of law and development in the 1990s as a compensatory means of redressing the legal instrumentalism of the first two epochs (the third moment) (ibid: 1 – 15; Lee, 2017: 420 – 423). The unifying theme underlying these orthodox accounts is their mirroring of the shifts in the dominant western development paradigm and assumptions about the role of law in relation to these changes in economic theory and practice at key bilateral and multilateral institutions.

[1] This title is a play of words on the title of Escobar's pivotal work on the discursive and disciplinary regimes of 'development' as a socio-political construct (Escobar, 1995; see note 5).

[2] Trubek and Galanter's first assault on the movement, remains today a trenchant critique of the limitations of law and development scholarship (Trubek and Galanter, 1974).

Beyond these chronological 'moments', reflecting what Lizararo-Rodriguez terms a 'top-down approach' to law and development studies (Lizararo-Rodriguez, 2017: 771), reside a broader constellation of scholarship which seek to conceptualise, constitute and critique law within its broader social, economic and geopolitical contexts. This wider landscape include literature which have been varyingly termed as 'sociological', 'anthropological' or 'bottom-up' approaches to law and development and which has roots in colonial and postcolonial research into legal systems in developing countries (ibid: 798 – 814). A key conceptual and methodological departure of this body of research from traditional legal scholarship is its recognition of the hybridity of normative orders that govern community relations and structure social, economic and political organisation (Sage and Woolcock, 2012; 1- 4; Merry, 2012: 66 – 70). This analytical framework of legal pluralism has been deployed to study not only the co-existence of multiple legal orders within a given social field in developing countries but increasingly, also how these plural legal regimes and the societies and economies they regulate are shaped by formal and non-formal normative influences from the exterior, including interventions of international development agencies and other external regulatory modalities (de Moerloose, 2015; Eslava, 2015; Ghai and Cotterell, 2010; Jayasuriya, 2012; Szablowski, 2007).

Importantly, broadening the lens of law and development studies also pluralises its epistemological frame of reference. It includes voices of scholars from the south and about the south, an often paradoxically neglectful omission in this field of scholarship. This heterodox tradition of law and development incorporates a longer historical trajectory and wider berth of study and critique about law and its relationship to social, economic and political organisation (see for example, Adelman and Paliwala, 1993; Chibundu, 1993; Tshuma, 1999). It also encompasses work by scholars who may not necessarily self-identify as law and development specialists but have problematised the notion of 'development' as organising principles for both law and social, economic and (geo)political relations (Anghie, 2001; Gathii, 1999). Law and development here also recognises the historically contingency and social construction of the concept of development[3] and its interrogates its relationship to law, both international and domestic, and other normative orderings (Anghie, 2001; Eslava, 2015; Rajagopal, 2003. Pahuja, 2011; Tan, 2011). In a departure from the more institutional accounts of law and development which posit law in a positive relationship to social and economic development, these narratives challenge the very construct of development itself in its juxtaposition with law and legal institutions.

The enlargement of law and development narratives to encompass a wider berth of socio-legal and anthropological research severs the flawed but intractable epistemological link between legal scholarship and institutional practice and moves the discipline on from a narrow instrumentalist approach to law and society and law and economic relations towards exploring the multiplicity of ways in which law intersects with communities and how this is facilitated or ruptured by external interventions. An increasing volume of work are now focused on opening the 'black box' of international development agencies themselves and examining these international institutions as sites of global norm production (Faundez, 2012; Szablowski, 2007; Tan, 2015) as well as examining the international regulatory framework governing

[3] Critical traditions of law and development have drawn on Escobar's conceptualisation of 'development as a historically produced discourse' that has 'created an extremely efficient apparatus for producing knowledge about, and the exercise of power over, the Third World' and in doing so, have enabled construction of an extensive regime of surveillance and discipline, including law and development policy, over the third world (see Anghie, 2001; Pahuja, 2011; Tan, 2011).

relationships between financiers, beneficiaries and affected communities of development projects and policies (Bradlow and Hunter, 2010; Dann, 2013; La Chimia, 2013; Manji, 2016; McAuslan, 2003). Other contributions in this vein focus on examining the complex interactions between international development institutions, development policy and practice and human rights, including exploring the legal and other normative obligations of development institutions under international and domestic human rights regimes (Darrow, 2003; Skogly, 2001) and examining the accountability mechanisms of such institutions for acts or omissions arising from their activities (Bradlow, 2010; Fourie, 2016; Mbengue and de Moerloose, 2017).

This body of work is less preoccupied with the centrality of rule of law project or establishing empirical links between law and social and economic development but about exploring the normative impact and emerging international law and global governance of international development more generally and their intersections with other arenas of international law. These broader epistemological approaches to law and development studies are not only interdisciplinary in theory and methods, they also challenge the instrumentalism of orthodox law and development scholarship in which law is treated as either a pathway towards an established orthodoxy of social and economic organisation or as a technical end in itself. In other words, law and development scholarship, in its expansive construction, provides a normative framework to studying and writing about law in its relationship to development within both its orthodox and critical traditions.

