Introduction

Situating (Sustainable) Development and Non-State Actors in International Law

When the World Bank supports a project in a developing country, it is not simply providing money. It also makes international law. It decides how environmental, social, and economic sustainability can be achieved in development projects. Individuals and communities, as well as borrowing States, affected by projects such as a dam construction likewise participate in this decisionmaking process and thus assume a lawmaking role. Explaining who this international lawmaking process involves, how it transpires, and what its implications are – for the essentially contested concept of sustainable development and the international legal accountability of international financial institutions (IFIs) like the World Bank – are the main tasks of this book. These pages tell the tale of two characters – sustainable development and the World Bank – and their contribution to the ongoing formation of *international sustainable development law*.[1] What makes them interesting characters is that, despite their outsized part in the public imagination and discourse, they are rather outsiders to the international legal order. Their position in international law is marginal at best and often disputed.

When it started, this project sought to solve this puzzle and understand the dissonant attitudes toward these two. In investigating where and how they fit, if at all, within international law, it became apparent that not only do they individually have a place within such order, but, more crucially, their alliance – which is plausible though not a given – has empowered them to even reshape that order. The findings and claims presented here ultimately center on the lawmaking dimension of the

[1] As used throughout the book, the term refers to a distinguishable area standing at the "intersection between international economic law, international environmental law and international social law aiming toward development that can last." Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* (Oxford University Press 2004) 46–47.

relationship between IFIs and sustainable development and what it means for calling international institutions to account for the exercise of their powers and legal mandates.

The approach taken to the questions motivating this work can be better understood by momentarily ignoring the word "sustainable" and focusing on "development." The notion of development, especially its dynamic and not always desirable link to international law, is an appropriate starting point for the following account, since it is the primary mandate of the institutions featured in this book. Moreover, as "'sustainable development' law is the new face of [international development law (IDL)],"[2] a digression into an abridged history of *international development law*[3] is needed.

From lived experiences in and resulting resistance from the Global South, development's connections with international law and organizations are palpable, if not inevitable.[4] International financial and economic institutions are indeed ubiquitous, tangible links between law and development today. But development has not originally[5] been of international concern.[6] States' economic affairs – employment rate, financial stability, poverty reduction – used to be matters of domestic jurisdiction and beyond the realm of international law. International organizations (IOs) "concerned with one or more aspects of economic and social development" only started proliferating after the Second World War.[7] Since then, certain principles have materialized to regulate the pursuit of "development," ambiguously defined as the term may be.

[2] Emmanuelle Tourme-Jouannet, "How to Depart from the Existing Dire Condition of Development" in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 399.

[3] See Koen de Feyter, "Contracting for Human Development: International Law and Development Revisited" (2002) 10 Asia Pacific Law Review 49; Edward Kwakwa, "Emerging International Development Law and Traditional International Law – Congruence or Cleavage?" (1987) 17 Georgia Journal of International & Comparative Law 431.

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

[5] Mindful of international law's dark origins and the "development" ambitions that drove colonialism and still drive imperialism, I ask a bit of the reader's indulgence as such discussion comes later in this chapter.

[6] Kerry Rittich, "Theorizing International Law and Development" in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016).

[7] Florentino P Feliciano, "Some International Law Aspects of International Economic Development" (1974) 4 Philippine Yearbook of International Law 49, 50–51.

In the sixties, when decolonization was nearing its formal end, "a species of public international law"[8] called *international law of development*[9] or *droit international du développement*[10] emerged. According to Peter Slinn, the French term – more accurately translated as "international law *for* development" – conveys "the idea of a dynamic, teleological process" and a policy, goal-oriented approach to international law, whereas the neutral English translation (international law *of* development) obscures the debate between the Francophone proponents and the adherents to "the classic perception of international law as a set of neutral, value-free rules."[11]

There have been different answers to the questions of whether and how international law regulates the quest[12] for development and the relationship[13] between and among those concerned with this pursuit. Some view international law optimistically and advocate for the use of "legal tools for reversing inequality and establishing a new international economic order (NIEO), or at least, social justice."[14] Others stress the sinister origins of international law itself, problematizing the relationship between development thought and practice and the "civilizing" mission

[8] James CN Paul, "The United Nations and the Creation of an International Law of Development" (1995) 36 Harvard International Law Journal 307, 310.

[9] See Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964) 176–81; Oscar Schachter, "The Evolving International Law of Development" (1976) 15 Columbia Journal of Transnational Law 1; Francis G Snyder and Peter Slinn, *International Law of Development: Comparative Perspectives* (Professional Books 1987); FV García Amador, *The Emerging International Law of Development: A New Dimension of International Economic Law* (Oceana 1990).

[10] See Alain Pellet, *Le Droit International Du Développement* (2nd edn, 1987); Michel Virally, "Vers un droit international du développement" (1965) 11 Annuaire français de droit international 3.

[11] Peter Slinn, "Differing Approaches to the Relationship between International Law and Development" in Francis G Snyder and Peter Slinn (eds), *International Law of Development: Comparative Perspectives* (Professional Books 1987) 27–28.

[12] See Qerim Qerimi, *Development in International Law: A Policy-Oriented Inquiry* (Martinus Nijhoff 2012); Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press 2008); Christine Chinkin, "The United Nations Decade for the Elimination of Poverty: What Role for International Law?" (2001) 54 Current Legal Problems 553; Henry J Steiner, "Social Rights and Economic Development: Converging Discourses?" (1998) 4 Buffalo Human Rights Law Review 25.

[13] See Philipp Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge University Press 2013); Philipp Dann and Michael Riegner, "Foreign Aid Agreements" in *Max Planck Encyclopedia of Public International Law* (2014).

[14] de Feyter (n 3) 50.

that rationalized colonialism.[15] Challenges against international development law additionally arise because individuals, purportedly the ultimate beneficiaries of development, have no legal standing to express their rights and claims before many international tribunals and fora.[16] Strands of this critique subsist, pertinently regarding the (human) right to development.[17] We will return to this exclusion and non-recognition of human beings in international law below.

Underlying international sustainable development law, as this book portrays, is the imperative for international law – having been "a stimulating factor in making the poor peoples of the world conscious of their rights, in creating new public expectations and in making them rebellious against present inequalities" – to likewise become "a stimulating and a creative factor in bridging the gap between the poor and rich," lest national and international turbulence ensue.[18] The monograph adopts and substantiates Emmanuelle Jouannet's claim that sustainable development is "the culmination and the synthesis of all the earlier changes bound up in a critical version that seeks to satisfy the economic and social purposes of development, along with the concern for the environment and for future generations."[19] It thus also advances, taking a policy-oriented approach, a similar normative project embedded in "international law *for* development."

APPROACHING THE MATERIALS AND WHY

To present a more nuanced understanding of the interrelationships among international law, sustainable development, and non-State actors, the book studies the IFIs' operational policies and procedures. Apart from the set of "soft law" instruments – United Nations General

[15] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011); James Thuo Gathii and Ntina Tzouvala, "Racial Capitalism and International Economic Law: Introduction" (2022) 25 Journal of International Economic Law 199.

[16] Philip Allott, "The Law of Development and the Development of Law" in Francis G Snyder and Peter Slinn (eds), *International Law of Development: Comparative Perspectives* (Professional Books 1987) 70–71, 81.

[17] See Emmanuelle Tourme-Jouannet, *What Is a Fair International Society? International Law between Development and Recognition* (Hart 2013) 47.

[18] Willem Dirk Verwey, *Economic Development, Peace, and International Law* (Van Gorcum 1972) 283.

[19] Tourme-Jouannet (n 17) 53.

Assembly (UNGA) resolutions, declarations, expert/committee reports – typically examined when studying the relationship between international law and sustainable development, the book links these arguably non-binding texts with materials (i) governing the IFIs' activities and (ii) generated and used by these international economic organizations.

Because IFIs are creatures of treaties (international agreements), their normative orders remain properly within the realm of international law.[20] As used in the book, "internal" law[21] includes not only IFIs' constituent documents (Charters, Articles of Agreement, etc.) but also the safeguard policies and other operational procedures they issue. The qualifier "internal" is employed insofar as they are only *directly* binding on the institutions. They are nevertheless of interest to international law because of their impact on the behavior – potentially even the obligations and rights – of States and non-State actors that interact with these IFIs.

While considerable critical accounts of the harms to people and environment caused by IFIs exist, there remains limited treatment of their functions and operations from an international law perspective. Indeed, for the greater part of their more than half-century existence, IFIs have been largely excluded from international legal studies, despite their importance for multilateral cooperation and achieving complex global objectives such as sustainable development. This exclusion parallels how rarely "development" is discussed in legal terms, although it is central to various IOs' mandates.[22]

To partly correct these omissions, the safeguard systems – "an important body of normative practice [that is] surprisingly neglected in the theory of international law"[23] – are treated here as international legal

[20] See generally Kirsten Schmalenbach, "International Organizations or Institutions, General Aspects" in *Max Planck Encyclopedia of Public International Law* (2020) paras 55–76 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e499>.

[21] The use of the term "internal law" loosely follows its conception as the set of rules or legal system that governs the IO's internal organization and functioning. See Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press 2005) 272–73.

