1. International investment law and development: Friends or foes?

Stephan W. Schill, Christian J. Tams and Rainer Hofmann

I. INTRODUCTION

The relationship between international investment law and international development law has long been a history of ignorance and mistrust. This need perhaps not have been so, as the two fields seem rather closely linked. Investment law is, as the First Recital in the Preamble of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) indicates, premised on a development nexus.[1] Moreover, there is broad consensus that investment, including foreign investment, can have a positive impact on economic development at a macro-economic level and serve as an instrument both for the transfer of technology and for financing specific development projects.[2] The connection between investment and development is also

[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, Preamble, First Recital ('Considering the need for international cooperation for economic development, and the role of private international investment therein').

[2] On the economic interrelationships see Giorgio Barba Navaretti and Anthony J Venables, *Multinational Firms in the World Economy* (Princeton UP 2004) 151–85; OECD, *Open Markets Matter – The Benefits of Trade and Market Liberalisation* (OECD 1998) 25–58; Henrik Hansen and John Rand, 'On the Causal Links between FDI and Growth in Developing Countries' (2006) 29 *The World Economy* 21; Abdur Chowdhury and George Mavrotas, 'FDI and Growth: What Causes What?' (2006) 29 *The World Economy* 9.

recognized in a large number of development policy instruments, including the Agenda 21 of the UN Conference on Environment and Development (1992),[3] the Monterrey Consensus and the Johannesburg Plan of Implementation (2002),[4] the Doha Declaration on Financing for Development (2008),[5] and the UN Millennium Development Goals (MDGs).[6]

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[3] UNCED, 'Agenda 21: Programme of Action for Sustainable Development' (14 June 1992) (UN Doc A/Conf.151/6/Rev.1) para 2.23 ('Investment is critical to the ability of developing countries to achieve needed economic growth to improve the welfare of their populations and to meet their basic needs in a sustainable manner, all without deteriorating or depleting the resource base that underpins development. Sustainable development requires increased investment, for which domestic and external financial resources are needed. Foreign private investment and the return of flight capital, which depend on a healthy investment climate, are an important source of financial resources.').

[4] United Nations, 'Monterrey Consensus of the International Conference on Financing for Development' (22 March 2002) (UN Doc A/AC.257/32) para 21 <http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf> accessed 18 May 2014 ('[a] transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitably and with maximum development impact.'). See also United Nations, 'Plan of Implementation of the World Summit on Sustainable Development' (26 August–4 September 2002) (UN Doc A/Conf.199/20) 7 ff.

[5] United Nations, 'Doha Declaration on Financing for Development' (9 December 2008) (UN Doc A/CONF.212/L.1/Rev.1) para 23 ('We recognize that private international capital flows, particularly foreign direct investment, are vital complements to national and international development efforts.'). See also the recent Outcome Document of the 'Third International Conference on Financing for Development: Addis Ababa Action Agenda' (Addis Ababa, 13–16 July 2015) (15 July 2015) (UN Doc A/Conf.227/L.1) para 45 ('We recognize the important contribution that direct investment, including foreign direct investment, can make to sustainable development, particularly when projects are aligned with national and regional sustainable development strategies.'). For further statements, including of the G8, G20, the Organisation for Economic Co-operation and Development (OECD), the World Bank, and UNCTAD, see Markus W Gehring and Andrew Newcombe, 'An Introduction to Sustainable Development in World Investment Law' in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer 2011) 3, 4–5.

[6] See United Nations Development Program, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (2005) <http://www.unmillenniumproject.org/documents/overviewEngLowRes.pdf> accessed 20 May 2014. Similarly, the Rio+20 Conference more recently led to the adoption of the Outcome Document 'The Future We Want' that called for

In fact, one may ask with some justification whether international investment law would exist as a privileged body of law for the promotion and protection of foreign investment unless it was assumed, rightly or wrongly, that investment contributed to development?

Notwithstanding the nexus between investment and development, the literature and jurisprudence on international investment law until recently have largely treated the law of international development in passing.[7] Similarly, models for international investment agreements (IIAs) have only rarely been conceptualized from a development perspective.[8] Notably, the rich debates surrounding the purported 'right to development' are only rarely explored from an investment law perspective. If

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increased investment in sustainable agriculture and rural development, water resources and sanitation services, clean energy technology, sustainable tourism, infrastructure, research and development, and education. See Annex to UNGA Res No 66/288 (11 September 2012) (UN Doc A/Res/66/288) paras 110, 123, 127, 131, 149, 154, 188, 201, 232, 271. The promotion of private investment will also remain an important pillar of the post-2015 development agenda. See Annex 'Transforming Our World: The 2030 Agenda for Sustainable Development' to UNGA Draft Res (12 August 2015) (Un Doc A/69/L.85) paras 20, 67 Goal 1.5.b, Goal 2.5.a, Goal 7.3.a, Goal 10.7.b, Goal 17.5.

[7] For the more recent surge in literature on investment and development see infra n 18. Before 2013, by contrast, there has been relatively little reflection on the relationship between investment and development. But see Andrew P Newcombe, 'Sustainable Development and Investment Treaty Law' (2007) 8 JWIT 357–407; Peter Muchlinski, 'Holistic Approaches to Development and International Investment Law: The Role of International Investment Agreements' in Julio Faundez and Celine Tan (eds), *International Economic Law, Globalization and Developing Countries* (Edward Elgar 2010) 180–204; Cordonier Segger, Gehring and Newcombe (n 5); Diane A Desierto, 'Development as an International Right: Investment in the New Trade-Based IIAs' (2011) 3 *Trade, Law and Development* 296; Olivier De Schutter, Johan Swinnen and Jan Wouters (eds), *Foreign Direct Investment and Human Development – The Law and Economics of International Investment Agreements* (Routledge 2012).

[8] An early exception is the 2005 International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development; see Howard Mann et al, 'IISD Model International Agreement on Investment for Sustainable Development' (April 2005) <https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> accessed 7 April 2015. For more background and further documentation see <https://www.iisd.org/investment/capacity/model.aspx> accessed 7 April 2015. Another development-inspired model IIA was the 2007 Norway Model BIT, available at <http://www.italaw.com/sites/default/files/archive/ita1031.pdf> accessed 7 April 2015 that was shelved in 2009 following largely critical input received during consultations.

investment lawyers have for a long time tended to ignore development discourses, their lack of interest has been reciprocated by development lawyers. Many works on international development law – including in its 'sustainable' variant – pay no more than lip-service to investment protection.[9] This contrasts starkly with world trade, human rights, global finance, etc. – where much discourse exists about the 'streamlining' of international law in light of developmental principles. Yet, all too often, the debate has bypassed international investment law. This is all the more surprising since at least one source of inspiration for the right to development, namely the long-standing controversies surrounding the establishment of a New International Economic Order, was very much investment-focused, if from a decidedly critical vantage point.[10]

More recent initiatives suggest that change is under way. Rather than in terms of ignorance or mistrust, the United Nations Conference on Trade and Development (UNCTAD) recently launched its Investment Policy Framework for Sustainable Development (IPFSD) which views the relationship between investment law and development in a positive light.[11] As its title indicates, it aims to make investment law development-friendly. For that purpose, the framework introduces a toolbox of principles for investment policy-making, guidelines for national investment policies, and options for the design of IIAs, which seek to ensure that investment meets countries' development needs. In UNCTAD's words:

> '*New generation' investment policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment.* This

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[9] See only Marie-Claire Cordonier Segger and Ashfaq Khalfan (eds), *Sustainable Development Law: Principles, Practices, and Prospects* (OUP 2004); Duncan French, *International Law and Policy of Sustainable Development* (Juris Publishing 2005); Marie-Claire Cordonier Segger and Christopher G Weeramantry (eds), *Sustainable Justice – Reconciling Economic, Social and Environmental Law* (Martinus Nijhoff 2005); Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Martinus Nijhoff 2008); Asif Qureshi and Xuan Gao (eds), *International Economic Law: Critical Concepts in Law*, Vol V: 'International Development Law' (Routledge 2011); Isabella D Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Hart 2012). An exception is Krista Nadakavukaren Schefer (ed.), *Poverty and the International Economic System – Duties to the World's Poor* (CUP 2013), which contains several chapters on international investment law and investment arbitration.