In this context, an important and rapidly emerging arena of scholarship on law and development has been on the intersections between international economic law and development. Law and development scholarship have long focused on international development agencies develop and circulate ideas about social and economic development and political organisation and how this discursive infrastructure both forms the disciplinary basis for and constitutes the regulatory framework for the global economy, whether its trade, investment, intellectual property or finance (see for example, Gordan and Sylvester, 2004; Mathews, 2006; Kennedy, 2006; Krever, 2011; Rittich, 2006; Tan, 2015). Increasingly, focus has turned to how development discourse and theory influence the design of domestic regulatory regimes and/or how these regimes collide with legal and non-legal normative economic regimes from the exterior (Ashiagbor, 2018; Faundez and Tan, 2010; Lee, 2017; Odor, 2015; Perry-Kessaris, 2014; Trubek, 2009).

An significant strand of this scholarship has been on examining (and indeed, as discussed above, problematising) the construction of development and its use as an organising principle in international economic law (Faundez, 2010; Pahuja, 2011; Tan, 2011) as well as on the relationship between IEL and other international regimes that purport to advance the normative agenda that has traditionally underpinned law and development studies, such as international environmental law and international human rights law (Cordonier Segger and Khalfan, 2004; Salomon and Arnott, 2014). This parallels an increasing interest in the concept of sustainable development law that is said to be 'found at the intersection of three principle fields of international law … international economic law, international law related to social development, especially human rights, and international environmental law' (Cordonier Segger and Khalfan, 2004: 52) and the incorporation of the social and environmental concerns into traditional scholarship on IEL (Gammage, 2017). The emergence of this body of scholarship under the broad umbrella of law and development studies has important consequences for law and development's place within wider legal scholarship. It reflects not only the normative significance of the construct of development, in all its contested permutations, to legal and non-legal normative orders beyond the realm of the state but it also

reflects actual and potential contributions a law and development methodological approach can make to the study of international economic law.

3. Challenging the Epistemologies of International Economic Law[4]

a) The Problem of International Economic Law

A prominent feature in international legal scholarship over the past two decades has been the transformation of international economic law from a subset of public international law into a multi-layered, highly specialised field of academic study and legal practice. Within three decades, the scholarship on and practice of IEL have progressed rapidly from a sub-field of international law into a discrete and expanding arena of study of its own, covering a range of specialist expertise, including trade, investment, finance and intellectual property. This surge to prominence of international economic law is reflected not only in the proliferation and efficacy of rules and institutions governing the global economy but also in the heightened influence, if not dominance, of these rules and institutions, over other areas of international law and the domestic realm of law and regulation (Faundez, 2010: 10; Faundez and Tan, 2010: 1 – 3; Tan, 2013: 19 – 22).

The evolution of international economic law in the past three decades can therefore be said to have been characterised by three notable features: the *expansion in the substantive areas* governed by international law, the *growth and diversification of international economic actors*, and the proliferation of *multiple sites of international economic governance*. These characteristics reflect both the heterogeneity of contemporary international economic engagements as well as the complex interplay of geopolitical and economic power that structure such legal, geopolitical and economic relations (Tan, 2013). The constitution of contemporary international economic law is thus embedded within a framework of evolving international, transnational and infra-national relationships where sites of normative conflict and contestation exist on multiple levels and between a multiplicity of state and non-state actors.

In this vein, orthodox methodologies of legal scholarship have been challenged by this expansion and growing complexity of international economic law as a field of study. First, traditional approaches to international law that underpin study of the regulatory framework of the global economy struggle to account for the plurality of normative orders, subjects and objects of contemporary IEL. A rigid adherence to doctrinal categories and normative hierarchies under formal international law fail to accommodate the diversity of normative orders of contemporary international economic law and the shift that Picciotto terms as the movement from 'hierarchy to polyarchy' in the sites of global economic governance (Picciotto, 2006: 2). Here, formalist accounts of international law struggle to situate and locate normative authority within the plural regimes that constitute contemporary international economic law. Rulemaking, or more precisely, norm creation, in international economic law transcends the traditional dichotomies of international law, notably between the domestic and the international, between public and private, and between 'hard' and 'soft' law (Tan, 2013: 23).

At the same time, this inability to capture the multiple sites of global economic governance is compounded by classical international law's reliance on the notion of a national state and the primacy of territorial integrity and state sovereignty as its organising principles. This has

[4] This section is drawn from Tan (2013).

resulted in an epistemological resistance to addressing 'complex legal processes *beyond nations*', both amongst traditional and comparative legal and socio-legal scholars on the global economy (Darian-Smith, 2013: 7 – 10). Specifically, contemporary studies on international economic law cannot adequately capture the consequences of geopolitical and economic changes that have resulted in the so-called 'decentering' of the state from its regulatory and functional roles, both in terms of jurisdictional devolution, both downwards (to the local) or upwards (to the supranational) and through increasing outsourcing of the state's prescriptive and enforcement functions to private entities or quasi-public regulatory authorities (see Darian-Smith, 2013: 5 – 10; also Picciotto, 20o6 & 11; Tan, 2013).