[22] See Duncan French, "'From Seoul With Love' – The Continuing Relevance of the 1986 Seoul ILA Declaration on Progressive Development of Principles of Public International Law Relating to A New International Economic Order" (2008) 55 Netherlands International Law Review 3, 17.

[23] Benedict Kingsbury, "Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples" in Guy S Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press 1999) 323.

materials. The safeguard system,[24] which each of the major multilateral development banks (MDBs) and other IFIs now have, takes center stage in this monograph. A safeguard system has two components: (i) a set of environmental and social policies ("safeguard policies") aimed at operationalizing the concept of sustainable development by, for example, requiring an environmental impact assessment (EIA); and (ii) an independent accountability mechanism (IAM) that interprets those policies in the course of investigating complaints submitted by project-affected people, who claim to be harmed by an MDB's alleged violations of its safeguard policies.

This methodological choice is key to the book's approach – pragmatic and doctrinal engagement combined with critical distancing – and arguments that follow the thrust of international law *for* development scholarship. The approach recognizes the arguable necessity for "institutional pragmatism"[25] in the international development context whilst insisting that IFIs *qua* IOs have legal personality[26] who thus bear rights and duties under international law. It concomitantly rejects the specious position that IFIs' violation of their own rules and policies, especially those concerning human rights and environmental protection, cannot trigger accountability or responsibility under international law.

The IFIs' constituent instruments, policies, procedures, and practices relating to development projects, including the reports of their respective IAMs, are textually and contextually analyzed here. The context wherein the safeguard policies apply is one wherein the individual is affected by international law, which, in turn, is affected, used, and shaped by the individual herself. Reasons for concentrating on IFIs' safeguard policies and independent accountability mechanisms are thus twofold. First is to stress that there already are policies and mechanisms, albeit still imperfect and at their nascent phase, by which the concept of sustainable development is sought to be operationalized. Second, viewing the IFIs'

[24] For the "systemic" treatment of the policies and the accountability mechanisms, see Harvey Himberg, *Comparative Review of Multilateral Development Bank Safeguard Systems* 1 (2015) <https://consultations.worldbank.org/content/dam/sites/consultations/doc/migration/mdb_safeguard_comparison_main_report_and_annexes_may_2015.pdf>.

[25] Daniel D Bradlow and Andria Naudé Fourie, "The Operational Policies of the World Bank and the International Finance Corporation: Creating Law-Making and Law-Governed Institutions?" (2013) 10 International Organizations Law Review 3, 8.

[26] *Reparation for Injuries suffered in the Service of the United Nations,* advisory opinion [1949] ICJ Rep 174, 179.

safeguard policies as part of international law prompts a greater sense of obligation on the part of IFIs to cooperate with borrowing States and project-affected individuals in the pursuit of sustainable development. Concomitantly, portraying IFIs as lawmakers is meant to subject them and their outputs to the "normative strictures and consequences that normally come hand in hand with being part of international law . . . [such as] systemic relation to other rules of international law including basic human rights and *jus cogens*."[27]

The safeguard systems deserve closer examination not only for their valuable contribution in filling lacunae in international law on sustainable development but also for their potential impact on altering the traditional State-centric view of international law, which needs to adapt to and address contemporary challenges, including those posed by the complex interdependence among economies, human societies, and the natural environment.

These unorthodox objects of inquiry also contribute to the book's uniqueness. They allow readers to explore how the law of IFIs – as part of international financial law, which is itself an understudied branch of international economic law – treats environmental and social issues and to thereby appreciate the similarities and differences in approaches with international trade and investment law. Further, the practice and case law of IAMs could fascinate, alarm, or both those who are interested in ensuring and enforcing the IFIs' responsibility for internationally wrongful conduct.

An international legal perspective is used here to (i) examine how IFIs have been undertaking reforms to shift toward a sustainable development orientation and (ii) demonstrate that IFIs are not only becoming participants in the international lawmaking process concerning sustainable development but also facilitating the participation of other non-State actors in such process. Significantly, the last point implies that the creation of international sustainable development law involves not only States, as traditional subjects and makers of international law, but also non-State actors, who invoke, clarify, elaborate, and operationalize the arguably vague and ambiguous concept of sustainable development. This perspective allows one to better appreciate how the international community's expectations, generated in part through various international

[27] Joost Pauwelyn, "Informal International Lawmaking: Framing the Concept and Research Questions" in Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012) 16–17.

"soft" law instruments, can be shaped, enhanced, reinforced, and made concrete through the work of IOs.

The book analyzes the IFIs' evolving environmental and social policies and the case law of different IAMs through a functional approach to lawmaking and the view of international law as a communicative process among relevant actors. The communications model of international lawmaking[28] is adopted, and the functional term "prescription" is used, in lieu of "law" or "rules" – to include in the scope of study the arrangements or relationships between and among a wider range of international actors: not only States but also IOs, individuals, nongovernmental organizations (NGOs), and other members of the international community.

Viewing international law as process, which is further discussed below, "entails harder work in identifying sources and applying norms, as nothing is mechanistic and context is always important."[29] It is thus particularly salient to this book's treatment of international instruments like IOs' outputs and UNGA resolutions as legally meaningful, although they are not formal sources of international law. Such treatment also hinges on the normative vision accompanying the notion of "international community": that international law must serve the interests of not only States but individuals as well.[30]

Since the book delves into the inner workings of MDBs and their IAMs, it presents a portrait taken with a telephoto (*contra* wide-angle) lens showing only a select group of States, IOs, and populations. The issues and hurdles in implementing sustainable development – identified by examining specific development projects, the IFIs' safeguard policies that apply to them, and the accountability mechanisms' operations – might be peculiar to the Global South, where IFI-supported development projects are implemented. Yet this focus crucially allows the spotlight to be shone on the asymmetric relationships – between IFIs and borrowing States, between project-affected people and IFIs, and even between government officials and local communities within a particular

[28] W Michael Reisman, "International Lawmaking: A Process of Communication: The Harold D. Lasswell Memorial Lecture" (1981) 75 Proceedings of the Annual Meeting (American Society of International Law) 101.

[29] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 8.

[30] See Benedict Kingsbury and Megan Donaldson, "From Bilateralism to Publicness in International Law" in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 79.

country – that also shape the international lawmaking process on sustainable development. The ostensible limitation, therefore, is necessary and constitutes the distinctive contribution of my work. The book's deliberately narrow focus is ultimately its strength, as it counteracts existing approaches that usually overlook these unequal interactions and their international legal implications.

The developing world is purposefully centered, because it highlights the vision of IFIs *qua* IOs constituted within the post–World War II international law framework, whose "primary goal is not limited to international peace and security, but extends to actions to eliminate poverty and facilitate development."[31] Concentrating on peoples in developing countries provides readers a glimpse of this vision. The scope of this study thus responds to the necessity for a better appreciation of the special challenges confronting the developing world and the demand for international law to take those particularities into account.

Some aspects of the book's findings are nevertheless generalizable. For instance, the posited link between the procedural and substantive principles defining sustainable development – as demonstrated by how public participation enhances the integration of environmental and social concerns into development projects – could conceivably apply to many economic activities undertaken in similar contexts. Fitting contemporary examples are financing and construction activities under the Belt and Road Initiative (BRI), the European Union's Global Gateway, and other transnational infrastructure projects.

WHAT THE BOOK OFFERS

Using as focal point the uncertainty of sustainable development's status in international law, the book proposes one way of understanding and analyzing the debatable legislative role of IFIs. The organizational and policy reforms IFIs undertook since the eighties to become more responsive to environmental and social concerns surrounding their economic activities have created avenues for them and other non-State actors to engage in a deliberative process with States regarding how sustainability can be defined and operationalized in the context of development projects.

[31] Mahnoush H Arsanjani, "Review of International Organizations as Law-Makers by José E. Alvarez" (2006) 100 The American Journal of International Law 733, 741.

The monograph is an in-depth study, from an international-law-as-process perspective, of the different IFIs' sustainability policies and the accountability mechanisms' functions – as they operate in select problematic, (un)sustainable development projects. It seeks to provide a means for researchers, and possibly development practitioners, to not lose sight of the forest for the trees: an accessible text to the IFIs' operational policies and procedures and the case law of their independent accountability mechanisms, viewed and examined contextually in the broader international legal order that they shape and form part of. It offers students and teachers of international sustainable development law an analytical framework to understand the operations of IFIs and the relatively unfamiliar quasi-judicial bodies, the IAMs. Put differently, the book delves into the IFIs' "internal" law to demonstrate that while international law does govern or discipline these IOs, the latter also participate in making international law. Accordingly, the core argument and certain premises dovetail with the contention that the safeguard systems shape the IFIs' international legal obligations and "influence the normative development of international law ... in areas that are particularly under-developed with respect to specific cases or factual situations."[32]

Taking this argument a step further, the book specifies that it is to the emerging area of "international sustainable development law" - that the IFIs, IAMs, and other non-State actors – through the safeguard systems – make their normative contribution. Despite the growth of the international (economic)[33] law and sustainability

[32] Bradlow and Naudé Fourie (n 25) 6–7. See also Daniel D Bradlow, "International Law and the Operations of the International Financial Institutions" in Daniel D Bradlow and David B Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010).