[10] See the discussion infra Parts II.B and III.A.

[11] See UNCTAD, *World Investment Report 2012 – Towards a New Generation of Investment Policies* (2012) 97 ff.

> leads to specific investment policy challenges at the national and international levels. At the national level, these include integrating investment policy into development strategy, incorporating sustainable development objectives in investment policy and ensuring investment policy relevance and effectiveness. At the international level, there is a need to strengthen the development dimension of international investment agreements (IIAs), balance the rights and obligations of States and investors, and manage the systemic complexity of the IIA regime.[12]

The Framework marks but the start of a more general agenda of UNCTAD to reform international investment law in order to serve better as an instrument for development.[13] How to achieve this goal is addressed in an ongoing policy process at UNCTAD. Independent of the outcome, the process is based on the premise that investment law and development can be reconciled: they can be friends. UNCTAD is not the only forum where development figures prominently in the debates on the future of international investment policy. Development equally plays an important role, for example, within the OECD,[14] the Association of South-East Asian Nations (ASEAN),[15] the Southern African Development Community (SADC),[16] or the Commonwealth Secretariat.[17] In

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[12] Ibid xii (*emphasis in the original*).

[13] UNCTAD, *World Investment Report 2013 – Global Value Chains: Investment and Trade for Development* (2013) 110 ff; UNCTAD, *World Investment Report 2014 – Towards a New Generation of Investment Policies* (2014) 126 ff; UNCTAD, *World Investment Report 2015 – Reforming International Investment Governance* (2015) 119 ff.

[14] See, e.g., Kathryn Gordon, Joachim Pohl and Marie Bouchard, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' (2014) OECD Working Papers on International Investment, 2014/01 <http://dx.doi.org/10.1787/5jz0xvgx1zlt-en> accessed 7 April 2015.

[15] See the ASEAN Comprehensive Investment Agreement (adopted 26 February 2009, entered into force 29 March 2012) <http://agreement.asean.org/media/download/20140119035519.pdf> accessed 7 April 2015.

[16] See South African Development Community (SADC) Model Bilateral Investment Treaty Template with Commentary (2012) <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> accessed 7 April 2015.

[17] See J Anthony VanDuzer, Penelope Simons and Graham Mayeda, 'Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries' (Commonwealth Secretariat 2012) <https://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf> accessed 7 April 2015.

parallel, there has been a surge in the literature in international investment law that addresses the field's relationship to development.[18]

Not everyone shares an optimistic view on investment and development though. While UNCTAD emphasizes sustainability, inclusiveness, and opportunities for reform, for many the relationship between investment and development is beyond repair. The former is an enemy of the latter: investment law impedes development needs. M. Sornarajah's work contains a particularly prominent version of this critique. It presents the relationship as one of irreconcilable conflict: investment law and development are foes.[19]

In his keynote to the Frankfurt Investment Law Workshop, which is reproduced in this volume, Sornarajah presents a scathing critique of the existing investment treaty system.[20] For him, 'investment treaties are based on lies' because there is no proof that their rationale to contribute to economic development by providing legal stability and independent

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[18] Anne van Aaken and Tobias A Lehmann, 'Sustainable Development and International Investment Law: A Harmonious View from Economics' in Roberto Echandi and Pierre Sauvé (eds), *Prospects of International Investment Law and Policy* (CUP 2013) 317–40; Ilze Dubava, 'The Future of International Investment Protection Law: The Promotion of Sustainable (Economic) Development as a Public Good' in Marise Cremona et al (eds), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* (Kluwer 2013) 389; see further the contributions by Markus W Gehring and Avidan Kent, Wolfgang Alschner and Elisabeth Tuerk, Pierre-Olivier Savoie, Diane A Desierto, Ursula Kriebaum, and Maria Gritsenko in Freya Baetens (ed.), *Investment Law Within International Law: Integrationalist Perspectives* (CUP 2013); the contributions by Lise Johnson and Rahim Moloo, Rahim Moloo and Jenny J Chao, Caroline Henckels, Stephan W Schill, Vid Prislan and Ruben Zandvliet, Mavluda Sattorova and Alessandra Asteriti as part of the 'Symposium on Sustainable Development and International Investment Law: Bridging the Divide' in Andrea K Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2012–2013* (OUP 2014) 265–473; as well as the contributions by Anne-Juliette Bonzon, Anne van Aaken, Laurence Boisson de Chazournes and Brian McGarry, Faraz Rojid and Maria de Carmen Vasquez, Krista Nadakavukaren Schefer, and Tarcisio Gazzini in the Special Issue on 'Special Issue: Towards Better BITs? – Making International Investment Law Responsive to Sustainable Development Objectives' (edited by Andreas R Ziegler) in 15 JWIT 803–963.

[19] See, e.g., Muthucumaraswamy Sornarajah, 'Mutations of Neo-Liberalism in International Investment Law' (2011) 3 *Trade, Law and Development* 203. See further Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015).

[20] Muthucumaraswamy Sornarajah, 'Developing Countries in the Investment Treaty System: A Law for Need or a Law for Greed?', in this volume, 43.

dispute settlement mechanisms holds true.[21] Instead, Sornarajah criticizes deeper structural concerns, noting that investment treaties are asymmetric because they *de facto* limit only the sovereignty of developing countries which are recipients of foreign investment from developed countries. Investment treaties limit host governments' policy space for the protection of public interests, such as environmental concerns or public health, and create potential liabilities of, not chances for, development for developing countries. Instead, Sornarajah opines, '[t]he only economic development the treaties bring are to the arbitrators who interpret these treaties and lawyers of large law firms who represent and argue before the arbitral tribunals.'[22] In consequence, investment treaties' 'true purpose is plunder under the cloak of a law made through the instrumentality of power'[23] that prolongs colonial domination of developing countries through new mechanisms of 'global governance'. Sornarajah therefore proposes 'to put an end to this falsehood that the system created benefits for the development of the poor.'[24]

So are international investment law and development friends or foes? Or perhaps a bit of both? The contributions in this book are organized around these questions. They do not yield one clear answer, but perhaps can help overcome the problems of ignorance and mutual mistrust. They do not tackle the underlying economic question of whether investment treaties in fact attract foreign investment,[25] have an impact on the cost of

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[21] Ibid 44.

[22] Ibid 46.

[23] Ibid 47.

[24] Ibid 46.