Even where methodological space enables consideration of informal regimes of regulation and governance of the global economy, limitations of traditional legal scholarship can constrain readings of IEL beyond what Frerichs in Perry-Kessaris (2013) describe as its '*text*' or 'the written rules and doctrines or what can be considered black letter law' to explore its '*context*' – the social, economic and political environment in which the 'legal text' operate and '*subtext*' – the 'moral' or the normative value of the legal text that may or may not depend on the aforementioned context in which the law operates (Perry-Kessaris, 2013: 7). This creates the commonly problematised socio-legal gap between 'law in the books' and 'law in action'. This inability (and often reluctance) of traditional IEL scholars to go beyond the 'legal text and its normative meanings' towards an analysis of the 'practice and behaviour' that underpin global lawmaking in the economic sphere can constrain our understanding not only how have law operates in practice in domestic and international arenas but also how law is formed and the social, economic and geopolitical dynamics that underlie international economic law (Halliday and Block-Lieb, 2013: 77 – 79).

This disinclination to consider 'analytically', 'empirically' and 'normatively' concepts and relationships, facts and methods and values and interests (Perry-Kessaris, 2013: 4 – 5) outside the realm of legal doctrine and jurisprudence have wider ramifications beyond the incompleteness of scholarship. The confinement of international economic law within a traditional doctrinal approach discounts law's culturally productive role and its constitutive power in shaping and sustaining dominant patterns of production and consumption and hegemonic forms of social, economic and political organisation. As Kennedy argues, law not only regulates the 'basic elements of global economic and political life', notably 'capital, labor, credit, money and liquidity' and the 'power and right' that accompany them, it creates them and organises them in ways that 'would alter the distribution of power and wealth and the trajectory of the society' (Kennedy, 2016: 11). Accordingly, in translating economic policy into practice, international economic law has not only provided the normative framework for transnational economic activity, it also serves as a narrative of the contests and conflicts underlying international economic relations.

Conventional international economic law scholarship thus suffers from what I call a 'methodological othering', a technique that excludes, marginalises and discounts as inferior approaches to the discipline that do not fit within its normative framework of analysis (Tan, forthcoming). Here, the universalising tendencies of contemporary IEL scholarship, like all dominant epistemologies, develop internal systems of classification and set internal rules of practice and methods that allow certain forms of knowledge to be selected and included and for others to be excluded and discounted (Tuhiwai-Smith, 2012: 13). In this manner, orthodox

approaches to international economic law form part of 'ideological-institutional complex'[5] (Pahuja, 2011: 10) of global governance that can and do sustain and perpetuate global economic and geopolitical asymmetries and social hierarchies.

Functionalist international legal scholarship, like the instrumentalism of the first wave of law and development scholarship, can post a totalising and ahistorical view of the regulatory framework of the global economy. While such scholarship may, in many cases, recognise that international economic law is often shaped by overt political expediencies or negotiated settlements among political constituencies and other actors in international law, it often fails to conceive of these regulatory frameworks as historically contingent and embedded within constellations of social, economic and political discourses, narratives and framings that systematically exclude traditions, rationales, actors and forces that is posits as the 'other' to its normalising rationale of IEL as a neutral regulator of social, economic and political relations and independent arbiter of disputes (see Orford, 2006).

b) Pluralising Scholarship on Law and the Global Economy

In this complex landscape of the global economy, the doctrines of law and development offer constructive tools to a) more comprehensively map and evaluate the role of law – international, transnational, national and local – and other normative orders and their impact on and contributions to the development process, particularly but not exclusively, in developing countries; and b) to analyse how legal/ regulatory and non-legal normative orderings intersect with the broader framework of society, economy, political systems and ecology at global and domestic levels. Importantly, law and development approaches, especially in their critical articulations, can provide an epistemological framework and the methodological techniques to critique and problematise the organising rationale and governing principles of international economic law.

At its very basic, law and development scholarship diversify the frames of reference for locating the multiplicity of normative regimes that structure the contemporary global economy. As discussed in section 2, a characteristic of law and development studies is its plural understanding of law that is not confined to the nation state or formally constituted rules or institutions. The use of the time-honoured methodological tool of socio-legal legal scholars – legal pluralism – has enabled law and development scholars to overcome the limitations of doctrinal categories and normative hierarchies set by formalist legal scholarship in order to map and understand the range of normative orders that structure and regulate global societies and economies. The concept of coexisting state and non-state legal orders without a necessary hierarchy and operating semi-autonomously from each other and yet possessing the same disciplinary power over the behaviour of their subjects of regulation can be similarly applied to international law, specifically international economic law.