[33] Friedl Weiss, Erik MG Denters, and Paul JIM de Waart (eds), *International Economic Law with a Human Face* (Martinus Nijhoff 1998); Marie-Claire Cordonier Segger and Markus W Gehring (eds), *Sustainable Development in World Trade Law* (Kluwer Law International 2005); Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Brill/Nijhoff 2009); Marie-Claire Cordonier Segger and others (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011); Emily Barrett Lydgate, "Sustainable Development in the WTO: From Mutual Supportiveness to Balancing" (2012) 11 World Trade Review 621; Wolfgang Alschner and Elisabeth Tuerk, "The Role of International Investment Agreements in Fostering Sustainable Development" in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013); Diane A Desierto, "Deciding International Investment Agreement Applicability: The Development Argument in Investment" in

literature[34] in recent decades, very little has been written about how sustainable development is understood and acquires legal significance within international development finance, an area largely regulated by "soft" law. Some answers might have already been offered regarding "What's trade or investment law got to do with sustainability?,"[35] but it is only more recently that the question of whether or how the relationship takes shape in other branches of international economic law has been asked. Works within the third branch, international financial

Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013); Stephan W Schill, Christian J Tams, and Rainer Hofmann, "International Investment Law and Development: Friends or Foes?" in *International Investment Law and Development* (Edward Elgar 2015); Mitsuo Matsushita and Thomas J Schoenbaum, *Emerging Issues in Sustainable Development: International Trade Law and Policy Relating to Natural Resources, Energy, and the Environment* (Springer 2016); Celine Tan and Julio Faundez, *Natural Resources and Sustainable Development: International Economic Law Perspectives* (Edward Elgar 2017); Anna Aseeva, "(Un)Sustainable Development(s) in International Economic Law: A Quest for Sustainability" (2018) 10 Sustainability 4022; Andrea K Bjorklund, "Sustainable Development and International Investment Law" in *Research Handbook on Environment and Investment Law* (Edward Elgar 2019).

[34] Alan E Boyle and David Freestone, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999); Nico J Schrijver and Friedl Weiss (eds), *International Law and Sustainable Development: Principles and Practice* (Martinus Nijhoff 2004); Dire Tladi, *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments* (Pretoria University Law Press 2007); Nico J Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Martinus Nijhoff 2008); Marie-Claire Cordonier Segger and Judge CG Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992–2012* (Taylor & Francis 2017); Marie-Claire Cordonier Segger, "Sustainable Development in International Law" in Hans Christian Bugge and Christina Voigt (eds), *Sustainable Development in International and National Law: What Did the Brundtland Report Do to Legal Thinking and Legal Development, and Where Can We Go from Here?* (Europa Law 2008); Virginie Barral, "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm" (2012) 23 European Journal of International Law 377; Rakhyun E Kim, "The Nexus between International Law and the Sustainable Development Goals" (2016) 25 Review of European, Comparative & International Environmental Law 15; Sumudu Atapattu, "From Our Common Future to Sustainable Development Goals: Evolution of Sustainable Development under International Law" (2018) 36 Wisconsin International Law Journal 215; Jonas Ebbesson and Ellen Hey (eds), *The Cambridge Handbook of the Sustainable Development Goals and International Law*, vol 1 (Cambridge University Press 2022); Ilias Bantekas and Francesco Seatzu (eds), *The UN Sustainable Development Goals: A Commentary* (Oxford University Press 2023).

[35] See, e.g., Marie-Claire Cordonier Segger, *Crafting Trade and Investment Accords for Sustainable Development: Athena's Treaties* (Oxford University Press 2021).

law[36] – analyzing whether and how ecological, human rights, inequalities, and other social concerns are integrated into development projects – remain scarce. The monograph aims to fill that gap by scrutinizing the IFIs' engagement with the concept and emphasizing the jurisgenerative processes[37] such engagement triggers.

Benedict Kingsbury's[38] lament – that the legal aspects of IOs' operational policies are inadequately examined, despite their evident importance to maintaining and evolving norms of wider application, is pertinent here. More than two decades later, international law scholarship on IFIs' rules or "internal" law has relatively increased. Several articles have described and critiqued IFIs' standard-setting role and exercise of international public authority in various policy areas.[39] Some of these publications have specifically examined the safeguard

[36] Daniel D Bradlow and Claudio Grossman, "Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF" (1995) 17 Human Rights Quarterly 411; Gerhard Loibl, "The World Bank Group and Sustainable Development" in Friedl Weiss, Erik MG Denters, and Paul de Waart (eds), *International Economic Law With a Human Face* (Martinus Nijhoff 1998); Charles E Di Leva, "International Environmental Law, the World Bank, and International Financial Institutions" in Daniel D Bradlow and David B Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010); David Freestone (ed), *The World Bank and Sustainable Development: Legal Essays* (Martinus Nijhoff 2012); Johanna Aleria P Lorenzo, "International Law-Making in the Field of Sustainable Development and an Emerging Droit Commun among International Financial Institutions" (2018) 7 Cambridge International Law Journal 327; Adebola Adeyemi, "Changing the Face of Sustainable Development in Developing Countries: The Role of the International Finance Corporation" (2014) 16 Environmental Law Review 91; Kevin P Gallagher and Fei Yuan, "Standardizing Sustainable Development: A Comparison of Development Banks in the Americas" (2017) 26 The Journal of Environment & Development 243; Ariel Meyerstein, "Transnational Private Financial Regulation and Sustainable Development: An Empirical Assessment of the Implementation of the Equator Principles" (2012) 45 New York University Journal of International Law and Politics 487; Ben Clift and Te-Anne Robles, "The IMF, Tackling Inequality, and Post-Neoliberal 'Reglobalization': The Paradoxes of Political Legitimation within Economistic Parameters" (2021) 18 Globalizations 39; Kristalina Georgieva and Rhoda Weeks-Brown, "The IMF's Evolving Role Within a Constant Mandate" (2023) 26 Journal of International Economic Law 17.

[37] See generally Robert Cover, "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative" (1983) 97 Harvard Law Review 1; Paul Schiff Berman, "A Pluralist Approach to International Law" (2007) 32 Yale Journal of International Law 301; Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012).

[38] Kingsbury (n 23) 339.

[39] See Bradlow and Naudé Fourie (n 25); Matthias Goldmann, "Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority" (2008) 9 German Law Journal 1865.

policies and their relationship with, and/or contribution to, international law.[40] Most pertinently, the existence of a "law of development cooperation" – built from, among others, the World Bank's operational policies and procedures – has been posited.[41] While the examined materials overlap, this book differs from Philipp Dann's work in terms of the approaches to such materials, the research questions posed, and the overall purpose of the study. To some extent, this monograph – by showing how seemingly "soft" law instruments that predominate international financial law can harden global sustainability commitments – takes up Dann's invitation to explore other items in the research agenda from the inchoate field of the law of development cooperation.

Like Philipp Dann and Michael Riegner, the book considers the World Bank's formulation of safeguards as "multilateral lawmaking projects" setting a "globally diffused normative [standard] for socially and environmentally sound development."[42] Although their narrative unpacks the normative assumptions and justification for international institutions' legislative functions and broadly sketches the techniques employed to make the safeguards legally binding on borrowing States, it lacks particular consideration of the actual texts and the ways that they are interpreted and implemented by various relevant actors. In contrast, a more comprehensive analysis – even including the International Finance Corporation's (IFC) Performance Standards and the Compliance Advisory Ombudsman (CAO) – is provided by Daniel Bradlow and Andria Naudé Fourie to support their argument that IFIs' operational policies, together with the IAMs' functions, are turning them into

[40] Giedre Jokubauskaite, "The Legal Nature of the World Bank Safeguards" (2018) 51 Verfassung in Recht und Übersee 78; Dimitri Van Den Meerssche, "Accountability in International Organisations: Reviewing the World Bank's Environmental and Social Framework" in Elena Sciso (ed), *Accountability, Transparency and Democracy in the Functioning of Bretton Woods Institutions* (Springer International 2017); Michael Riegner, "Governance Indicators in the Law of Development Finance: A Legal Analysis of the World Bank's 'Country Policy and Institutional Assessment'" (2016) 19 Journal of International Economic Law 1; Michael Riegner, "The Equator Principles on Sustainable Finance Assessed from a Critical Development and Third World Perspective" (2014) 5 Transnational Legal Theory 489; Melanne Andromecca Civic, "Prospects for the Respect and Promotion of Internationally Recognized Sustainable Development Practices: A Case Study of the World Bank Environmental Guidelines and Procedures" (1998) 9 Fordham Environmental Law Review 231.

[41] Dann, *The Law of Development Cooperation* (n 13).