[25] There is an increasing amount of studies on this topic, with diverging results. Contrast only Jennifer Tobin and Susan Rose-Ackerman, 'When BITs Have Some Bite' in Catherine A Rogers and Roger P Alford (eds), *The Future of Investment Arbitration* (OUP 2009) 131 (finding a positive correlation between investment agreements and investment flows) with Emma Aisbett, 'Bilateral Investment Treaties and Foreign Direct Investment: Correlation and Causation' in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009) 395 (negating a correlation between investment agreements and investment flows). In more recent refined studies, however, evidence is becoming more robust that there is a positive correlation between investment agreements and the inflow of foreign direct investment. See, for example, Axel Berger et al, 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box' (2012) 10 *Int'l Economics and Economic Policy* 247; Tim Büthe and Helen V Milner, 'Foreign Direct Investment and Institutional Diversity in Trade Agreements: Credibility,

capital by reducing political risk,[26] or are able to have positive influence on macro-economic growth of host States;[27] instead, the focus is on the conceptual relations between international investment law and development. A significant problem in this context is not only that there is a gap between investment and development in the practice of international investment law, but also that the notion of development is itself elusive, or at least multi-faceted. This also makes it more difficult to integrate international investment law and development.

Against this background, the present chapter is intended to set the stage. It starts with an analysis of the multi-faceted and multi-layered notion of 'development' (Part II). It then discusses the gap between international investment law and development within international investment policy and the practice of investment arbitration, and, more recently, in the debate about the 'legitimacy crisis' of international investment law (Part III). This gap, the chapter then suggests, can be overcome through a more comprehensive and integrated vision of the relationship between investment and development and by considering and critically analyzing the conceptual linkages between international investment law and development as done in the chapters of this book (Part IV).

II. THE LEGAL REGIME OF (SUSTAINABLE) DEVELOPMENT

Compared to the international investment regime, the international legal regime of (sustainable) development seems fuzzy. There is no equivalent

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Commitment, and Economic Flows in the Developing World, 1971–2007' (2014) 66 *World Politics* 88 (with further references).

[26] See Srividya Jandhyala and Robert J Weiner, '*Institutions sans frontières*: International Agreements and Foreign Investment' (2014) 45 J Int'l Bus Studies 649.

[27] There appears to be no research that examines the link between IIAs and economic growth directly. It is arguable, however, that this link can be drawn by understanding IIAs as requiring contracting states to implement economic institutions, such as property and contract protection, government according to the rule of law and effective dispute resolution mechanisms, and linking this to the question to which extent institutions contribute to growth and development. See on this link Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 3–6; Stephan W Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan W Schill (ed.), *International Investment Law and Comparative Public Law* (OUP 2010) 151, 177–81 (with further references to literature on institutional economics).

to the relatively homogenous governance structure of large numbers of IIAs.[28] Whereas international investment law has been gradually built, treaty by treaty (or 'BIT by BIT', as is often said),[29] the legal regime of development has evolved in different waves and in a less linear fashion. The contemporary regime draws on, and seeks to integrate, a broad range of overlapping, and partly competing, influences. It is multi-layered, and any attempt to assess its relevance for, and linkages with, contemporary investment law must take account of these various layers.[30] They include rules on development that emerged first on the inter-State level after World War II and during the debates in the 1970s about the emergence of a New International Economic Order (A.), the human rights dimension with the right to development (B.), the concept of sustainable development that emerged in the 1980s (C.) and the debates about development and good governance that started in the 1990s (D.). These multiple layers of international development law contribute to the lack of conceptual clarity when assessing the relationship between international investment law and development.

A. 'Development Age' and 'New International Economic Order'

In the discourse on development, President Truman's 1949 inaugural address is widely seen as a starting point. In its famous Point Four, the US President proposed to 'embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas.'[31] In its emphasis on creating conditions conducive to economic and social progress, this was not entirely new: it notably took up ideas that had been articulated in

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[28] Schill, *Multilateralization* (n 27).

[29] See Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *The International Lawyer* 655.

[30] For a fuller analysis see Gilbert Rist, *The History of Development: From Western Origins to Global Faith* (4th edn, Zed Books 2014); Philipp Dann, *The Law of Development Cooperation* (CUP 2013), especially Part I (35–154); Philipp Dann, Stefan Kadelbach and Markus Kaltenborn (eds), *Entwicklung und Recht. Eine systematische Einführung* (Nomos 2014).

[31] Harry S Truman, 'Inaugural Address' (20 January 1949), reproduced in *Department of State Bulletin*, 30 January 1949, 123; also available at <http://www.presidency.ucsb.edu/ws/?pid=13282> accessed 7 April 2015. Rist (n 30) 70–71 provides context.

the 1944 Declaration Concerning the Aims and Purposes of the International Labour Organization (the Declaration of Philadelphia),[32] but added a particular idealist twist.

Point Four not only marked the beginning of a new presidency, but also, as Gilbert Rist notes, 'inaugurated the "development age"'[33] during which specialized institutions and programs devoted to development policy were to be established at the national and international levels. It was a peculiar beginning though: one based on modernization theory that aimed to create, in 'underdeveloped areas', conditions for the 'faithful re-creation of the successful economic and social development of modern Western societies.'[34] In line with the scientific focus of the project, law was primarily seen as an instrument, a tool of and for modernization. This implied the export of Western (domestic) legal concepts as part of a 'law and development' agenda.[35]

While the institutions of the 'development age' were being set up, the modernization theory underlying President Truman's Point Four came under fire during the process of decolonization.[36] The poor economic circumstances besetting many of the newly independent countries were no longer explained as an 'absence of modernity', but as a result of structural inequalities in the international economic system.[37] This added a new, more critical dimension to what was now being referred to as the

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[32] 15 UNTS 35. For a recent (benevolent) re-evaluation see Alain Supiot, *L'esprit de Philadelphie* (Seuil 2010).

[33] Rist (n 30) 71.

[34] Dann (n 30) 58.

[35] See, e.g., David M Trubek, 'Towards a Social Theory of Law' (1972) 82 Yale LJ 1; and the overview in Elliot M Burg, 'Law and Development. A Review of the Literature and a Critique of "Scholars in Estrangement"' (1977) 25 AJCL 492.

[36] See Brun-Otto Bryde, *The Politics and Sociology of African Legal Development* (Metzner 1976); David M Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies' [1974] Wisc LR 1062.

[37] See Francis G Snyder, 'Law and Development in the Light of Dependency Theory' (1980) 14 *Law & Society* 723. As Ahmed Mahiou, 'Development, International Law of' in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of International Law* (OUP 2015) <http://opil.ouplaw.com/home/EPIL> accessed 2 April 2015 succinctly notes, it would be necessary to overcome 'the unbalanced structure of international economic relations and the relationships of domination established to the advantage of certain States. In order to break the vicious cycle of underdevelopment, these relations of dependence and domination preventing the countries of the South from pursuing a coherent strategy of development must first be addressed' (ibid para 3).