The notion of 'global legal pluralism' is increasingly being used to describe this diversity of international economic normative regimes and understand the relationship between formal international law, constituted through official inter-state dialogue and negotiations and informal law or 'soft law', constituted through transgovernmental and private processes (see Berman, 2005; Tan, 2013). A pluralist approach to IEL enables us to identify and examine the multiple sites of normative authority in the global economic architecture and to understand the

[5] These ideational sites include both the legal academy and its practice that operate through 'a dynamic relation' with 'formal institutions' of international law and 'the actions of both state actors and non-governmental organisations' (Pahuja, 2011: 10).

shifting nature of contemporary IEL that have both destabilised traditional normative hierarchies and created new forms of regulatory and disciplinary boundaries for its subjects and objects (see section 2(a)). Understanding the law and legal regimes beyond the state captures the emergence of new normative forms under economic globalization and engages with the three characteristics of what Picciotto describes as the new 'networked governance' of the global economy: the destabilization of normative hierarchy; the blurring of distinctions between normative forms; and the functional fragmentation and technicization of state functions (Picciotto, 2011: 17). Approaching international economic law through the plurality of its legal orders exposes and interrogates the emergent organising logic of the global economy that transcends the boundaries of the nation state and establishes what Sasken terms 'new jurisdictional geographies' that cut across traditional binaries of global/local, public/private, and formal/informal (Sasken, 2008: 61 – 68).

At the same time, mapping the increasingly diverse intersections between emergent forms of law and governance in the global economy correspondingly necessitates greater methodological diversity. As a field of study formed in the intersections between 'economics, law and institutions' (Trubek and Santos, 2006: 4), law and development studies is by nature interdisciplinary and, as a corollary, contextual in its approach to the role of law in society. Law and development scholars, in both orthodox and critical traditions, problematise law's shifting relationship with economic theory and practice and its role in relation to the organisation and governance of states, communities and the economy inasmuch as they also try to unpack the normative ideas, policies and institutional practice of development as an economic, social and geopolitical concept (see Davis and Trebilcock, 2008). This process is inherently interdisciplinary, placing law – domestic, international and local – firmly within the confluence of theoretical and institutional perspectives on economics, sociology, history, political economy and international relations.

The embedding of law within the prevailing economic or social paradigm at any given historical point (see discussion on the epochal periodisation of law and development studies in section 2) places law and legal institutions in a dynamic dialectical relationship with law and economic or social theory (see Trebilcock and Prado, 2014: 45 – 48; Trubek and Santos, 2006: 10 – 18). As a methodology, it challenges the formalism of conventional legal scholarship by moving beyond a concern with legal rules, interpretative practice and reflective jurisprudence towards understanding the drivers of law and legal reform and their effect on the ground, whether as a pathway to normative social ideals – for example, economic development, social cohesion, human security, gender empowerment, community justice, ecological sustainability or human rights – or as a social ideal in its own right. A law and development approach to the study of international economic law thus addresses the socio-economic and political dynamics underlying the rules and institutions of the global economy and seek to understand the relationship between international economic law and legal institutions and their impact on developing countries and communities within them as well as on these countries' relationship with the exterior.

In her introduction to a landmark collection on socio-legal approaches to IEL, Perry-Kessaris argues that law (and by extension, international economic law) 'has been travelling on … an interdisciplinary path for some time now' (Perry-Kessaris, 2013: 5) with the hybridity of legal study becoming an increasingly inescapable path for legal scholars, including international economic lawyers. Law and development studies offers a potential entry-point for such interdisciplinary sojourns by providing a normative approach to the study of IEL that challenges the law as a historically and contemporaneously apolitical space. One strand of this scholarship offers an instrumental (and sometimes empirical) assessment of the role of law in

the context of economic development and what Trebilcock and Prado term as 'economic prospects' in developing countries (Trebilcock and Prado, 2014: 183 – 213; see also Lee, 2017). Although not necessarily challenging the premise of the 'ideational infrastructure'[6] that underpins the construction of IEL (see discussion below), some IEL scholarship in this vein attempt to draw on economic theories (for example of trade or investment) to distil an understanding of the aforementioned expansive reforms of IEL deliver on the substantive promises of economic growth and prosperity for developing countries[7].

Other international economic lawyers have drawn on comparative legal methodologies to address and understand the evolution of and use of 'development' as a construct in international economic law and, increasingly to understand the tensions and conflicts that arise when international regimes collide. Here, 'development' is enrolled varyingly as a guiding principle, a standard of action, a commitment device or a descriptor to evaluate both the doctrines and implicit public values that underlie international economic law, in multiple regulatory arenas of the global economy, including investment law (Feichtner, 2015; Block-Lieb and Halliday, 2017; Schill et al, 2015); sovereign debt governance (Wong, 2012); and trade law (Gammage, 2017; Picker, 2013). 'Development' is also often a proxy for incorporating non-economic values and interests that is insufficiently captured with the traditional ontological lens of IEL, such as poverty (Nadakavukaren Schefer, 2013); labour (Harrison et al, 2015); and human rights (Bartels, 2009; de Brabandere, 2018). Much of this scholarship is focused on understanding how development and its associated constructs is treated in global economic lawmaking and adjudication of international economic disputes.

