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Introduction

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Law, State, and the New Developmentalism

An Introduction

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The field of law and development requires constant realignment. The field exists at the intersection of law, economics, and the practices of states and development agencies. As economic policies, legal theories, and institutional practices change, the salient issues in law and development change as well. The twenty-first century has ushered in a new era. Once again, prior development theories are being challenged and new practices are emerging. Law and development scholars need to understand the new trends and explore their implications for legal studies and practice.

The shift in development policy and practice can be seen in many regions, but nowhere more clearly than in Latin America. After a long period during which neoliberal policies prevailed and the state's role in the economy was curtailed, many countries in the region have begun to explore new forms of state activism. These experiments with a renewed role for the state – and the theories designed to explain and guide them – are sometimes referred to as the "new developmentalism."

Within Latin America, Brazil has been a leader in the formation of new developmental policies and in the creation of a new developmental discourse. Starting with the election of Lula da Silva in 2002 and gaining momentum during Lula's second term in 2006, Brazil has instituted new forms of industrial and social policy, experienced a surge in growth, and seen a reduction in inequality. These results have drawn attention to the Brazilian experiment and generated a new discourse in development studies as Brazilian and foreign scholars seek both to explain and guide these reforms. The result is a burgeoning literature that explores new developmentalism in Brazil and the possible emergence of a new kind of developmental state.

This book is the result of a study by legal scholars from Brazil and elsewhere in the Americas to understand new developmentalism in Brazil and begin to assess its significance for law and development studies.[1] We took as our baseline Trubek and

[1] The project was called LANDS – Law and the New Developmental State. It was managed by the Global Legal Studies Center at the University of Wisconsin–Madison with assistance from Cebrap,

Santos's observation in 2006 that neoliberal dominance in the field had ended but no dominant paradigm had yet emerged to replace it.[2] However, by 2007, when our project began, it was clear that a new discourse was emerging in Latin America and there were signs of the emergence of a new developmentalism. We thought that if the new developmentalism were to take hold at the policy as well as the discursive level it would lead to another shift in the dominant development paradigm. Such a shift would, of course, have great significance for the law – and vice versa.

To explore this possibility, we looked at recent policy changes in Brazil and their implications for law. We also compared some of the developments in Brazil with what was occurring in a few other countries in the region showing both similarities and differences with the Brazilian experience. We did case studies on law and industrial policy in Brazil and Colombia, trade law and policy in Brazil and Mexico, social policy and law in Brazil and Colombia, and law and financial policy and innovation in Brazil.

These studies suggest that in Brazil, a new form of developmental state is emerging. In this "new developmental state" approach, the government plays an active role in mobilizing resources, stimulating investment, and promoting innovation. It employs open-economy industrial policy to restructure industry and increase international competiveness. It uses an active social policy to eliminate poverty, reduce inequality, and stimulate domestic demand. Unlike the developmental state of the 1950s to the 1980s, the new developmental state seeks to benefit from participation in the global economy while avoiding the dangers of free-trade fundamentalism. In this emerging model the government tries to stimulate, not replace, the private sector and much emphasis is placed on public-private collaboration. There is some disagreement about the extent to which these new forms of Brazilian "state activism" have cohered into a stable "model," but there clearly has been a decisive turn, and this has significant implications for the law.[3] This chapter explores these issues and outlines the rest of the volume.

LAW AND DEVELOPMENT IN HISTORICAL PERSPECTIVE

In some periods, economics, legal theory, and development agency practices have come together to form a relatively coherent vision and doctrine that guided the

The Brazilian Center for Analysis and Planning, and Los Andes University. Financial support was provided by the University of Wisconsin and the Ford Foundation.

[2] David M. Trubek and Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (Cambridge, New York: Cambridge University Press, 2006).

[3] In this volume, we use three terms to describe the emerging model and the ideas that relate to this shift in state practice. In describing the new role of the state, some refer to "new state activism," suggesting something less than a full-blown model, whereas others use the term "new developmental state." I use the term "new developmentalism" to describe a broad movement in the realm of ideas that seeks to explain and guide this turn in state practice.

practices of foreign aid agencies and influenced domestic reformers. When law, economics, agency practice, and state policy are aligned, a relatively clear set of policies can be derived and it is easy to design projects. This has happened twice in recent memory. The first such moment was the law of the developmental state: in this model, law was seen primarily as a tool to render state intervention more effective. The second was the role assigned to law in the neoliberal market order: neoliberal law and development saw law basically as a framework for the market and a shield against undesirable state intervention in market activities.

Each of these models was associated with the dominant economic and legal theories of the time. In the 1960s, development economists favored a strong role for the state, believed that private enterprise lacked the resources to build key industries and that state ownership was essential, and thought that import-substitution industrialization and delinking from world markets was the preferred road to development. The first moment in law and development doctrine drew on these ideas. The law of the developmental state was designed to strengthen the state apparatus so it could perform the roles assigned to it. Law and development accepted the need for a strong state and drew on prevailing ideas about the power of public law as a transformative agent.