'law of development' or 'international development law':[38] 'international development law [would] challeng[e] classic [international] law to work towards the reduction of inequalities and the realization of a new order.'[39] It had become a 'committed branch of law.'[40]

Nowhere was this more clearly felt than in the heated debates about a New International Economic Order (NIEO). Drawing on the relatively scarce UN Charter references to 'economic and social progress and development,'[41] a series of UN resolutions adopted during the 1970s – among them the Declaration on a New International Economic Order[42] and the Charter of Economic Rights and Duties of States[43] – sought to formulate firmer rules requiring industralized States to provide 'active support for the industrialization of developing countries, more equal global trade relations, and the general goal of international social justice and the harmonization of living standards.'[44] This differed markedly from President Truman's idea of industrialized nations benevolently (and of their free will) making 'the benefits of [their] scientific advances and industrial progress available for the improvement and growth of underdeveloped areas.'[45] Yet while the diagnosis was radically different, the cure prescribed remained rather similar: development remained a question of

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[38] For doctrinal expositions see notably Michel Virally, 'Vers un droit international du développement' (1965) XI AFDI 3; Georges Abi-Saab, 'The Independent States and the Rules of International Law: An Outline' (1962) 8 Howard LJ 95; Oscar Schachter, 'The Evolving International Law of Development' (1976) 15 Colum JTL 1; Mohammed Bedjaoui, *Pour un nouvel ordre économique international* (UNESCO 1979); Michel Virally, 'Où en est le droit international du développement' (1975) 20 *Revue juridique et politique: Indépendance et coopération* 279.

[39] Mahiou (n 37) para 9.

[40] Ibid.

[41] Article 55(a) UN Charter.

[42] Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (S-VI) (1 May 1974) (UN Doc A/RES/S-6/3201); and further Programme of Action on the Establishment of a New International Economic Order, UNGA Res 3202 (S-VI) (1 May 1974) (UN Doc A/RES/S-6/3202).

[43] Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974) (UN Doc A/RES/29/3281).

[44] Dann (n 30) 64. For further comment see, e.g., SK Chatterjee, 'The Charter of Economic Rights and Duties of States: An Evaluation after 15 Years' (1991) 40 ICLQ 669; Gillian M White, 'The New International Economic Order: Principles and Trends' in Hazel Fox (ed.), *International Economic Law and the Developing States*: *An Introduction* (BIICL 1992) 25; DHN Johnson, 'The New International Economic Order' (1983) 37 *The Yearbook of World Affairs* 204.

[45] Cf Truman (n 31).

economic growth.[46] To incentivize economic growth, independence of developing countries from developed countries and self-determination in order to allow countries to set their own development objectives and strategies, rather than an international governance framework for development, was propagated.

During the 1970s, a number of reforms were initiated with a view to implementing the NIEO agenda.[47] GATT contracting parties agreed to a preferential treatment for developing countries; international funds were set up to regulate and stabilize the price of commodities; and various UN agencies engaged in attempts to formulate codes of conduct for transnational corporations. Yet many of the more concrete proposals at the heart of the NIEO agenda – binding provisions on technology transfer; a lessening of expropriation standards;[48] a right to receive development assistance, etc. – met with resistance.[49] And when (as Sacerdoti notes) '[b]y the end of the 1970s, new economic policies and a new assertiveness in international affairs emerged among industrialized nations', such as Great Britain and the United States, hopes for an international consensus faded; and the 'unity of the NIEO project' gave rise to separate regimes governing trade and investment, on the one hand (in which market sector principles prevailed), and a specialized regime of international cooperation for development, on the other.[50]

While the NIEO project lost steam and gave way to a neoliberal agenda limiting the role of the State as an economic actor,[51] three further strands of the multi-layered 'development agenda' came to assume normative relevance: human rights, sustainable development, and good

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[46] Philipp Dann, 'Ideengeschichte von Recht und Entwicklung' in Dann, Kadelbach and Kaltenborn (n 30) 24.

[47] For a helpful summary see Giorgio Sacerdoti, 'New International Economic Order (NIEO)' in Wolfrum (n 37) paras 21–4.

[48] See notably Article 2(2)(c) of the Charter of Economic Rights and Duties of States, which recognized the right of States to 'nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.'

[49] For example, the Charter's recognition of a right to nationalize property (see last footnote) was rejected by sixteen capital-exporting States. In the award in the *Texaco case,* Arbitrator Dupuy held the provision *not* to reflect general international law: see *Texaco Overseas Petroleum Co & California Asiatic Oil Co v The Government of the Libyan Arab Republic*, 53 ILR 389, 489 ff.

[50] Sacerdoti (n 47) paras 26–7 (quote at para 25).

[51] The process is summarized by Dann (n 46) 26–8.

governance. They continue to shape the contemporary regime of development and, existing side by side, account for its multiple layers.

B. Adding a Human Rights Dimension: The Right to Development

The move towards a 'right to development' is the first of the contemporary layers.[52] The right can be seen as an attempt to blend demands for a just world economic order and for self-determination with human rights discourses. The link between human rights and economic and social conditions had long been recognized – notably in the ILO's Declaration of Philadelphia, but also in Article 28 of the Universal Declaration of Human Rights, which recognized the need to establish 'a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.'[53] Two decades later, the concluding document of the Teheran Human Rights Conference of 1968 found '[t]he widening gap between the economically developed and developing countries' to be an impediment to 'the realization of human rights in the international community' and considered 'lasting progress in the implementation of human rights [to be] dependent upon sound and effective national and international policies of economic and social development.'[54]

In retrospect, it seems almost natural that once human rights discourses had trickled down, they would gradually begin to shape debates about development. A 'human rights-based approach' would measure development not only in terms of economic growth, but place emphasis on the growth of individual liberties.[55] This broader understanding of development emphasized the role of the individual as the beneficiary of

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[52] For recent assessments and many further references see Bunn (n 9); Felix Kirchmeier, 'The Right to Development – Where Do We Stand? State of the Debate on the Right to Development' Occasional Papers No 23 (Friedrich-Ebert-Stiftung 2006); Alhagi Marong, 'Development, Right to, International Protection' in Wolfrum (n 37). See also Diane A Desierto, 'The International Mandate for Development: Building Compliant Investment within the State's Development Decision-Making Processes', in this volume, 333.

[53] Universal Declaration on Human Rights, UNGA Res 217 A (III) (10 December 1948) (UN Doc A/RES/3/217A).

[54] See Articles 12 and 13 of the Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran (1968) (UN Doc A/CONF.32/41) 3.

[55] That engagement was a gradual process, as perceptively noted by Philip Alston, 'Revitalising United Nations Work on Human Rights and Development' (1991) 18 MULR 216.

development policies; and it placed development discourses squarely into a framework of individual rights: the 'law of development' was complemented by a 'right to development'.[56] The 1986 General Assembly Declaration on the Right to Development, adopted by an overwhelming majority of 146:1 votes (8 abstaining), completed that process on the universal level.[57] Since 1986, the right to development is regularly counted among the widely-recognized solidarity (or 'third generation') rights.[58]

Yet, notwithstanding its formal recognition, the substance of the right has remained hazy. According to the 1986 Declaration, the right combines individual and collective aspects, entitling 'every human person and all peoples … to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.'[59] Since 1986, various UN institutions – among them the Office of the High Commissioner for Human Rights, a dedicated Working Group on the right to development and the United Nations Development Program – have sought to operationalize the right.[60] Since 2000, this process has been increasingly integrated into the wider attempt to formulate and implement the MDGs.[61]

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[56] The argument is typically traced back to Kéba M'Baye, 'Le droit au developpement comme un droit de l'homme' (1972) 5 *Revue des droits de l'homme* 505.

[57] For an earlier recognition at the regional level see African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 22. That provision however focuses on the collective dimension of the right to development, which is viewed as a right of peoples.

[58] See, e.g., 'Vienna Declaration and Programme of Action' World Conference on Human Rights in Vienna (25 June 1993) (UN Doc A/Conf.157/24) Part I, section III (Article I.10): right to development an 'integral part of fundamental human rights'. For many further details see Bunn (n 9) 46–52.