Approaches borrowed from law and development studies broaden the range of sources drawn from by scholars to form a more pluralist understanding of international economic law and support normative claims made as a consequence of this shift. As IEL scholars move away from a formalist approach to conceptualising law and regulatory relations in the global economy, there is also an imperative to move beyond doctrinal research methods that underpin doctrinal legal research. With strands of law and development studies rooted in legal anthropology and socio-legal studies, experience from law and development studies can serve to expand the sources of IEL scholarship beyond primary materials and legal jurisprudence, contributing towards a more robust application of social science methods to IEL research (see Harrison, 2014; Perry-Kessaris, 2014).

In their attempts to bridge the gap between the aforementioned 'law in the books' and 'law in action' (see section 3(a)), empirical legal scholars have deployed socio-legal approaches to understanding the context and subtext of international economic law and, in doing so, contributed towards a broader understanding of lawmaking and adjudication in both international, regional and national arenas (Braithwaite and Drahos, 2000; Block-Lieb, 2017l Dezalay and Garth, 1996; Halliday and Carruthers, 2007; Harrison et al, 2014; Sattorova, 2018).

Crucially, law and development studies itself presents a body of empirically-grounded research on the impact of global economic law and governance on local regulatory regimes

[6] I borrow this term from Okonjo (2017)'s unpublished manuscript describing the complex web of legal, institutional and performative technologies and practices that govern the regulation of international financial markets (Okonjo, 2018).

[7] See Trebilcock, 2015 in relation to international trade law; Ginsburg (2005); Guzman (1998) and Yackee (2008) on international investment law.

and communities (Eslava, 2015; Ochoa, 2017; Szabowski, 2007) as well as on law reform as a pathway to economic development (Davis and Trebilcock, 2001).

c) Law and Development as Critical Praxis

An important exercise in the mapping of contemporary international economic law is examining the link between international economic law and the forms of social, economic and political organisation it structures and the relationships that it creates and sanctions through its regimes of *regulation* and *legitimation*. International economic law has played a significant role in facilitating the globalization of economic relations by providing the regulatory framework for global integration and the restructuring of social, economic and geopolitical governance discussed in the previous section. At the same time, the rules and institutional practice of the global economy has also been instrumental in validating these regulatory and institutional changes by sanctioning its normative narratives.

The theory and practice of international economic law achieves this through its aforementioned culturally productive role, in its function as a system of symbols and signification that creates and attaches meaning to actors, forces and practices, normalising or delegitimising actions, policies, social and economic trajectories and rationales that influence and undergrid transactions and relationships in the global economy (see Darian-Smith, 2-13: 60). Tarullo, for example, perceives of international economic law as 'a set of myths' – legal texts that 'communicate 'facts about the world even as they purport to regulate it', the effect of which 'is to sanctify one way of knowing events in the world' (Tarullo, 1985: 547 – 548). Law generally, and international economic law particularly, can be viewed as sites of struggle and distributive contestation over economic resources and political power (Darian-Smith, 2013; Kennedy, 2016).

Transformations in the regulatory structure of the global economy and the patterns of production and consumption that they support are deeply embedded within local, national and global hierarchies of wealth, political power and structural societal asymmetries of race, class and gender, and the outcomes of power struggles and local contests that reflect and reproduce these organisational forces and structures. Law and development scholarship have intersected with the study of IEL in considering these contests and outcomes within a deeply embedded social field. Ashiagbor (2018) and Perry-Kessaris (2014) both use the lens of economic sociology to understand law's role in the construction of markets and the dynamics of political and economic power that organises the frameworks of regional integration projects and trade policies in developing countries (Ashiagbor, 2018) or systematises understandings of market-based legal development and reform (Perry-Kessaris, 2014).

Orthodox methodologies to the study of law and the global economy struggle to conceive of law that is embedded within a broader framework of economic and social relations nor of law as the aforementioned '(multi)cultural artefact' and its role as a tool of *discursive* and *productive* as well as *coercive* power that is 'both constituting and being constituted by' a range of social, political and economic relations and cultural and institutional practice (Darian-Smith, 2013: 40 & 60). This perspective of law 'rejects law's claim to autonomy and its tendency toward self-referentiality' (ibid: 60 – 61). Contextual and critical traditions of law and development draw upon these understandings of law as part of a broader 'ideological-institutional complex' (Pahuja, 2011: 10) that structure law and society, in this case, international law. Pahuja (2011), Eslava (2015; 2008)
and other scholars engaged in critical readings of international law challenge the idea of law's neutrality and problematise the use of 'development' as an organising concept for legal

reform and institutional change. These approaches counter the instrumentalist tradition of law and development scholarship that posit a functionalist technical approach to examining law's role in global and local economies.