Things began to change in the 1980s. As the negative aspects of the original developmental state model became clearer, economists began to question prior prescriptions. They started to counsel a narrowing of the state's role and favored an opening to world markets. This move within economics helped generate the second, or neoliberal, moment in law and development doctrine. This stressed the role of law in protecting investor expectations, facilitating private transactions, and limiting the role of the state. It coincided with developments in legal theory that emphasized the importance of markets and the limits and unintended consequences of legal intervention.

Both those moments have passed. Elements of both models remain in thought and practice, but neither mode is hegemonic. Rather, we find ourselves in a period in which there is no prevailing orthodoxy either in development theory or in law and development doctrine. The consensus on which the neoliberal model was built is crumbling, and we see new ideas emerging both in development economics and state practice.

It is in this climate that ideas about a *new* developmental state are emerging, and in which some people are starting to work out the implications of these ideas for law. These ideas point to different models of development and different roles for law. On the basis of our research in Brazil and elsewhere, we think the combination of new state practices and new roles for law suggests the possible emergence of a new moment in which law, development policy, and institutional practices may once again become aligned.

THE CHANGING ROLE OF THE STATE IN LATIN AMERICA AND NEW IDEAS ABOUT DEVELOPMENT POLICY

To understand the context in which this is happening, it is important to understand the revival of interest in the role of the state in Latin America.

The Role of the State in Developmentalism and the Rise of Neoliberalism

In the middle of the twentieth century, during the era of Latin American import-substitution industrialization (ISI), the state played a central role. Elites believed that an open global economy would condemn the region to perpetual economic inferiority, private industry would be too weak to serve as an engine of rapid growth, voluntary savings were too low to finance needed investment, and private markets were inefficient. To fill the gaps, the state used taxation and other tools to raise funds for investment, state-owned enterprises (SOEs) led the industrialization drive, and state agencies and regulations protected domestic industry against international competition and buffered shocks from the global economy.

Technocrats in state agencies developed industrial policies and development plans that charted economic strategies to be carried out through governmental bodies, development banks, and SOEs. For the region as a whole, and especially for some countries such as Brazil, these policies paid off at least in terms of relatively high growth rates.

All this began to change in the 1980s. Facing an economic crisis caused by a worsening external environment, inflation, a huge overhang of debt, and declining returns from the ISI strategy, most of the region found it necessary to turn to the International Financial Institutions (IFIs) for support. Although support was forthcoming, it was conditioned on major policy shifts that significantly affected the role of the state. This conditionality coincided with an intellectual revolution within regional elite circles as free-market ideas came to replace the stress on states and planning that had dominated classic developmentalism.

These twin forces led to the emergence of a new development paradigm, sometimes referred to as the Washington Consensus (WC), which drew on neoliberal ideas, stressed the importance of markets and open economies for growth, and called for a much narrower role for the state. The result was a major set of policy shifts including deregulation, privatization, macroeconomic stabilization, fiscal discipline, financial liberalization, import liberalization, antitrust enforcement, and encouragement for private foreign investment. Industrial policy, which was a central feature of the ISI era, was largely abandoned (at least at the rhetorical level), and much of the institutional structure of the ISI period was dismantled.

This new discourse became dominant in the 1990s, and the WC model influenced policy changes throughout the region. Whereas there was variation in the extent to which these policies were followed and in the sequencing of the several reforms, scholars agree that a major shift in the role of the state occurred throughout Latin America. Commenting on this shift, Stallings and Peres conclude: "The shift in the 1980s and 1990s from a development strategy based on a strong state and a relatively closed economy to one that is market-oriented and open was among the most profound changes in Latin American economic history."[4]

Studies of the neoliberal-inspired reforms tend to focus on five core areas: trade liberalization, domestic finance liberalization, capital account opening, privatization, and tax reform. To one degree or another, all countries in the region carried out reforms in these areas in the 1990s. The initial results, however, were disappointing. On the one hand, the rapid growth that many expected did not materialize. Whereas average growth rates exceeded 3 percent from 1950 to 1980, after 1990 they dipped significantly. On the other hand, the reform effort led to substantial social dislocation. Little support was available to offset the impact of these dislocations, and that led to expressions of dissatisfaction with the new paradigm and protest in many countries. Because the neoliberal era coincided with democratization in much of the region, this dissatisfaction could not easily be ignored by political elites.

Latin American Alternatives

As the new millennium dawned, voices within and throughout the region were taking another look at the neoliberal vision and beginning to question its strictures concerning the state.[5] This has led to new support for an activist state and the rise of new ideas about development that we call "the new developmentalism."[6] Proponents of

[4] Barbara Stallings and Wilson Peres, "Is Economic Reform Dead in Latin America? Rhetoric and Reality since 2000," *Journal of Latin American Studies* 43(4) (November 2011).