[59] Declaration on the Right to Development, UNGA Res 41/128 (4 December 1986) (UN Doc A/RES/41/128) art 1(1).

[60] For a comprehensive account see the High Commissioner's *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (OHCHR 2010).

[61] See United Nations Millennium Declaration, UNGA Res 55/2 (18 September 2000) (UN Doc A/RES/55/2) and the comprehensive documentation at <http://www.un.org/millenniumgoals> accessed 1 April 2015. Para 11 of the Millennium Declaration reflects the centrality of the right to development; it runs as follows: 'We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.' In line with this, the

In the quest for operationalization, the right to development seems to be gradually transformed into a benchmark against which national and international policies across a range of sectors are being evaluated. For example, in its work towards the implementation of the eighth MDG ('to develop a global partnership for development'), a High-Level Task Force on the Right to Development, established in 2004,[62] identified a large number of criteria and indicators to assess the policies in three core areas: development policy, participatory human rights processes, and social justice in development.[63] Nearly three decades after the adoption of the 1986 Declaration on the Right to Development, this much more fine-grained approach indeed seems promising; yet at the same time, it suggests that the right to development is now seen as a framework of analysis for assessing policies towards development, not as a free-standing enforceable right.

C. Integrating Ecological Concerns: Sustainable Development

In parallel to debates about a 'right to development', global public concern for environmental protection resulted in yet another strand of development discourses, which perhaps today is the most prominent: the demand that development be sustainable. Following the widely quoted definition of the Brundtland Report, sustainable development is understood not only as economic development (and can neither fully be captured by individual rights discourses); instead it needs to be understood as 'development that meets the needs of the present without compromising the ability of future generations to meet their own

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eighth millennium development goal (MDG 8) is to 'develop a global partnership for development'. For brief comment see Bunn (n 9) 169–71. The 'integration' of development discourses into the MDG process is not uncontroversial. According to Rist (n 30), the 'division of "development" into a set of discrete goals actually paralyses thought and stands in the way of their systemic linkage' (ibid 235); in his poignant words, the MDG process leads to 'development in shreds' (ibid 233).

[62] See UNCHR, Res 2004/7 (13 April 2004) (UN Doc E/CN.4/RES/2004/7). Detailed information about the work of High Level Task Force is available at <http://www.ohchr.org/EN/Issues/Development/Pages/HighLevelTaskForce.aspx> accessed 1 April 2015.

[63] See HRC, 'Consolidation of Findings of the High-level Task Force on the Implementation of the Right to Development' (25 March 2010) (UN Doc A/HRC/15/WG.2/TF/2/Add.1).

needs.'[64] Sustainable development therefore encompasses economic growth, environmental protection, and social development in an intra-generational perspective.[65]

While the 1986 Declaration on the Right to Development had not mentioned the environment, most of the major documents adopted subsequently recognize it as a key public policy goal. The 1992 Rio Declaration on Environment and Development emphasizes the link between environmental protection and economic development: 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.'[66]

As with the right to development, sustainable development needs to be operationalized; it is 'not an action-oriented rule but rather a principle that guides States in their decision-making.'[67] Yet, compared to the right to development, that operationalization seems rather well under way. As Virginie Barral notes, quite apart from the debate about its customary status, references to sustainable development have been included in approximately 300 international treaties.[68] References to that notion have served to legitimize dynamic readings of treaty provisions in light of environmental concerns.[69] And depending on the wording of a particular clause, these treaties either require States in some general manner to

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[64] World Commission on Environment and Development, *Our Common Future* (OUP 1987) 43.

[65] On the notion of sustainable development, its emergence and legal nature see, e.g., Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 EJIL 377; Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, Aldershot 2008); Ulrich Beyerlin, 'Sustainable Development' in Wolfrum (n 37); Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Brill 2008); International Law Association, 'New Delhi Declaration of Principles of International Law Relating to Sustainable Development' (2002) 49(2) NILR 299.

[66] United Nations Conference on Environment and Development, Rio Declaration on Environment and Development (12 August 1992) (UN Doc A/CONF.151/26) Principle 4.

[67] Beyerlin (n 65) para 17.

[68] Barral (n 65) 384.

[69] The *Shrimp Turtle* case is a prominent example; in it, the WTO Appellate Body drew on (amongst other things) the reference to sustainable development in the preamble to the WTO Agreement to justify its evolutive interpretation of Article XX(g) GATT: see WTO, *United States – Import Prohibition of certain Shrimp and Shrimp Products*, Report of the Appellate Body (12 October 1998) WT/DS58/AV/R, para 127.

integrate environmental considerations into economic development projects, or specify the measures that will need to be adopted in fulfilment of their obligations.

D. Back to the State? Development and Good Governance

Finally, alongside human rights-based and ecologically informed approaches, the contemporary understanding of development is informed by concerns for governance structures. According to this approach, successful development depends on functioning political and economic structures in the recipient countries. In line with this, national and international agencies, from the 1990s onwards, began to tie development to rule of law standards and institutional reform.[70]

Compared to the neoliberal agenda of the Washington Consensus, this resulted in a re-evaluation of the State: market forces no doubt remained crucial, but themselves depended on functioning structures, which development policies would need to bolster.[71] As Philipp Dann notes perceptively, while the agendas differed, this in some ways meant a return to the roots: 'Law reform in developing countries, the hallmark of the law and development movement [of the 1950s and 1960s], was rediscovered by development agencies in the 1990s.'[72] This adds a further normative layer

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[70] For early initiatives see the World Bank's report on *Sub-Saharan Africa: From Crisis to Sustainable Growth* (World Bank 1989) and on *Governance and Development* (World Bank 1992). See further Beate Rudolf, 'Is Good Governance a Norm of International Law?' in Pierre-Marie Dupuy et al (eds), *Völkerrecht als Wertordnung. Festschrift Christian Tomuschat* (Engel 2006) 1007; Jan Kooiman, *Governing as Governance* (Sage 2003); Matthias Koetter, 'Good Governance' in Dann, Kadelbach and Kaltenborn (n 30) 553; and the contributions to Perry Kessaris (ed.), *Law in the Pursuit of Development Principles into Practice?* (Routledge 2009).

[71] See Stefan Oeter, 'Fragile Staatlichkeit und Entwicklung' in Dann, Kadelbach and Kaltenborn (n 30) 471. As Anne-Marie Slaughter and William Burke White, 'The Future of International Law is Domestic (or, The European Way of Law)' (2006) 47 Harvard ILJ 327 have argued convincingly, this new focus on governance and functioning State structures seems a general feature of contemporary international law.

[72] Dann (n 30) 7. Unsurprisingly, the move towards governance discourses has met with resistance: for an influential critique see, e.g., Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 245–72.

to the notion of development: functioning normative structures in recipient countries were now considered a prerequisite of development. As Stefan Kadelbach notes, 'law has become part of the notion of development.'[73]

E. Interim Conclusion

As this brief summary highlights, the concept of development has itself been in a state of almost permanent development. On its journey from 'western origins to global faith'[74] the notion of development has acquired many meanings. Debates about its human rights, ecological and governance dimensions highlight the openness of the concept, which can be imbued with different layers of normativity. The result is an extremely heterogeneous normative concept that operates in conjunction with other rules and principles of international law. In order to be effective, developmental imperatives or demands need to make themselves felt in other legal regimes. For present purposes, the relevant other legal regime is that of international investment law. To be successful, it is thus crucial that the idea and notion of development is enculturated in that legal regime. This is not always without problems. Indeed, as the subsequent section discusses, there is a considerable gap between international investment law and the notion of development and developmental principles.