[42] Philipp Dann and Michael Riegner, "The World Bank's Environmental and Social Safeguards and the Evolution of Global Order" (2019) 32 Leiden Journal of International Law 537, 538, 547.

law-making and law-governed institutions. Included in these authors' premises, which the book adopts, is a focus on the IAMs' role as interpreters of the safeguards.[43] In contrast to their work, however, the present one devotes considerable space to detail their substantive content, mindful that the safeguards remain quite unfamiliar to many readers and scholars. Further, sharing the attention and importance, albeit not the research method, that Dimitri Van Den Meerssche affords the Bank's lawyers,[44] the present work likewise underscores the vital role of interpretation in enabling IFIs, as well as IAMs, to become participants in the international lawmaking process concerning sustainable development.

The book also corroborates Giedre Jokubauskaite's assessment – that the World Bank's environmental and social policies "captures a practice-oriented standard of authoritative behaviour set by international legal obligations"[45] – and expands it in two ways. First, the book delves into and exposes the interaction between political commitments and international "soft law" instruments concerning the vague concept of sustainable development, on the one hand, and the IFIs' policies, on the other. It also concretely depicts how particular safeguards operate in specific development projects. Second, the book examines how independent accountability mechanisms, as part of the safeguard system, further clarify environmental and social sustainability in development projects. Instead of treating such "intra-institutional law-making" as an alternative[46] to traditional inter-State rulemaking, however, the present work views the international lawmaking *process* holistically, such that IFIs and other non-State actors are among the participants, together with States.

Separately, the literature on accountability mechanisms has taken two main forms: one focuses on the structural features, the rules governing their proceedings, and their variations across different mechanisms;[47]

[43] Bradlow and Naudé Fourie (n 25) 41–45.

[44] Dimitri Van Den Meerssche, *The World Bank's Lawyers: The Life of International Law as Institutional Practice* (Oxford University Press 2022).

[45] Giedre Jokubauskaite, "The World Bank Environmental and Social Framework in a Wider Realm of Public International Law" (2019) 32 Leiden Journal of International Law 457, 458.

[46] Ibid. 458–59.

[47] See, e.g., Makane Moïse Mbengue and Stéphanie de Moerloose, "Multilateral Development Banks and Sustainable Development: On Emulation, Fragmentation and a Common Law of Sustainable Development" (2017) 10 Law and Development Review

another tackles the jurisprudence but only on an individual basis or through select case studies from one IAM.[48] Theoretical and comprehensive empirical treatments of cases investigated by the Inspection Panel also exist.[49]

Yet, thus far, most authors have dealt with the environmental and social policies in isolation from the accountability mechanisms. The notable exceptions[50] who inspired the present work have holistically examined the safeguards and the IAMS, but they are limited by their formats (book chapter, journal article), whereas the jurisgenerative potential of the safeguard system as a whole deserves a book treatment due to its fairly unfamiliar components and various nuances. No work has yet to comprehensively study the safeguard systems, in their entirety and across different IFIs, from an international law perspective. It is such a task that the monograph undertakes.

389; Richard E Bissell and Suresh Nanwani, "Multilateral Development Bank Accountability Mechanisms: Development and Challenges" (2009) 6 Manchester Journal of International Economic Law 2; Daniel D Bradlow, "Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions" (2005) 36 Georgetown Journal of International Law 403; Enrique R Carrasco, Wesley Carrington, and HeeJin Lee, "Governance and Accountability: The Regional Development Banks" (2009) 27 Boston University International Law Journal 1; Karel Wellens, *Remedies against International Organisations* (Cambridge University Press 2002).

[48] See, e.g., Sabine Schlemmer-Schulte, "The Inspection Panel's Case Law" in Gudmundur S Alfredsson and Rolf Ring (eds), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Martinus Nijhoff 2001); Jonathan A Fox, "The World Bank Inspection Panel: Lessons from the First Five Years" (2000) 6 Global Governance 279; Mariarita Circi, "The World Bank Inspection Panel: The Indian Mumbai Urban Transport Project Case" in Sabino Cassese and others (eds), *Global Administrative Law: Cases, Materials, Issues* (Second, 2008); Jalia Kangave, "Investigating the Failure of Resettlement and Rehabilitation in Development Projects: A Critical Analysis of the World Bank's Policy on Involuntary Resettlement Using Lessons from Uganda's Bujagali Hydroelectric Project" (2012) 45 University of British Columbia Law Review 327.

[49] See, e.g., Andria Naudé Fourie, *World Bank Accountability: In Theory and in Practice* (Eleven International 2016); Andria Naudé Fourie, *The World Bank Inspection Panel Casebook* (Eleven International 2014); Kristen Lewis, "Citizen-Driven Accountability for Sustainable Development: Giving Affected People A Greater Voice – 20 Years On" (Independent Accountability Mechanisms Network 2012) <https://inspectionpanel.org/sites/inspectionpanel.org/files/publications/CitizenDrivenAccountability.pdf>.

[50] David Freestone, "The Environmental and Social Safeguard Policies of the World Bank and the Evolving Role of the Inspection Panel" in David Freestone (ed), *The World Bank and Sustainable Development: Legal Essays* (Martinus Nijhoff 2012); Bradlow and Naudé Fourie (n 25); Dann and Riegner (n 42).

TERMINOLOGY AND USAGE

Referring to the World Bank and its regional counterparts as "international financial institutions" (and only occasionally as "multilateral development banks") is a deliberate terminological choice involving three considerations that are central to this book's approach and claims. First, the term IFIs maintains and highlights two characteristics of the World Bank and its peers, namely, that of being creations of international law that have treaties as their founding documents and that of being entities primarily rooted in and concerned with economics. Second, underscoring that IFIs are IOs more clearly signals how the monograph builds on the IOs as lawmakers thesis and the literature on global administrative law and international public authority. In the same vein, identifying these entities as institutions more closely situates this work within international institutional law and particularly associates it with the research agenda on institutional law and development governance that Philipp Dann posited.[51] Third, the term MDBs runs the risk of glossing over the fact that "development," as well as "sustainable development," is an essentially contested concept. In contrast, "IFIs" is a relatively neutral or less loaded term. Nevertheless, "MDBs" is used mainly for demonstrating how the ambiguity of the word "development" has allowed an evolutionary treaty interpretation of the World Bank's Articles of Agreement. The comparative analysis in Chapter 6 also uses MDBs more frequently, for consistency with the actual names of these entities.

The remainder of this introductory chapter expounds the research question – *how do IFIs accord legal significance to an essentially contested concept like sustainable development and with what implications for these IOs' accountability under international law* – and the ways that the book's approach and response deviate from existing literature touching on this inquiry.

I.1 Sustainable Development: What's International Law Got to Do with It?

Denying sustainable development a place in the international legal system, a standard argument goes: the pursuit of sustainability is not regulated by international law, because it merely involves broad political

[51] Philipp Dann, "Institutional Law and Development Governance: An Introduction" (2019) 12 Law and Development Review 537.

commitments that are unenforceable and, at best, considered soft law. These critical or skeptical views consist of two strands that are often intertwined but can be analytically distinguished. The first refers to the vagueness of the concept, that is, the lack of sufficient normative guidance that supposedly prevents it from becoming legally meaningful.[52] The second cites the absence of a binding multilateral treaty or any other formal source of international law that defines sustainable development and lays down the rights and obligations associated with the concept.[53]

The first is a question of content, the second of pedigree. Both can be analyzed as problems concerning the *international lawmaking process*.

I.1.1 Finding Content

The widely cited and established meaning of sustainable development comes from the Brundtland Commission Report: development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[54] In the landmark *Gabčíkovo-Nagymaros Case*, the International Court of Justice (ICJ) sheds some light regarding its content and characterization: "This need to reconcile economic development with protection of the environment

[52] See, e.g., Günther Handl, "Sustainable Development: General Rules versus Specific Obligations" in Winfried Lang (ed), *Sustainable Development and International Law* (Graham & Trotman/M Nijhoff 1995); Vaughan Lowe, "Sustainable Development and Unsustainable Arguments" in Alan E Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999) 34; Michael Redclift, "The Meaning of Sustainable Development" (1992) 23 Geoforum 395; Sharachchandra M Lélé, "Sustainable Development: A Critical Review" (1991) 19 World Development 607; Michael McCloskey, "The Emperor Has No Clothes: The Conundrum of Sustainable Development" (1999) 9 Duke Environmental Law and Policy Forum 153; Thomas M Parris and Robert W Kates, "Characterizing and Measuring Sustainable Development" (2003) 28 Annual Review of Environment and Resources 559; Michael Redclift, "Sustainable Development (1987–2005): An Oxymoron Comes of Age" (2005) 13 Sustainable Development 212.

[53] See, e.g., Lowe (n 52); William M Lafferty, "The Politics of Sustainable Development: Global Norms for National Implementation" (1996) 5 Environmental Politics 185; Alhaji BM Marong, "From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development" (2003) 16 Georgetown International Environmental Law Review 21.

[54] World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) 8.

is aptly expressed in the concept of sustainable development."[55] The Court's statement recognizes a tension between environmental protection and economic development and crucially affirms that sustainable development – albeit legally classified as neither a right nor an obligation but a "concept" – is an injunction to resolve such tension. These descriptions provide some clarity but arguably little normative guidance.