Within this tradition, law and development scholars, as well as scholars under the umbrella of third world approaches to international law (TWAIL), have forwarded trenchant critiques of how 'development' as a construct and relatedly, concepts of 'rule of law' and 'good governance' have been enrolled as legal and political techniques to legitimise interventions in colonial and postcolonial states (Anghie, 2001; Eslava, 2015 & 2008; Gathii, 1999; Pahuja, 2011; Tan, 2011). Here, the treatment of 'development as a discourse instead of a theory or a fact' is considered 'both a methodological decision and a critical stance' (Eslava, 2008), one that posits the notion of development as a theoretical and institutional technique to classify knowledge and circulate ideas about the nature and form of social and economic organisation that privilege the dominant actors within the global economy. The positing of the developmental status and legal systems of developing countries against the normative ideal of European law, economy and society serve to legitimise the entry of and disciplinary engagement of western states, via development agencies and other international organisations into third world states under the guise of progress or rehabilitation (Anghie, 2011; Pahuja, 2011).

Critical traditions of law and development scholarship necessarily counters the instrumentalist approaches of traditional law and development scholarship by not only problematising the 'law' but also deconstructing the term 'development'. These epistemological traditions can reflect a critical praxis for the law and development movement by a) exposing the underlying power dynamics and paradoxical social and economic asymmetries the structure the relationship between law and the global economy and law reform and economic development; and b) mobilise resistance against the entrenchment of global asymmetries via legal and institutional reforms of law and development. Scholarship that accords primacy to voices and experiences from the south as it speaks about the role and impact of law, including international economic law, within developing countries can redress the 'methodological otherness' that characterises conventional studies on the global economy. These critical traditions are grounded in the agency of southern actors within the international economic architecture, viewing southern states and communities as *subjects* and not *objects* of international development interventions.

In doing so, these critical traditions challenge the essentialist positions of prevailing IEL scholarship and mainstream approaches of law and development movement that centres on particular constructions of Euro-American legalism and conceptualisations of law, justice and rights (Darian-Smith, 2013: 6) and reclaim the infrastructure of knowledge, systems of classification and 'regimes of truth' about the third world (Tuhiwai-Smith, 2012: 33) that have historically structured economic and geopolitical relations between the north and south and legitimised normative intrusions into developing countries. Here, they can serve as a critical praxis 'to decolonize the dominant and homogeneous forms of Western legal knowledge and present alternative and complimentary systems of knowing and existing beyond the Global North' (Darian-Smith, 2013: 108).

4. Conclusion

International economic law, through a law and development lens, can move international scholarship on the global economy beyond the doctrinal and provide a richer understanding of international economic law as both a source of *regulation* and *legitimation* of contemporary

and dominant patterns of economic production, consumption and circulation. Law and development approaches recognise the dynamic and constitutive relationship law establishes with economic activity and can provide an alternative systemisation of discourses and knowledge about legal, social, economic and political organisation and cultural formations that are empowering and which resist attempts to foreclose radical reform of asymmetrical relations within the global economy, including problematic patterns of production and consumption.

However, to serve effectively as useful conceptual and methodological techniques for the pluralising of international economic law, law and development as a field of scholarship must itself resist its own totalising discourses, instrumentalist praxis and the tendency towards epochal linearity which characterise the theoretical, substantive and applied constituents of the discipline. Only by recapturing law and development as a site for contestation can we appreciate its value and contributions to the pluralisation of legal scholarship generally and the study of international economic law in particular

References

Adelman, Sam and Paliwala, Abdul (eds) (1999), *Law and Crisis in the Third World*, Hans Zell for the Centre of Modern African Studies and University of Warwick.

Anghie, Antony (2001), 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations', *New York University Journal of International Law and Politics* 34 (3).

Ashiagbor, Diamond (2018), 'Theorizing the Relationship Between Social Law and Markets in Regional Integration Projects', *Social and Legal Studies* online first access, available at: http://journals.sagepub.com/doi/abs/10.1177/0964663918754373

Balakrishnan Rajagopal (2003), *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge: Cambridge University Press.

Berman, Paul Schiff (2005), 'From International Law to Law and Globalization', *Columbia Journal of Transnational Law* 43 (2).

Block-Lieb, Susan and Halliday, Terence (2017), *Global Lawmakers International Organizations in the Crafting of World Markets*, Cambridge: Cambridge University Press.

Chibundu, Maxwell (1997), 'Law in Development: On Tapping, Gourding and Serving Palm-Wine', *Case Western Reserve Journal of International Law* 29 (2).

Cotula, Lorenzo (2012), *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law*, Abingdon: Routledge.

Dann, Philipp (2013), *The Law of International Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany*, Cambridge: Cambridge University Press.

Davis, Kevin and Trebilcock, Michael (2008), 'The Relationship between Law and Development: Optimists versus Skeptics', *The American Journal of Comparative Law* 56 (4).

Davis, Kevin and Trebilcock, Michael (2001), 'Legal Reforms and Development', *Third World Quarterly* 22 (1).

Darian-Smith, Eve (2013), *Law and Societies in Global Contexts*, Cambridge: Cambridge University Press.

Dezalay, Yves and Garth, Bryan (1996), *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, Abingdon: Routledge.

Eslava, Luis (2015), *Local Space, Global Life: The Everyday Operation of International law and Development*, Cambridge: Cambridge University Press.