[5] Francisco Panizza divides these voices into three camps: the "post–Washington Consensus" or PWC, the "new developmentalism," and "twenty-first-century socialism." The PWC seeks to supplement the WC reforms with more attention to social protection and inequality, recognizes the need for institutional strengthening, and eschews simple one-size-fits-all, top-down approaches in favor of more consensual and bottom-up ways of making policy. But the PWC retains the basic WC commitment to market primacy and a limited role for the state. Conversely, whereas the new developmentalism assumes that the market is important for development, it posits a more substantial role for the state. Twenty-first-century socialism, however, seems to want to transcend capitalist market relations altogether. Francisco Panizza, *Contemporary Latin America: Development and Democracy beyond the Washington Consensus* (New York: Zed Books, 2009).

[6] Those who accept the market but promote a more substantial role for the state in growth and social protection use different labels to explain their views. They include neostructuralism, new state activism, and new developmentalism. These variations on what I call generically "the new developmentalism" vary in the policies they prescribe.

this approach believe in both strong markets and strong states and stress the importance of public-private collaboration.

New developmentalism in Latin America asserts that neoliberal ideas will not work in the region and state intervention is necessary because of structural obstacles to growth. These include a low propensity to invest, weak systems for innovation, and low levels of private research and development (R&D). Only through state intervention, it is believed, can the region transform its productive structure in ways that will allow it to capture rents in the global economy.

A major source of these ideas is the UN Economic Commission for Latin America and the Caribbean (ECLAC). Once the herald of statism and delinking from the global economy, ECLAC now recognizes the importance of the private sector, stresses the importance of exports, recommends attention to global competiveness, and sees the need for a new kind of industrial policy.[7] Instead of favoring state-owned enterprises, ECLAC now understands that the private sector can be a motor for growth. It counsels selective public intervention and public-private partnerships that are designed to unleash the entrepreneurial energies of the private sector while ensuring that the private sector has the support needed to be globally competitive and able to compete in technologically advanced and high-value-added fields. It also places great emphasis on the need for active social policy to overcome social exclusion, reduce poverty, maintain demand, and contribute to the goal of increased competitiveness by promoting training and reducing the social costs of structural change.[8]

Similar ideas have been championed by Luiz Carlos Bresser-Pereira, a Brazilian economist and former finance minister. He shares the ECLAC view that structural features of the Brazilian and other Latin American economies require state intervention. What he calls the “new developmentalism” accepts the market as the primary allocator of resources, supports trade liberalization, and is export oriented. It also manages exchange rates to keep exports competitive, favors industrial policy

[7] ECLAC was the source for many of the ideas that animated the classic developmental state. Starting in the 1950s, ECLAC proposed alternative approaches including state ownership of major industries and delinkage from the world economy. The original ECLAC point of view, often referred to as structuralism, rejected the application of neoclassical economics to development. It stressed that structural conditions in the region rendered neoclassical prescriptions ineffective, and it proposed what were at the time heterodox solutions. Among the structural conditions of greatest concern were the unequal terms of trade between primary products (provided by the periphery) and industrial goods (produced in the center), low levels of investment, and economic dualism that led to “unlimited supplies of labor” and meant that wages would always lag productivity gains. Among solutions offered were planning, forced savings, state-owned enterprises in key industries, and import-substitution industrialization policies that provided for protection of domestic industry. Ricardo Bielschowsky, “Sixty Years of ECLAC: Structuralism & Neo-Structuralism,” 97 *CEPAL Review* 171 (2009); Eugenio Lahera, Ottone Ernetos, and Osvaldo Rosales, “A Summary of the ECLAC Proposal,” 55 *CEPAL Review* 7 (1995).

[8] Lahera et al., supra note 7.

but makes support for business temporary and conditioned on international competiveness, favors fiscal equilibrium, and opposes inflation. He proposes a robust role for the state that, he says, should regulate the market, redistribute income, create a national development strategy, supplement private-sector investment in areas where capital markets do not function, and facilitate technological progress and innovation.[9]

Globalization and Learning in the New Developmentalism

Because new developmentalists favor export-led growth policies and open domestic markets, they pay attention to the need to maintain competitiveness in an increasingly fast-moving and integrated world economy. Scholars argue that neither the state nor the private sector alone is capable of developing optimal developmental trajectories. They posit an important role for the state in fostering competiveness and encouraging innovation, and they favor partnerships between the state and the private sector.

The stress on innovation and competiveness leads to a new kind of industrial policy designed to foster public-private partnerships and joint experimentation.