What existing definitions of sustainable development lack, it seems, is a clearly determined way to reconcile the conflicting goals. The legal academic critique about conceptual vagueness and deficient normativity parallels policy objections: without a proper definition of sustainable development, different people having different interests will reach different understandings and implement it differently. Hence, the concept or policy objective would not truly change behavior, especially as it could be co-opted by powerful actors to serve only their own interests. These criticisms, however, could be put in perspective and analyzed through the notion of an essentially contested concept, which is a concept whose "proper use [] inevitably involves endless [and unresolvable] disputes about [its] proper uses on the part of their users," since the dispute is "sustained by perfectly respectable arguments and evidence."[56] As Gallie explained, "to use an essentially contested concept means to use it against other uses and to recognize that one's own use of it has to be maintained against these other uses."[57]

Applying this analytical framework to sustainable development, Stephen Connelly underscored the need "to acknowledge the intellectual legitimacy of alternative interpretations . . . to appreciate how and why they can be strongly held and defended," concluding that it remains possible to pursue development trajectories "as though [a conception of sustainability] exists as the ideal for which we strive, always in competition with conceptions that are comprehensible but, from our perspective, undesirable."[58] Sustainable development is neither a useless nor defective concept, Michael Jacobs further argued, because the fact that it allows contestation or "political struggle over the direction of social and economic development" is not a problem that needs correction but a feature

[55] *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, 78, para 140.

[56] WB Gallie, "Essentially Contested Concepts" (1955) 56 Proceedings of the Aristotelian Society 167, 169.

[57] Ibid. 172.

[58] Steve Connelly, "Mapping Sustainable Development as a Contested Concept" (2007) 12 Local Environment 259, 262, 275.

that can push national governments and other relevant actors to learn and reappraise their policies.[59] Using a Jungian analytical psychology perspective, Alison Peck similarly maintained:

> What is necessary for sustainable development to be transformative is not that opposites will be eliminated, nor that they will be "harmonized" in the sense of ceasing to be opposites. . .. Economics, environment, and equity will all have their dogs in the fight. . .. As long as the fight is conscious – as long as we agree that "sustainable development" is our goal – Jung suggests that transformation will occur. *Is* occurring.[60]

It is therefore just as important to understand how disputing parties formed their positions regarding sustainability. Indeed, despite sustainable development's purported conceptual vagueness, IFIs managed to concretize and implement norms that steer economic activities in development projects toward environmental and social sustainability. Drawing from ideas about institutional learning[61] and epistemic communities,[62] the book posits that given the predominant professional (and thereby cultural)[63] background of IFI officials and staff, these IOs' understanding and operationalization of sustainable development largely derive from economic thought.[64] This section thus highlights discussions in economics and political philosophy,[65] to explain how IFIs translated the principles or core ideas underlying sustainable development into legal and operational terms. Specifically, the so-called Capability Approach[66]

[59] Michael Jacobs, "Sustainable Development as a Contested Concept" in Andrew Dobson (ed), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford University Press 1999) 26, 29.

[60] Alison Peck, "Sustainable Development and the Reconciliation of Opposites" (2012) 57 Saint Louis University Law Journal 151, 177–78. (Italics in the original)

[61] See generally Martha Finnemore, "Norms, Culture, and World Politics: Insights from Sociology's Institutionalism" (1996) 50 International Organization 325; Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52 International Organization 887.

[62] See generally Peter M Haas, *Epistemic Communities, Constructivism, and International Environmental Politics* (Routledge 2015).

[63] Galit A Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford University Press 2012).

[64] Rittich (n 6) 827–28.

[65] Martha Craven Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Press of Harvard University Press 2011); Martha Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice" (2003) 9 Feminist Economics 33.

[66] See Ingrid Robeyns, "Capability Approach" in Jan Peil and Irene van Staveren (eds), *Handbook of Economics and Ethics* (Edward Elgar 2009).

has been influential in their determination of factors that qualify development as sustainable.

Individuals have traditionally been marginalized, if not entirely excluded, both in the international lawmaking[67] process and in the development decisionmaking process.[68] Such omission subsequently led to demands for the two disciplines – international law and economics – to make the individual the focus of analysis and to make the processes inclusive and participatory. Emphasis on the agency of human beings and the changing concern within economics from growth to development are synthesized in Amartya Sen's revolutionary capability approach, which rejects a purely quantitative conception (measured in gross domestic product, GDP) of "development" and instead embraces a holistic and multidimensional process.[69] Under this approach, "Development, well-being and justice are regarded in a comprehensive and integrated manner, and much attention is paid to the links between . . . the economic, social, political and cultural dimensions of life."[70] Additionally, development is a "process of expanding the real freedoms [capabilities] that people enjoy," with freedom being not only "the primary ends of development" but "also among its principal means."[71]

Central to the approach is an understanding of so-called functionings and capabilities that together constitute a person's well-being.[72] It involves treating economic growth as a means to expand capabilities,

[67] Akin to the *international law as process* perspective discussed below, some scholars use the term "law-making" (instead of simply "law") to describe their project, since their focus or objective is precisely "to find out whether the normative processes under review can somehow lead to 'law.'" See Joost Pauwelyn, Ramses A Wessel, and Jan Wouters, "Informal International Law as Presumptive Law: Exploring New Modes of Law-Making" in Rain Liivoja and Jarna Petman (eds), *International Law-making: Essays in Honour of Jan Klabbers* (Routledge 2014) 81.

[68] See Daniel D Bradlow, "Development Decision-Making and the Content of International Development Law" (2004) 27 Boston College International and Comparative Law Review 195. ("Development decision-making" is defined as "the way in which individuals, groups, and institutions decide to adopt and then implement policies, programs, and projects that affect the evolution of their own and/or other's social and physical environments.").

[69] Amartya Sen, *Development as Freedom* (Knopf Doubleday 1999); Amartya Sen, "The Ends and Means of Sustainability" (2013) 14 Journal of Human Development and Capabilities 6; Sudhir Anand and Amartya Sen, "Human Development and Economic Sustainability" (2000) 28 World Development 2029.

[70] Robeyns (n 66) 41.

[71] Sen, *Development as Freedom* (n 69) 3, 10.

[72] David A Crocker and Ingrid Robeyns, "Capability and Agency" in Christopher W Morris (ed), *Amartya Sen* (Cambridge University Press 2010) 63.

rather than purely an end itself.[73] As Sen explained, "Having greater freedom to do the things one has reason to value is (1) significant in itself for the person's overall freedom, and (2) important in fostering the person's opportunity to have valuable outcomes."[74] As another author succinctly put it, "development properly construed is about strengthening all of these freedoms"[75] from different sorts of deprivation.

Also important for the capability approach is the concept of agency, which underscores the procedure by which decisions about well-being are made or enacted and suggests that individuals and groups should decide for themselves what functionings and capabilities are valuable.[76] To Sen, the "agent" is "someone who acts and brings about change, and whose achievements can be judged in terms of her own values and objectives."[77] He thus commends democratic processes, arguing that "our conceptualization of economic needs depends crucially on open public debates and discussions, the guaranteeing of which requires insistence on basic political liberty and civil rights."[78] Put differently, public discussion and reasoning on the selection of capabilities lead to greater understanding of the value and specific role of such capabilities.[79]

A capability-centered approach to sustainability means "see[ing] human beings not merely as creatures who have needs but primarily as people whose freedoms really matter."[80] To solve the quandary of unsustainability, Sen explains, "we need a vision of mankind not as patients whose interests have to be looked after, but as agents who can do effective things – both individually and jointly."[81] From this perspective, freedom "operates through values as well as institutions" not only to specify the ends of sustainable development but also to identify the means for achieving such objective.[82] The capability approach to sustainable development can accordingly be gleaned from the core idea of the

[73] Sen, *Development as Freedom* (n 69) 14–15; Sakiko Fukudu-Parr, "The Human Development Paradigm: Operationalizing Sen's Ideas on Capabilities" (2003) 9 Feminist Economics 301, 304–5.
[74] Sen, *Development as Freedom* (n 69) 18.
[75] Robert McDonald, "Sustainable Development as Freedom" (2006) 13 International Journal of Sustainable Development & World Ecology 445, 446.
[76] Crocker and Robeyns (n 72) 61, 75.
[77] Sen, *Development as Freedom* (n 69) 19.
[78] Ibid. 148.
[79] Robeyns (n 66) 43.
[80] Sen, "The Ends and Means of Sustainability" (n 69) 11–12.
[81] Ibid. 7.
[82] Ibid. 18.

1972 Stockholm Declaration on the Human Environment[83] that human beings are "both creature[s] and moulder[s] of [their] environment" and that the natural and man-made aspects of the environment "are essential to [human] well-being and to the enjoyment of basic human rights – even the right to life itself."[84]

As will be seen from the World Bank's experience recounted in Chapter 2, IFIs' economic expertise–derived authority underwent changes in parallel with the discipline itself. But it was not simply a matter of adopting ideas from development economics, it also became imperative for them – as IFIs delved further "deeply into the social, economic and political life of countries and away from core macroeconomic competencies"[85] – to make organizational and processual changes that balance technocracy with democratic accountability.[86]

I.1.2 Moving beyond Pedigree

If one were to cite the 2030 Agenda containing the Sustainable Development Goals (SDGs) as legal basis for requiring States to develop in a sustainable manner, a too-facile response would likely be that a "mere" UNGA resolution is not a source of international law,[87] does not create binding or legally enforceable rights and obligations,[88] and is, at best, "soft" law.