III. THE INVESTMENT/DEVELOPMENT GAP IN INTERNATIONAL INVESTMENT LAW

Despite the widespread view among economists and many international organizations that investment is instrumental for development, there has long existed a significant gap between the discourse on international investment law and that on development. This is not only true in respect of the literature on the concept of development, the right to development, and the concept of sustainable development, but also in the practice of international investment law. This gap can be seen when considering the evolution of investment law in the struggle between capital-exporting and capital-importing countries (A.), the way development is viewed within investment arbitration (B.), and the ongoing debate about the 'legitimacy

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[73] Stefan Kadelbach, 'Entwicklung als normatives Konzept' in Dann, Kadelbach and Kaltenborn (n 30) 57 ('Recht wird … Teil des Entwicklungsbegriffs').

[74] See the sub-title of Rist's influential account (n 30).

crisis' of international investment law (C.). Yet, there are also some glimpses of a more positive attitude towards development concerns within international investment law and investor-State dispute settlement as investment law contains gateways for development concerns to seep in (D.).

A. The Evolution of International Investment Law

The evolution of international investment law is characterized by a clash of interests between capital-exporting and capital-importing countries, which is often equated with the clash between investment protection and development. In fact, the international law of foreign investment has evolved mainly as a law of investment (or investor) protection against the background of conflicts of interests of investors from capital-exporting States and those of capital-importing host countries.[75]

Following a period of gunboat diplomacy by capital-exporting states during the 19th and early 20th centuries,[76] the roots of modern investment law stretch back to the struggle over the content of customary international law on the protection of aliens in the wake of the Soviet and Mexican revolutions after the end of World War I.[77] While capital-importing countries argued against an independent standard for the protection of foreign investments under international law, supporting instead protection exclusively by national law in national courts, European powers and the United States argued for an independent system of protection under international law. These capital-exporting countries not only advocated for an independent system of protection that would provide for prompt, adequate, and effective compensation for expropriation under the Hull formula but also supported the existence of a minimum standard of treatment in customary international law.[78]

After World War II, capital-exporting countries continued to make efforts to garner support for a multilateral investment treaty. Such efforts

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[75] For a comprehensive take on the history of investment law see Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties* (Kluwer 2009) 1–73.

[76] See O Thomas Johnson and Jonathan Gimblett, 'From Gunboats to BITs: The Evolution of Modern International Investment Law' in Karl P Sauvant (ed.), *Yearbook on International Investment Law & Policy 2010–2011* (OUP 2012) 649.

[77] On this see also Rudolf Dolzer, *Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht* (Springer 1985) 13 ff.

[78] Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 December 1962) (UN Doc A/RES/1803(XVII)). The resolution constituted a compromise in this context.

failed, however, due to the conflicting interests of developed and developing countries,[79] preventing the establishment of the International Trade Organization in the late 1940s,[80] as well as the OECD Convention on the Protection of Foreign Property of 1967.[81] In both cases, the lack of a consensus on the appropriate scope of protection of property under international law was decisive. The ICSID Convention was the only example of a successful multilateral instrument on international investment law. Yet, following the maxim 'procedure before substance',[82] it does not contain provisions on substantive investment protection, but only provides for procedural rules for the settlement of disputes through arbitration.

Instead, in the 1970s, as already alluded to above, developing and socialist countries mobilized against an independent customary international law standard of protection of foreign investment, in particular through UN General Assembly Resolution 3201 of 5 May 1974 ('Declaration on the Establishment of a New International Economic Order')[83] and UN General Assembly Resolution 3281 of 12 December 1974 ('Charter of Economic Rights and Duties of States').[84] In parallel, and foreshadowing modern debates about corporate social responsibility,[85] attempts were made within the United Nations Centre on Transnational Corporations (UNCTC) to impose duties on multinational corporations through a code of conduct, including the duty to respect human rights.[86] Through these approaches, developing and socialist countries emphasized

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[79] On the development after 1945 see Schill, *Multilateralization* (n 27) 31–6.

[80] On this see William Diebold, 'The End of the ITO' (1952) 16 *Essays on International Finance* 81.

[81] Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention, 7 ILM 117 (1968).

[82] See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 9.

[83] See *Declaration on the Establishment of a New International Economic Order* (n 42).

[84] See *Charter of Economic Rights and Duties of States* (n 43).

[85] On this see Peter Muchlinski, 'Corporate Social Responsibility' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 637, 638.

[86] See 'Draft United Nations Code of Conduct on Transnational Corporations (1985)' in UNCTAD, *International Investment Instruments: A Compendium*, Vol I – Multilateral Instruments (United Nations 1996) 161 ff; see comprehensively Carsten-Thomas Ebenroth and Joachim Karl, *Code of Conduct – Ansätze zur vertraglichen Gestaltung internationaler Investitionen* (Universitätsverlag Konstanz 1987); Karl P Sauvant, 'The Negotiations of the United

their interest in development and countered the demands of capital-exporting countries for investment liberalization and protection. Although their attempts did not prevail at the time, the position of developing countries caused an intensive debate about the scope of the protection of property under customary international law.[87]

However, despite the rejection of a customary standard of investment protection, developing countries soon felt the need to attract foreign investment in order to meet their own economic development goals (especially given their limited financial resources and the lack of technology for more sophisticated economic activity). This need was further exacerbated by the debt crisis in the 1980s and the limited availability of official development assistance. Such events ultimately led to the rise of bilateral investment treaties (BITs), in particular after the end of the Cold War, when the adoption of a market economy promised more economic growth and development than alternative models.[88] Although BITs are now a truly global phenomenon (being regularly concluded between typical capital-exporting and capital-importing countries as well as between developed and among developing countries), the evolution of this area of law in North-South struggles explains, at least historically, the gap between the investment and development discourses.

B. Development Discourse in Investment Arbitration

The gap can also be seen in the limited number of instances where investment law and development have come into contact in dispute settlement practice under investment treaties. The notion of development, or considerations relating to it, play a role in only three areas: in respect of the definition of what constitutes an investment, regarding the question of whether the host State's level of development influences the substantive standards of protection, and as regards the object and purpose of international investment law. Tellingly, investment protection and development are often understood from the perspective of conflicting interests and objectives. Development, in other words, is regularly used as an argument to limit the protection of foreign investments, and hence as antagonistic to investment.

First, there is significant debate in investment arbitration with regard to the importance of development for the definition of investment in Article

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Nations Code of Conduct on Transnational Corporations: Experiences and Lessons Learned' (2015) 16 JWIT 11.