Eslava, Luis (2008), 'Corporate Social Responsibility and Development: A Knot of Disempowerment', *Sortuz, Onati Journal of Emergent Socio-Legal Studies* 2 (2).

Escobar, Arturo (1995), *Encountering Development: The Making and Unmaking of the Third World*, Princeton: Princeton University Press.

Faundez, Julio (2010), 'International Economic Law and Development: Before and After Neoliberalism', in Julio Faundez and Celine Tan (eds), *International Economic Law, Globalization and Developing Countries*, Aldershot: Edward Elgar.

Faundez, Julio and Tan, Celine (2010), 'Introduction', to Julio Faundez and Celine Tan (eds), *International Economic Law, Globalization and Developing Countries*, Aldershot, Edward Elgar.

Feitchner, Isabel (2015), 'International (Investment) Law and Distribution of Conflicts over Natural Resources, in Stephan Schill, Christian Tams and Rainer Hoffman (eds), *International Investment Law and Development: Bridging the Gap*, Cheltenham, UK and Northampton, US: Edward Elgar.

Fourie, Andria Naudé (2016), *World Bank Accountability in Theory and Practice*, The Hague: Eleven International Publishing.

Gammage, Clair (2017), *North-South Regional Trade Agreements as Legal Regimes: A Critical Assessment of the EU-SADC Economic Partnership Agreement*, Cheltenham, UK and Northampton, US: Edward Elgar.

Gathii, James Thuo (1999), 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law', *Buffalo Human Rights Law Review* 5.

Ghai, Yash and Cotterrell, Jill (eds) (2010), *Marginalized Communities and Access to Justice*, Abingdon: Routledge.

Gimsburg, Tom (2005), 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governacne', *International Review of Law and Economics* 25.

Guzman, Andrew (1998), 'Why Do LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', *Virginia Journal of International Law* 38.

Halliday, Terence and Block-Lieb, Susan (2013), 'Global Duellists: The Recursive Politics of text in International Trade Law', in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context and Subtext*, Abingdon: Routledge.

Halliday, Terence and Carruthers, Bruce (2006), 'The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes', *American Journal of Sociology* 112 (4).

Harrison, James (2014), 'The Case for Investigative Legal Pluralism in International Economic Law Linkage Debates: A Strategy for Enhancing the Value of International Legal Discourse', *London Review of International Law* 2 (1).

Harrison, James, Liam Campling, Ben Richardson, and Adrian Smith (2015), 'Working Beyond the Border? A New Research Agenda for the Evaluation of Labour Standards in EU Trade Agreements', *International Labour Review* 155 (3).

Jayasuriya, Kanishka (2012), 'Institutional Hybrids and the Rule of Law as a Regulatory Project' in Brian Tamanaha, Caroline Sage and Michael Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, Cambridge: Cambridge University Press.

Kennedy, David (2016), *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy*, Princeton and Oxford: Princeton University Press.

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

Krever, Tor (2011), 'The Legal Turn in Late Development Theory; the Rule of Law and the World Bank's Development Model', *Harvard International Law Journal* 52 (1).

La Chimia, Annamaria (2013), *Tied Aid and Development Aid Procurement in the Framework of the EU and WTO Law: The Imperative for Change*, Oxford and Portland, Oregon, Hart Publishing.

Lee, Yong Shik (2017), 'General Theory of Law and Development', *Cornell International Law Journal* 50 (3).

Lizarazo-Rodríguez, Liliana (2017), 'Mapping Law and Development', *Indonesian Journal of International and Comparative Law* 4 (4).

Manji, Ambreena (2016), 'The International Development (Official Development Assistance Target) Act 2015: Legislative Spending Targets, Poverty Alleviation and Aid Scrutiny', *Modern Law Review* 79 (4).

Mathews, Susan (2006), 'Resistance is Futile: You Will be Assimilated', in *Leiden Journal of International Law 1*9 (1).

Mbengue, Makane Moïse and de Moerloose, Stéphanie (2017), 'Multilateral Development Banks and Sustainable Development: On Emulation, Fragmentation and a Common Law of Sustainable Development', *Law and Development Review* 10 (2).

McAuslan, Patrick (2003), 'The International Development Act 2002: Benign Imperialism or Missed Opportunity?', *Modern Law Review* 66 (4).

Merry, Sally (2012), 'Legal Pluralism and Legal Culture: Mapping the Terrain', in Brian Tamanaha, Caroline Sage and Michael Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, Cambridge: Cambridge University Press.

Ochoa, Christiana (2017), 'Generating Conflict: Gold, Water and Vulnerable Communities in the Colombian Highlands', in Celine Tan and Julio Faundez (eds), *Natural Resources and Sustainable Development: International Economic Law Perspectives*, Cheltenham, UK and Northampton, US: Edward Elgar.

Okonjo, Jeremmy (2018), 'Ideas and Technological Practices as Regulatory Actants: The Ideological and Performative Reproduction of Regulatory Neoliberalism in Global Financial Markets', Unpublished PhD Manuscript, on file with the author.