Scholars arguing that sustainable development has normative force posit that it is a general principle of international law, a customary norm, and/or an interpretive tool. Their argument is succinctly and aptly summarized as follows:

> In considering evidence to support the existence of a principle of customary international law on sustainable development, there is clearly a great deal of general state practice committing to sustainable development, and

[83] Report of the U.N. Conference on the Human Environment, U.N. Doc. A/CONF.48/14 and Corr.1, chap. I [hereinafter, the "Stockholm Declaration"].

[84] Stockholm Declaration, Preamble, para 1.

[85] Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press 2011) 52–53 (citation omitted).

[86] See Daniel C Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law" (2006) 115 Yale Law Journal 1490, 1520.

[87] Statute of the International Court of Justice, June 26, 1945, T.S. No. 993 [I.C.J. Statute at 25], art. 38(1).

[88] See generally James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 42; Carl-August Fleischhauer and Bruno Simma, "Ch.IV The General Assembly, Functions and Powers, Article 13" in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) 550.

> there appears to be a certain weight of *opinio juris* which supports the proposal that states do this because they feel bound by some form of international commitment to sustainable development. If it were a principle of international law (recognized in treaty and emerging as customary), it seems most likely that the norm would be mainly related to the integration of environment and socio-economic development: that States shall take environmental protection into account in the development process and *vice versa* (as stated in the *Iron Rhine Railway* arbitration). A slightly more optimistic view would be that States are, building on this commitment to integration of environment, social and economic priorities in the development process, also beginning to recognize a right of States to promote sustainable development, implying a related duty not to interfere duly with each others' efforts to do so (as implied in the *Uruguay River Pulp Mills* case).[89]

Even admitting *arguendo* that the 2030 Agenda is "soft" law, the possibility of its hardening into customary international law or assisting in the progressive development of the law[90] should not be readily dismissed. UNGA Resolutions have normative value despite being nonbinding. According to the ICJ, they "can in certain circumstances, provide evidence [regarding] the existence of a rule or the emergence of an *opinio juris*."[91]

Notably, the formation of law from nonbinding international instruments[92] has been particularly relevant to the development of international environmental law[93] and international economic law.[94]

[89] Cordonier Segger (n 34) 141.

[90] See generally Crawford (n 88) 42; Mark Weston Janis, *International Law* (6th edn, Aspen 2012) 55; Stephen M Schwebel, "The Effect of Resolutions of the U.N. General Assembly on Customary International Law" (1979) 73 Proceedings of the Annual Meeting (American Society of International Law) 301; Eduardo Jiménez de Aréchaga, "International Law in the Past Third of a Century" (1978) 159 Recueil des cours de l'Académie de droit international de La Haye = Collected courses of the Hague Academy of International Law 1, 34; Volker Röben, "International Law, Development through International Organizations, Policies and Practice" in *Max Planck Encyclopedia of Public International Law* (2010) paras 33–35.

[91] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 254–55, para 70.

[92] Janis (n 90) 55.

[93] Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (Cambridge University Press 2015) 34–35; Jürgen Friedrich, *International Environmental "Soft Law"* (Springer Berlin Heidelberg 2013) 247; Pierre-Marie Dupuy, "Formation of Customary International Law and General Principles" in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (1st edn, Oxford University Press 2008).

[94] Ignaz Seidl-Hohenveldern, "International Economic 'Soft Law'" (1979) 163 Collected Courses of the Hague Academy of International Law; Sergei A Voitovich, "Normative Acts of the International Economic Organizations in International Law-Making" (1990) 24 Journal of World Trade 21, 31.

Defending the legal relevance of international "soft" law or "quasi-regulation," Elihu Lauterpacht argued that the international community should not be deprived of "the use of a device that contributes to orderly behavior and development within a given field."[95] In their conceptualization of informal international lawmaking, Joost Pauwelyn and his colleagues also differentiated "being law" from having "legal effect": a norm can change behavior or determine a tribunal's decision "independently of whether it is law or merely has legal effect based, for example, on grounds of acquiescence, estoppel, or legitimate expectations."[96] Studies under this project illustrate how "expertise-based legitimacy" could be reconciled with a "more inclusive understanding of international legal norms."[97]

Labeling declarations, resolutions, IOs' reports, and other non-treaty instruments as "soft" law, and the resulting conclusion that these texts are legally insignificant, are thus unhelpful.[98] Regardless of their form[99] or technical designation, these international instruments nevertheless affect the behavior of both States and non-States in their interactions with one another, meaning, among States and between States and non-State actors.[100] Breaking free from the formality of Article 38, Alan Boyle and Christine Chinkin asserted that norms can emerge from "post-conference interactions between non-governmental interpretative communities' [international organizations] and state agencies."[101] Likewise for Jutta Brunnée and Stephen Toope, norms acquire fidelity and become suitable for legal reasoning not due to their pedigree but through adherence to Lon Fuller's conditions of legality and shared understandings of such norms.[102]

[95] Elihu Lauterpacht, "Are International Organizations Doing Their Job? International Legislation" (1996) 90 American Society of International Law Proceedings 593, 595.

[96] Joost Pauwelyn, Ramses A Wessel, and Jan Wouters, "Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable" in Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012) 527–28.

[97] Pauwelyn, Wessel, and Wouters (n 67) 89–90.

[98] See Benedict Kingsbury and Lorenzo Casini, "Global Administrative Law Dimensions of International Organizations Law" (2009) 6 International Organizations Law Review 319, 351.

[99] See Richard Collins, "Mapping the Terrain of Institutional 'Lawmaking': Form and Function in International Law" in Elaine Fahey (ed), *The Actors of Postnational Rule-making: Contemporary Challenges of European and International Law* (Routledge 2016).

[100] Kingsbury and Casini (n 98) 349.

[101] Alan E Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 83.

[102] Jutta Brunnée and Stephen J Toope, "Interactional International Law: An Introduction" (2011) 3 International Theory 307, 315–16.

The IFIs' lawmaking role thus challenges and prompts re-thinking the doctrine of sources. It also creates the need "for a more fully formed international administrative law."[103] The book contributes to both endeavors, viewing international law as a process and tracing the journey of IFIs, other non-State actors, and sustainable development – as "co-travelers" – through the international legal system.

I.2 Non-State Actor Participation and Alternative Views of International Law

The importance of human agency and individual participation in the development decisionmaking process parallels the growing recognition of non-State actors' crucial role in the international lawmaking process.[104] The role of IFIs and their safeguard systems in international sustainable development lawmaking draws upon the complementarity of these trends.

The characteristics that purportedly negate the legal meaning and status of sustainable development are only problematic under a positivist and formalist international law. An inquiry into the relationship between international law and sustainable development would be more productive and insightful if one were to remove the blinders that limit to certain actors or outputs what can be observed and legally analyzed. The international lawmaking process for a complex, multidimensional, and interdisciplinary concept such as sustainable development compels a deviation from the traditionally State-centric, sovereignty-based perspective.

[103] Kingsbury (n 23) 323.

[104] See generally Anthea Roberts and Sandesh Sivakumaran, "Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law" (2012) 37 Yale Journal of International Law 107; Julian Arato, "Corporations as Lawmakers" (2015) 56 Harvard International Law Journal 229; Janet K Levit, "Bottom-up International Lawmaking: Reflections on the New Haven School of International Law" (2007) 32 Yale Journal of International Law 393; Kal Raustiala, "The 'Participatory Revolution' in International Environmental Law" (1997) 21 Harvard Environmental Law Review 537, 555; George (Rock) Pring and Susan Y Noé, "The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development" in Donald N Zillman, Alastair R Lucas, and George W (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press 2002) 52.

I.2.1 Process

In describing international law as "world social process," founders of the New Haven School explained that "process" signified interaction and "social" referred to living beings who are the active participants in such interaction.[105] Viewing international law as a process entails "reject[ing] the notion of law merely as the impartial application of rules" and embracing, rather than eschewing, policy considerations, especially where the rules are not overwhelmingly clear.[106]

In addition to being closely associated with policy-oriented jurisprudence, the New Haven School distinctly understands international law as an authoritative decisionmaking process wherein "reference to [rules: past decisions and current norms] is of great importance, but in which the concept of community policy also plays its part."[107] Policy-orientedness means that law is "a product of and an instrument in society [that] must promote preferred ends of a society"[108] and implies that international legal rules "are intended to reflect the needs of international policy arguments and vice versa."[109] Simply put, under the New Haven School approach to international law, there is no necessary divide or conflict between law and policy.

This position, in turn, has critical implications for who are considered subjects and makers of international law. Indeed, this approach prefers the term "participants,"[110] as it embodies "an all-inclusive, non-discriminatory concept containing such diverse [entities] as individuals, states and social groupings" that provides scholars with "a conceptual technique for mapping relevant social processes."[111]

[105] Myres S McDougal and Harold D Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order" (1959) 53 American Journal of International Law 1, 7–8.