[9] Luiz Carlos Bresser-Pereira, "From Old to New Developmentalism in Latin America," in *Handbook of Latin America Economics*, ed. Jose Antonio Ocampo (Oxford: Oxford University Press, 2009). For Bresser-Pereira, new developmentalism largely is a set of policies designed to support export-led growth. He stresses that this policy is not for all developing countries but only those middle-income countries that already have an industrial base, can produce products that are globally competitive, and thus potentially can profit from export-led growth based on manufactured products. He emphasizes four major policy areas that are necessary to ensure that a country can compete globally with manufactured exports: industrial policy, exchange rate policy, fiscal policy, and incomes/labor market policy. Industrial policy is necessary to ensure competiveness and move industry toward areas with higher global growth possibilities. Because of systemic and structural market failures, this will not occur without public support. Various incentives and forms of technical and financial support are necessary to carry out this industrial restructuring. But the export strategy cannot work if the currency is overvalued. Therefore, active exchange rate policy is important to maintain an exchange rate that keeps national industry globally competitive. This means combating the effects of the Dutch disease – that is, exchange rate appreciation due to external demand for commodities. Fiscal policy is important for two reasons. First, it affects the exchange rate: if a country relies on foreign savings to cover deficits, this will drive up the exchange rate, so the budget should be in surplus to limit reliance of foreign savings and the resulting exchange rate appreciation. Secondly, a fiscal surplus is needed to generate the domestic savings needed for the investment involved in industrial restructuring. Finally, new developmentalism requires active incomes and labor market policies for two reasons. First, to combat a structural feature of emerging economies: the tendency of wages to lag behind productivity. This occurs because the existence of almost unlimited supplies of labor in these countries holds back the wage rate. This depresses domestic demand thus discouraging investment. To counter this, an incomes policy ensuring wage increases is essential. Secondly, labor market policy must allow for flexibility so the kinds of structural transformation needed for global competitiveness can be carried out. To implement all these policies, Bresser-Pereira asserts, the state must be strong but a strong market and close public-private coordination are also needed.

Because the optimal paths for growth in the new global knowledge economy are not known in advance, experimentation is essential and there is a need for improved processes of learning and discovery. Great attention is paid to how best to secure knowledge of the paths investment should take for maximum social return. It would not be too much of an exaggeration to say that this body of thought sees development as a process of discovery in which the state seeks to empower the private sector, and state and market function best when they are linked in collaborative structures that foster experimentation and revision.

This inquiry has highlighted the need for new forms of state action and a call for new public services.[10] New developmentalists recognize that market signals are important and private actors have much of the information and know-how needed to chart effective strategies. But they also assume that, without various inputs, incentives, and guidelines from the state, private actors may not get the full picture needed to make good investments or be able to capitalize on what they know. In such cases, effective development policy requires close coordination between public and private actors, joint experimentation and search for new investment opportunities, and careful tailoring of public action to deal with specific needs and contexts.[11]

These assumptions about knowledge and learning lead many new developmentalists to reject one-size-fits-all approaches.[12] They stress that there is no one policy or model that will lead to economic progress in all countries at all times. [13] New developmentalism's stance toward trade policy also highlights the need for learning and discovery processes. The literature rejects a static concept of comparative

[10] Prior theories had simple approaches to knowledge production. Classical developmentalism assumed that the state could, more or less by itself, develop the knowledge necessary for effective investment – that is why such stress was placed on planning ministries and five-year plans and why it was thought that SOEs should be created in many areas of industry and finance. On the other hand, neoliberalism took the opposite position, asserting that states would always – or almost always – get it wrong. The solution was to bar states from making investment decisions in most sectors of the economy so the market could find the right path by itself. "Industrial policy," once a progressive slogan, became a dirty word associated with inefficient efforts by government to pick winners and the risk that inefficient industries would "capture" government.

[11] Dani Rodrik, "Industrial Policy for the Twenty-First Century," www.ksg.harvard.edu/rodrik/ (2004); Charles F. Sabel, "Bootstrapping Development: Rethinking the Role of Public Intervention in Promoting Growth," unpublished manuscript (2005); Ricardo Hausmann, Dani Rodrik, and C. F. Sabel, "Reconfiguring Industrial Policy: A Framework with Application to South Africa," unpublished manuscript (2007).

[12] This top-down, one-size-fits-all approach has already been heavily criticized. Scholars have pointed out that even if it is necessary to have institutions for certain functions, there are different ways to deal with such functional needs. They also have noted that given the social embeddedness of economic institutions, it is often impossible successfully to "transplant" institutions from one nation to another. They argue that development policy must allow each nation to shape its institutional structure according to its own needs and traditions.

[13] Moreover, the interest in experimentation suggests that variation within nations can help identify best practices and optimal paths. Hausmann, Rodrik, and Sabel, "Reconfiguring Industrial Policy."