Ordor, Ada (2015), 'Tracking the Law and Development Continuum through Multiple Intersections', *Law and Development Review* 8 (2).

Pahuja, Sundhya (2011), *Decolonising International; Law; Development, Economic Growth and the Politics of Universality*, Cambridge: Cambridge University Press.

Perrone, Nicholas and Schneiderman, David (forthcoming), 'Critique of International Economic Law: Depoliticization, Inequality, Precarity', in Emilios Christodoulidis, Ruth Dukes and Marco Goldoni (eds), R*esearch Handbook on Critical Legal Theory*, Cheltenham, UK and Northampton, US: Edward Elgar.

Perry-Kessaris, Amanda (2014), 'The Case for a Visualised Economic Sociology of Legal Development' *Current Legal Problems* 67 (1).

Picciotto, Sol (2011), *Regulating Global Corporate Capitalism*, Cambridge: Cambridge University Press.

Picciotto, Sol (2006), 'Regulatory Networks and Global Governance', Paper presented at the WG Hart Legal Workshop 2006, 'The Retreat of the State: Challenges to Law and Lawyers', Institute of Advanced Legal Studies, University of London, 27 – 29 June 2006.

Rittich, Kerry (2006), 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social', in David Trubek and Alvaros Santos (eds), *The New Law and Development: A Critical Appraisal*, Cambridge: Cambridge University Press.

Sasken, Saskia (2008), 'Neither Global nor National: Novel Assemblages of Territory, Authority and Rights', *Ethics and Global Politics* 1 (1 – 2).

Salomon, Margot and Arnott, Colin (2014), 'Better Development Decision-Making: Applying Human Rights Law to Neoclassical Economics' *Nordic Journal of Human Rights* 32 (1).

Sattorova, Mavluda (2018), *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?*, Oxford and Portland, Oregon, Hart Publishing.

Schill, Stephan, Tams, Christian and Hoffman, Rainer (2015), 'International Investment Law and Development: Friends or Fores?', in Rainer Hofmann, Rainer, Stephan Schill and Christian Tams (eds), *International Investment Law and Development: Bridging the Gap*, Cheltenham, UK and Northampton, US: Edward Elgar.

Szablowski, David (2007), 'Transnational Law and Local Struggles: Mining, Communities and the World Bank',

Tamanaha, Brian, Caroline Sage and Michael Woolcock (2012), 'Introduction', in Brian Tamanaha, Caroline Sage and Michael Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, Cambridge: Cambridge University Press.

Tamanaha, Brian (2011), 'The Primacy of Society and the Failures of Law and Development', *Cornell International Law Journal* 44 (2).

Tamanaha (1995), 'The Lessons of Law and Development Studies', *American Journal of International Law* 5 (1).

Tan, Celine (forthcoming), 'Doing It Differently? The Case for Pluralising International Economic Law Scholarship', in Delpano, Rossana and Tsagourias, Nicholas (eds), *Research Methods in International Law: A Handbook*, Cheltenham, UK and Northampton, US: Edward Elgar.

Tan, Celine (2015), 'Reviving the Emperor's Old Clothes: The Good Governance Agenda, Development and International Investment Law', in Stephan Schill, Christian Tams and Rainer Hoffman (eds), *International Investment Law and Development: Bridging the Gap*, Cheltenham, UK and Northampton, US: Edward Elgar.

Tan, Celine (2013), 'Navigating New Landscapes: Socio-Legal Mapping of Plurality and Power in International Economic Law', in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context and Subtext*, Abingdon: Routledge.

Tan, Celine (2011), *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States*, Abingdon: Routledge.

Trebilcock, Michael (2015), *Advanced Introduction to International Trade Law*, Cheltenham, UK and Northampton, US: Edward Elgar.

Trebilcock, Michael and Prado, Mariana Mota (2014), *Advanced Introduction to Law and Development*, Cheltenham, UK and Northampton, US: Edward Elgar.

Trubek, David (2009), 'The Political Economy of the Rule of Law: The Challenge of the New Developmental State', *Hague Journal of the Rule of Law* 1 (1).

Trubek, David M and Galanter, Marc (1974), 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', *Wisconsin Law Review*, No 4

Trubek, David M and Santos, Alvaros (2006), 'Introduction: The Third Moment in Law and Development and the Emergence of a New Critical Practice', in David Trubek and Alvaros Santos (eds), *The New Law and Development: A Critical Appraisal*, Cambridge: Cambridge University Press.

Tshuma, Lawrence (1999), 'The Political Economy of the World Bank's Legal Framework for Economic Development', *Social and Legal Studies* 8 (1).

Tuhiwai-Smith, Linda (2012), *Decolonising Methodologies: Research and Indigenous Peoples*, 2nd ed, London and New York: Zed Books.

Yackee, Jason (2008), 'Credible Commitment and the Rule of (international) law: Do BITS Promote Foreign Direct Investment', *Law and Society Review* 42 (4).