[106] Rosalyn Higgins, "Policy Considerations and the International Judicial Process" (1968) 17 The International and Comparative Law Quarterly 58, 58–59.

[107] Ibid. 83.

[108] Eisuke Suzuki, "The New Haven School of International Law: An Invitation to A Policy-Oriented Jurisprudence" (1974) 1 Yale Journal of International Law 1, 5.

[109] Harold Hongju Koh, "Is There a 'New' New Haven School of International Law?" (2007) 32 Yale Journal of International Law 559, 563.

[110] Myres S McDougal, Harold D Lasswell, and W Michael Reisman, "The World Constitutive Process of Authoritative Decision" (1967) 19 Journal of Legal Education 253, 262.

[111] Math Noortmann, "Understanding Non-State Actors in the Contemporary World Society: Transcending the International, Mainstreaming the Transnational, or Bringing the Participants Back In?" in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate 2010)

The process view additionally conveys the existence and importance of continuity and incremental changes.[112] It implies that international law results from a dynamic and deliberative interaction, which can be both purposeful and unintentional, with good practice possibly, eventually becoming considered a legal obligation over time.[113] Law thus materializes when IOs, States, and affected peoples make, challenge, defend, and elaborate claims and arguments "in the context of [a] diffuse normative process," which "offers a promising new channel for the development of international law in areas where incremental agreement on practice is ahead of state consensus on principle."[114] Benedict Kingsbury likewise explained that when IOs make policies to accomplish global objectives, they are not merely creating internal rules but "are participating in an international normative process."[115] More generally, it is possible to produce norms from "international incidents" – as Michael Reisman[116] calls events involving a series of argumentation or communication between one actor performing some action and justifying it and other actors responding to such action and justification.[117]

Concomitant to the process view is a *functional approach to lawmaking*. As identified here, functional lawmaking occurs in "any communication between elites and politically relevant groups which shapes wide expectations about appropriate future behavior."[118] The international lawmaking process described in this monograph involves States and non-State actors interacting and communicating in the context of the IFIs' operational activities, that is, funding development projects. The account employs the New Haven School framework, which breaks down

162–63. See also Janne Nijman, "Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory' of International Legal Personality," in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate 2010) 91–124.

[112] Higgins, "Policy Considerations and the International Judicial Process" (n 106) 59.

[113] Ian Johnstone, "Law-Making by International Organizations: Perspectives from IL/IR Theory" in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 283.

[114] Ian Johnstone, "Law-Making through the Operational Activities of International Organizations" (2008) 40 George Washington International Law Review 87, 121–22.

[115] Kingsbury (n 23) 342.

[116] W Michael Reisman, "International Incidents: Introduction to a New Genre in the Study of International Law" (1984) 10 Yale Journal of International Law 1, 3. Emphasis added.

[117] See also Johnstone, "Law-Making through the Operational Activities" (n 114) 88.

[118] Reisman (n 28) 107.

"decision" into seven functions: gathering intelligence, promoting preferences, prescribing authoritative policy or lawmaking, applying prescriptions, invoking or making provisional characterizations of deviations from prescriptions, terminating prescriptions, and appraising the aggregate performance of a community's decision processes in terms of community goals.

The process view thus dispels the notion that international law can only be found and embodied in treaties, customs, and general principles. Such insight informs the examination of IFIs' "internal" law to explain how they operationalize and accord legal significance to the arguably ambiguous and contentious concept of sustainable development.

I.2.2 Pluralist

The study of international law through a legal pluralist lens, Paul Schiff Berman explained, begins with Robert Cover's idea that "law does not reside solely in the coercive commands of a sovereign power" and is instead "constantly constructed through the contest among various norm-generating communities" that are not limited to nation-states.[119] This view, closely related to the New Haven School approach discussed above, shifts the focus of international legal scholars "to the variety of normative assertions, the impact of such assertions on legal consciousness, and the way these norms are deployed by actors both within and without governmental bureaucracies."[120]

Significantly, the capability approach also aligns with the New Haven School's treatment of individuals as participants in the international lawmaking process: "When we focus on individual human beings who constitute groups and communities, it becomes evident that [they] have their own demands, identifications and expectations. They act on their own behalf or act collectively to maximise values through institutions affecting resources."[121] Scholars have made arguments for inclusivity in the transnational prescriptive process as far back as the seventies, stressing how "expectations about policies, authority, and control are created by both official and non-official cooperative behavior' and the preference

[119] Berman (n 37) 302.
[120] Ibid. 303.
[121] Eisuke Suzuki, "Non-State Actors in International Law in Policy Perspective" in Math Noortmann, August Reinisch, and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart 2015) 35.

for constantly accommodating "the interests and behavior of all participants who are affected by the prescriptions being created."[122]

In some sense, therefore, the book reiterates and extends this call, by transposing it to the resolution of sustainability concerns arising in IFI-supported development projects. Parenthetically, although this project does not cover the matter of aid effectiveness, its proposition – an attempt to expand the importance of grassroots or community involvement in development projects – is derived from the monitoring role of local communities (vis-à-vis the borrowing country itself) that Susan Rose-Ackerman considers significant in limiting corruption in the use of foreign aid.[123]

The pluralist approach debunks the proposition that States hold exclusive authority to make international law and are the sole legitimate units of analysis in international legal scholarship. In the areas of international economic law, international environmental law, and international human rights law – at the intersection[124] of which areas international sustainable development law can emerge and be discovered – the principle of public participation is extant and essential in varying degrees and forms. As will be elaborated and reiterated throughout, public participation[125] is significant in implementing the principle of integration,[126] which lies at the core of sustainable development. Consequently, an understanding of the interrelationships among the economic, environmental, and social dimensions of development requires inputs from various actors, whose interests in and knowledge

[122] Myres S McDougal and W Michael Reisman, "The Prescribing Function in World Constitutive Process: How International Law Is Made" (1979) 6 Yale Studies in World Public Order 249, 274.

[123] See Susan Rose-Ackerman, "Governance and Corruption" in Bjørn Lomborg (ed), *Global Crises, Global Solutions* (Cambridge University Press 2004) 321–22.

[124] See Bradlow, "Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions" (n 47) 410; Ole Kristian Fauchald, "Hardening the Legal Softness of the World Bank through an Inspection Panel?" (2013) 58 Scandinavian Studies in Law 101, 107–8.

[125] Lewis (n 49).

[126] Schrijver (n 34) 203–4; Marie-Claire Cordonier Segger and Markus Gehring, "The Principle of Integration for Sustainable Development in European Policy and Jurisprudence" in Marie-Claire Cordonier Segger and Judge CG Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992–2012* (Taylor & Francis 2017); Dire Tladi, "Sustainable Development, Integration and International Law and Policy: Sombre Reflections on World Bank Efforts" (2004) 29 South African Yearbook of International Law 164, 166.

of these three dimensions have to be taken into account in the authoritative decisionmaking process.

I.3 International Organizations as Lawmakers

This book develops the idea that instead of displacing traditional sources, IFIs' (sustainability) rules concretize and build upon them. Long before "globalization" and "sustainable development" became buzzwords or phenomena influencing changes in international law, the IOs' lawmaking role had been explored from different angles. International organizations engage in "law-making by subterfuge"[127] or "law-making through the back door, if not quite by stealth."[128] Their policies form part of a normative process and their operations (practices and programmatic work such as humanitarian action and development assistance) often pertain to "widely acknowledged but not well-specified norms"[129] that sometimes generate friction, thereby compelling affected governments to react and initiate a discourse (action and reaction) and engage in legal argumentation, which, in turn, can cause soft law to harden.[130] Interactive processes in the international community are legally relevant when they "were solidified in growing expectations of legitimate authority."[131] In most new fields of international law, only continuous organization can "implement the objectives and policies of co-operation,"[132] and issues in these fields require the "invention of tools to organize the world economy and communications network."[133]

Some IOs' lawmaking role manifests through the involvement of judicial or quasi-judicial bodies. In this book, MDBs' independent accountability mechanisms resemble the "global community of courts" that Anne-Marie Slaughter depicts as being constituted by judges, who see each other as "fellow professionals in an endeavor that transcends national borders" and are "fac[ing] common substantive and institutional problems … learn[ing] from one another's experience and

[127] José E Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2006) 217.
[128] Johnstone, "Law-Making by IOs" (n 113) 275.
[129] Kingsbury (n 23) 340.
[130] See Fauchald (n 124) 107.
[131] Alvarez, *IOs as Law-Makers* (n 127) 52.
[132] Friedmann (n 9) 294.
[133] Brigitte Stern, "What, Exactly, Is the Job of International Institutions?" (1996) 90 American Society of International Law Proceedings 585, 591.

reasoning . . . and cooperat[ing] directly to resolve specific disputes."[134] Transjudicial deliberation[135] or transnational judicial dialogue explains how domestic courts, through informal networks, "interact[] with and engag[e] each other in a rich and complex dialogue on a wide range of issues" that enable them to "collectively engage in the co-constitutive process of creating and shaping international legal norms," thereby promoting cross-fertilization resulting to global jurisprudence.[136]

In studying the mechanisms' "dockets," specifically the significance of cases arising from co-financed projects to the creation of international sustainable development law, this book also takes a "common law approach" to international lawmaking. Under this approach, law is "develop[ed] through the resolution of specific problems brought forward through actual disputes"[137] and "jurisprudence is not 'soft law' so much as it is a hardwired component of legal analysis."[138] The approach presupposes that (i) adjudicators' rationality impels them to draw lessons from past experiences and (ii) actors interacting with adjudicators expect such learning process and references to precedent to occur.[139] More broadly, the common law approach could unsettle the notion that international law is simply a body of rules organized under principles and axioms and instead re-channel the energy and attention of the international community to tackling and resolving the progressively transnational nature of contemporary economic, social, environmental, and resource problems.[140]

This approach is useful because of common law's flexibility, elasticity, and infinite resourcefulness, "in devising the ways and means of effectuating principles" of justice and equity.[141] Proceeding from the premise

[134] Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44 Harvard International Law Journal 191, 193.