87 Dolzer (n 77) 35 ff.

88 On the development of BITs see Schill, *Multilateralization* (n 27) 40–44.

25(1) ICSID Convention.[89] Following the decision in *Salini v. Morocco*,[90] which developed the so-called *Salini* test,[91] arbitral tribunals debate whether the requirement of a contribution to the host country's economic development should be a constitutive element of the definition of investment.[92] The main argument to justify the inclusion of such a requirement is the object and purpose of the ICSID Convention, as set out in its Preamble.[93] However, it is doubtful whether, on these grounds, the existence of an investment can be made dependent on whether an identifiable economic activity contributes to the development of the host country. Legal certainty is endangered if it is unclear at the time the investment is established if it contributes to the development of the host

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[89] See Devashish Krishan, 'A Notion of ICSID Investment' in Todd J Weiler (ed.), *Investment Treaty Arbitration and International Law* (Huntington 2008) 61; Julian D Mortenson, 'The Meaning of "Investment", ICSID's Travaux and the Domain of International Investment Law' (2010) 51 Harvard ILJ 257; Nitish Monebhurrun, 'The Political Use of the Economic Development Criterion in Defining Investments in International Investment Arbitration' (2012) 29 J Int'l Arb 567; see further Diane A Desierto, 'Deciding International Investment Agreement Appicability: The Development Argument in Investment' in Baetens (n 18) 240, 243–8.

[90] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001).

[91] See, e.g., *Biwater Gauff Ltd v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008) para 319 (with reference to *Salini* (n 90)); cf also Christoph H Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention – A Commentary* (CUP 2009) Art. 25 para 153. Under this jurisprudence the characteristics of an investment are: (1) a monetary contribution to a project by the investor; (2) a certain duration of the economic activity at stake; (3) the investor's intention to make profit; (4) the assumption of risk; and (5) a contribution of the investment to the economic development of the host country.

[92] Comprehensively on the relevant arbitral jurisprudence see Mortenson (n 89) 268-80. See in particular the decisions in *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No ARB/05/10, Award on Jurisdiction (17 May 2007) paras 123 ff; *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No ARB/05/10, Decision on the Application for Annulment (16 April 2009) paras 56 ff and ibid, Dissenting Opinion of Judge Mohamed Shahabuddeen paras 14 ff (where the majority of the Annulment Committee supported that contribution to development did not form part of the definition of investment, while the sole arbitrator as well as the dissenting Committee member supported that contribution to host State development was a necessary criterion).

[93] See supra n 1; drawing on the Preamble, e.g., *Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award (9 February 2004) paras 28–9.

country and whether its activity is consequently an investment in the meaning of the ICSID Convention. This uncertainty would also negatively affect investments that are conducive to economic development and hence desirable from the host country's perspective. Moreover, the host State always remains free to regulate and block the admission of undesired investments[94] and to regulate investor conduct under domestic law, including by establishing obligations not to harm the environment or to respect interests of the local population. All of this makes it doubtful whether introducing the contribution to economic development as a criterion for the very protection of an investment is actually conducive to development interests.[95]

Second, development also plays a role in whether the host country's level of development has an impact on the interpretation of substantive protection standards. This may come up, for example, when considering whether the interpretation of fair and equitable treatment is different depending on whether the host State is a developed or a developing country.[96] While some tribunals explicitly take into account the level of

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[94] Note however that some treaties do impose pre-establishment obligations and market access requirements, and some also restrict performance requirements that can be used by host States in order to obtain development benefits from an investment. Admittedly, with these treaties, host States do not remain completely free to regulate the admission of foreign investments; yet these obligations are also not absolute and it remains an open question, which is hardly addressed in the literature, whether admission requirements have negative effects on sustainable development. In any event, even market-access obligations do not do away with the ability of States to regulate investor conduct in the public interest as discussed below.

[95] Similarly, but with partly differing argumentation, see Mortenson (n 89) 280 ff. For more recent decisions rejecting that the protection of an investment should depend on its contribution to the host State's development, see, e.g., *SGS Société Générale de Surveillance SA v The Republic of Paraguay*, ICSID Case No ARB/07/29, Award (10 February 2012) paras 106–108; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Decision on Jurisdiction (27 September 2012) paras 218–25 (with further references to arbitral jurisprudence); *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2, Award (31 October 2012) para 295; *Electrabel SA v Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 5.43; *KT Asia Investment Group BV v Kazakhstan*, ICSID Case No ARB/09/8, Award (17 October 2013) paras 171–3.

[96] See comprehensively and with reference to further arbitral cases Nick Gallus, 'The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection' (2005) 6 JWIT 711–29; Ursula

development in order to negate a violation of investors' rights,[97] other tribunals refuse to do so when interpreting substantive standards.[98] Despite a lack of consensus on this issue among arbitral tribunals, the debate illustrates that the development perspective of international investment law is, albeit in a rudimentary manner, reflected in investment arbitration and that the stability of investment protection and the expectations of foreign investors need to be considered relative to the state of development of the host country.

Finally, development-related considerations play a role in arbitral jurisprudence when considering the object and purpose of the ICSID Convention and international investment treaties more generally. Even though arbitral tribunals perceive the protection of foreign investment as the main purpose of these treaties, they also take into account broader overarching concerns of development. Most famously, the tribunal in *Amco v. Indonesia* stated that 'the [ICSID] Convention is aimed to protect, to the same extent and with the same vigour the investor and the host country, not forgetting that to protect investments is to protect the general interest of development and of developing countries.'[99] Furthermore, development as the object and purpose of IIAs also often informs

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Kriebaum, 'The Relevance of Economic and Political Conditions for Protection under Investment Treaties' (2011) 10 LPICT 383; Maria Gritsenko, 'Relevance of the Host State's Development Status in Investment Treaty Arbitration' in Baetens (n 18) 341; Ursula Kriebaum, 'Are Investment Treaty Standards Flexible Enough to Meet the Needs of Developing Countries?' in Baetens (n 18) 330.

[97] For example, the tribunal in *Alex Genin v Estonia* argued that the irregular cancellation of a banking license in the 1990s did not constitute a violation of the fair and equitable treatment standard because the investor knowingly accepted that Estonia was in transition from socialist planning to a market economy. See *Alex Genin Eastern Credit Limited, Inc and AS Baltoil v Estonia*, ICSID Case No ARB/99/2, Final Award (25 June 2001) paras 348 ff. Similarly, *Pantechniki SA Contractors & Engineers v Republic of Albania*, ICSID Case No ARB/07/21, Award (30 July 2009) paras 76–82 (finding that the host country's level of development, namely the environment of desolation and lawlessness at the time of the establishment of the investment needed to be taken into consideration when applying the substantive investment treaty standards); see also *White Industries Australia Limited v Republic of India,* UNCITRAL, Final Award (30 November 2011) paras 10.3.15, 10.4.18 (arguing in favor of taking the development level into consideration).

[98] In this sense, e.g., *Gami Investments, Inc v United Mexican States*, UNCITRAL, Final Award (15 November 2004) para 94.

[99] *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction (25 September 1983) para 23.

the interpretation of investment treaties more generally. For instance, in the context of the protection of legitimate expectations as part of fair and equitable treatment, the tribunal in *Lemire v. Ukraine*, having recourse to the preamble of the applicable BIT, stated that the purpose of the treaty was not the protection of foreign investment per se; instead, the protection pursued a farther-reaching objective, namely to help the development of the host country.[100]

Even if the references to development mentioned above are not the general rule in arbitral jurisprudence, they nevertheless illustrate an awareness that international investment law is related to, and relevant for, development. Nonetheless, a broader discourse on the relationship between investment protection and development is missing within arbitration practice. This is certainly not least due to the fact that the majority of counsel and arbitrators have a background in international commercial arbitration and practice investment law as a sub-discipline of international arbitration without necessarily having in-depth awareness of its development implications.[101] This contributes to isolating the discourse within investment arbitration from the underlying development objectives of international investment law and the broader discourse and scholarship on the international law of development.