[135] See Anne-Marie Slaughter, "A Typology of Transjudicial Communication" (1994) 29 University of Richmond Law Review 99, 102.

[136] Melissa A Waters, "Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law" (2004) 93 Georgetown Law Journal 487, 490 (citation omitted).

[137] Frederic G Sourgens, "Law's Laboratory: Developing International Law on Investment Protection as Common Law" (2013) 34 Northwestern Journal of International Law & Business 181, 226 (citations omitted).

[138] Ibid. 186.

[139] See McDougal and Reisman (n 122) 264.

[140] See Sourgens (n 137) 247.

[141] John CH Wu, "The Common-Law Approach to International Law" (1959) 5 The Catholic Lawyer 295, 302.

that "the common law regards man as having the dignity of being made in the image of his Maker," John Wu presents an approach to international law (alternative to judicial positivism, which focuses on State consent) that considers sovereignty "as ethical in foundation, pluralistic in distribution, relative to the purpose of the common good, and circumscribed within the limits of law and reason."[142]

The due regard that the common-law approach gives to human dignity is a feature that accountability mechanisms seem to strive for, although neither consistently nor successfully, in handling project-affected people's complaints. This proposition means taking into account the multidimensional goals and interests of the intended project beneficiaries. It also means valuing the agency of project-affected people in making decisions relating to their development, such that their participation in the relevant processes cannot be so easily disregarded or overridden by technicalities and overly pragmatic considerations.

As these statements illustrate, other scholars have posited the lawmaking function of international institutions.[143] But few have closely examined the idea in relation to IFIs.[144] Moreover, an account about the legal techniques, mechanisms, and procedures they employ remains limited.[145] Hence, whilst building on the IOs as lawmakers thesis, the book is distinguishable on three aspects.

First, the book yields the hopefully reassuring finding that IFIs have also empowered, albeit circuitously and still imperfectly, other non-State actors such as individuals and local communities, to participate in the international lawmaking process concerning sustainable development.

[142] Ibid. 296, 298.

[143] See, e.g., Jan Wouters and Philip De Man, "International Organizations as Law-Makers" in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011); Ramses A Wessel, "Informal International Law-Making as a New Form of World Legislation?" (2011) 8 International Organizations Law Review 253, 254; Nigel D White, "Separate but Connected: Inter-Governmental Organizations and International Law Forum on International Institutional Law" (2008) 5 International Organizations Law Review 175, 181.

[144] Susan Block-Lieb and Terence C Halliday, *Global Lawmakers: International Organizations in the Crafting of World Markets* (Cambridge University Press 2017); Chris Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (Cambridge University Press 2011); Kristen Boon, "'Open for Business': International Financial Institutions, Postconflict Economic Reform, and Rule of Law" (2006) 100 Proceedings of the ASIL Annual Meeting 142.

[145] Andria Naudé Fourie, "The World Bank Inspection Panel's Normative Potential: A Critical Assessment, and Restatement" (2012) 59 Netherlands International Law Review 199, 200–201.

Second, the thesis is expounded here specifically in relation to international sustainable development law, that is, the contribution of IFIs' safeguard systems to this nascent field and practice. Third, the rare publications substantiating the IFIs' lawmaking function often stop short of scrutinizing the implications[146] of such function for these IOs' international legal accountability. The book urges greater thinking and more serious debates not only about the potential responsibility of IFIs for noncompliance with their legal mandates and for harms caused to peoples and the environment in many developing countries but also regarding the relationship of their accountability mechanisms to the law of international responsibility.

The book shows that the purposes of IFIs today are no longer limited to facilitating cooperation, managing compliance, or even providing resources. Rather, they can now also inform and prescribe the content of norms applicable to various entities acting at the transnational level and, possibly supplementing the law governing the relations among States and non-State actors.

STRUCTURE OF THE BOOK

The book is divided into two parts and consists of nine chapters, including this introduction and the Conclusion. Part I includes Chapters 1–4, each of which describes the book's two main characters – sustainable development and the World Bank exemplifying IFIs – and narrates how their paths meet. Chapter 1 ("Sustainability's Journey: Snapshots from Stockholm, Rio, Copenhagen, The Hague, Johannesburg, and New York") maps the international community's varied and evolving understandings of sustainable development, drawing particular attention to how these understandings overlap with and echo themes from early attempts to reform international economic law, that is, the legal rules governing the global economic order and the contemporary efforts to codify the human right to development. Chapter 2 ("Detour to Bretton Woods: Re-Constructing the International Bank for Sustainable Development") runs parallel to the immediately preceding chapter by tracing the changing definitions of development, as implemented by one of the pillar organizations of international financial law, that is, the

[146] A notable exception is Sinclair's cautious attitude about the promises *and* perils of IO reform. Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017).

World Bank, whose mandate and functions have likewise been evolving. It employs the New Haven approach to international law and treaty interpretation to expound how development has come to be understood in the Bank's operations as involving not only economic growth but also environmental, governance, and human rights concerns, despite the "political activity prohibition" in its constituent instrument.

The last two chapters in Part I explains the main characters' respective features that establish their initially uncertain connection. Chapter 3 ("Public Participation and Integration: Procedural and Substantive Principles of Sustainable Development") identifies the distinct but intertwined principles of sustainable development that particularly found resonance in the IFIs. It discusses the posited link between the two, with public participation serving as the procedural component of sustainable development, which in substance requires the integration of environmental, social, and economic concerns. Chapter 4 ("Safeguard Systems: Legal Institutional Framework for Sustainability of Development Projects") elaborates how the World Bank translated the sustainable development principles, analyzed in Chapter 3, into its operational policies and procedures. It details the contents of select safeguard policies – environmental assessment, involuntary resettlement, indigenous peoples – and their interpretation by the Inspection Panel.

Part II, comprising Chapters 5–7, presents the book's core argument that *IFIs are international lawmakers in the field of sustainable development who can thus be held legally accountable*. The first prong of the thesis – IFIs' contribution to international sustainable development lawmaking – has two components, which Chapters 5 and 6 respectively elaborate. Chapter 5 ("IFIs as Lawmakers I: Hardening International 'Soft' Law on Sustainable Development and Externalizing 'Internal' Law on Development Finance") uses examples of "un-sustainable development projects" in various developing countries to show how the safeguard systems work (and not) in ensuring the environmental, social, and economic sustainability of IFIs' operations and the projects they support. Chapter 6 ("IFIs as Lawmakers II: Harmonizing and Communicating toward a *Droit Commun* on Sustainable Development") uses the coordination and cooperation among MDBs and among IAMs to demonstrate how they learn from one another's approach to sustainability and engage in actions that reinforce the authoritativeness of their collective understanding of sustainable development.

Rounding up Part II is Chapter 7 ("Institutional Lawmaking and International Legal Accountability"), which is a vital continuation of

the narrative about the interrelationship among international law, IFIs, and sustainable development. A demand for accountability motivated the initial encounter; it is also accountability – more broadly construed – that should underpin the IFIs' international lawmaking role vis-à-vis sustainable development. To expound the second prong of the book's claim, this penultimate chapter sketches a complementary relationship between independent accountability mechanisms and the International Law Commission (ILC) draft Articles on the Responsibility of International Organizations (ARIO), with a view to upholding the right to remedy in the development finance context. It then pleads that, given the IFIs' critical roles as creatures, creators, and catalysts of international law – especially regarding sustainable development – international legal scholars should begin taking them seriously and further scrutinizing their "internal" rules and operations.

The Conclusion ("A Place for Accountable Non-State Actor Participation in International Sustainable Development Lawmaking") synthesizes the book's findings and presents the reimagined view of IFIs not only as funders of development projects but also as lawmakers and enablers of non-State actor participation in the international lawmaking process concerning sustainable development. As each of the chapters will demonstrate, sustainable development can derive meaning and normative force within the international legal order through the work of IFIs and their interaction with other non-State actors and with States from the Global South. This lawmaking role urges further scrutiny to ensure IFIs' accountable exercise of power and performance of their legal mandates and creativity to genuinely uphold the right to remedy of project-affected people.