C. The 'Legitimacy Crisis' of International Investment Law

Finally, the gap between investment and development also reflects in the debates about the legitimacy crisis of international investment law.[102] This debate focuses on the democratic accountability of arbitrators, the extent to which their interpretations of investment treaties restrict the right to regulate in the public interest, and the institution of investor-State dispute settlement.[103] Symptoms of this crisis can be seen in the recent

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[100] *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) paras 272–3.

[101] On this see Stephan W Schill, 'International Investment Law and Comparative Public Law: An Introduction' in Schill, *Comparative Public Law* (n 27) 3.

[102] See Charles N Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chicago JIL 471, 473 (with further references).

[103] On this and on the following, see Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 152 ff; see also David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (CUP 2008) (specifically on the threat of investment law to democracy); Kyla Tienhaara, *The Expropriation of Environmental Governance* (CUP 2009).

withdrawal of some States from BITs and the ICSID Convention[104] and in the efforts of many countries to recalibrate their investment treaty obligations and restrict investment treaty arbitration.[105]

This criticism of investment law can also be read as relating to development concerns. In essence, some critics have argued that investment protection is becoming an obstacle to the development objectives of host countries and sustainable development more generally. As such, the many vague legal terms used in BITs raise concerns that arbitral tribunals may interpret the treaties to curtail state measures aimed at the protection of the environment, human rights, labor and social standards, or taken in reaction to financial crises, for the benefit of the protection of investors, without sufficiently considering the public interests involved. This can be seen as affecting (sustainable) development, as this concept is understood as encompassing the right of States to further social development as well as the protection of the environment or human rights. International investment law's 'legitimacy crisis' therefore shows how acute the gap vis-à-vis the notion of development and developmental principles has become.

It is not least for this reason that Sornarajah argues, as was alluded to above, that international investment law and investment treaty arbitration are so flawed that bridging the gap is not only practically difficult, but structurally impossible because the system as such is fundamentally flawed and detrimental to the development of developing countries. For him,

> the episode of investment treaty arbitration, which began with *AAPL v. Sri Lanka* in 1990, brought out the worst tendencies in international law and in international lawyers. The neoliberal age sought to use international law instrumentally in order to advance the precepts of its own market-driven agenda. It sought to construct a law that was conducive to liberal flows of foreign investment. The ethos for it was created by international financial institutions – the International Monetary Fund and the World Bank – which saw in instruments like BITs the means of purveying the tenets of neoliberalism. They encouraged these treaties. … These premises were acted upon by arbitrators who enhanced the scope of the law that was contained in

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On the criticism of investment law see also José E Alvarez, 'The Public International Law Regime Governing Foreign Investment' (2009) 344 RdC 193, 246 ff.

[104] For example, Bolivia, Ecuador and Venezuela have denounced the ICSID Convention in 2007, 2009 and 2012, respectively.

[105] See José E Alvarez, 'Why Are We "Re-calibrating" Our Investment Treaties?' (2010) 4 *World Arbitration & Mediation Review* 143 (2010).

> the treaties … This was an age in which international law served the interests of greed. The sooner that situation is ended, the better for the credibility of international law. … It is time that international law is redirected to serve man's need rather than his greed.[106]

Sornarajah therefore offers a view of international investment law and development as two irreconcilable antagonists. Accordingly, the gap between them cannot be bridged because of the power structures between developed and developing countries in the making of international investment law, because of the one-sided content of the rules that benefit investors to the detriment of competing public concerns, and because of the biases of those who apply them.

D. Existing Gateways for Development Concerns

The investment/development gap notwithstanding, various attempts exist to make international investment law more receptive to development concerns. Changes in treaty-making are one such attempt. They focus, above all, on institutional changes to investor-State arbitration, ranging from a return to State-to-State arbitration,[107] via introducing a common appeals body in order to review investment treaty awards,[108] to establishing a permanent international investment court.[109] However they also involve development-focused reforms, including the inclusion of preambles in investment treaties that make reference to development, the recalibration of substantive investment treaty standards, and the inclusion of exception clauses in order to grant host States sufficient policy space to pursue their development strategies.

Another gateway through which development concerns can enter international investment law is treaty interpretation. In fact, the jurisprudence of investment treaty tribunals illustrates how the protection of foreign investment can be reconciled with the pursuance of development strategies of host States. For example, many arbitral tribunals are

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[106] Sornarajah (n 20) 66 (internal citations omitted).

[107] For example, the Australia-United States Free Trade Agreement has chosen this option; see William S Dodge, 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia–United States Free Trade Agreement' (2006) 39 Vanderbilt JTL 1 (2006).

[108] In this sense, for example, Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham L Rev 1521, 1617 ff.

[109] In this sense see Van Harten (n 103) 180 ff.

increasingly having recourse, even under old-style, lean BITs, to argumentative structures and principles of reasoning that ensure host States considerable policy space to implement their own development strategies and to take measures to comply with international treaties that aim at sustainable development, such as environmental or human rights protection. Proportionality analysis is such an argumentative strategy, which tribunals increasingly use in order to balance the protection of foreign investments and non-investment concerns that are part of the concept of sustainable development.[110] In fact, proportionality balancing itself is often considered as a function of the concept of sustainable development.[111] Exercising (degrees of) deference in the review of government conduct is another strategy tribunals employ.[112] Similar to proportionality balancing, this could ensure that host States are given sufficient policy space to pursue their development strategies. Overall, the practice of international investment law illustrates that even traditional, more restrictive investment treaties, and their interpretation by arbitral tribunals, need not necessarily restrict the development strategies of host countries and instead can be construed to leave policy space for States to pursue them. Much, however, depends on the willingness of arbitral tribunals to make use of these options.

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[110] See Benedict Kingsbury and Stephan W Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality' in Schill, *Comparative Public Law* (n 27) 75; Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2010) 4(1) *Law & Ethics of Human Rights* <http://www.bepress.com/lehr/vol4/iss1/art4> accessed 7 April 2015; Erlend Leonhardsen, 'Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration' (2012) 3 JIDS 95; Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' (2012) 15 JIEL 223. Examples from arbitral jurisprudence include *Tecnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003) para 122; *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award (17 March 2006) para 306; *Total SA v Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability (27 December 2010) paras 123 and 197; *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011) paras 241–3 and 373; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012) paras 384 ff; *Deutsche Bank v Sri Lanka* (n 95) para 522.

[111] Barral (n 65) 395–7.

[112] Stephan W Schill, 'Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review' (2012) 3 JIDS 577.

Finally, investment treaty disciplines themselves can be viewed as good governance instruments that require States to implement decision-making patterns and legal principles that are conducive to economic growth, and hence further an important aspect of sustainable development. This can be illustrated, for example, in respect of the arbitral jurisprudence on the fair and equitable treatment standard.[113] Indeed, arbitral tribunals have concretized the standard to reflect a number of more specific legal principles that run parallel to the concept of the rule of law, as we know it from domestic administrative and constitutional law,[114] but also from how the United Nations understands it.[115] Thus, arbitral tribunals regularly interpret fair and equitable treatment to encompass the following elements that are part of the concept of the rule of law: (1) the requirement of legal security and predictability; (2) the principle of legality; (3) the protection of legitimate expectations; (4) basic due process requirements for administrative and judicial proceedings; (5) the protection against arbitrariness and discrimination; (6) legal certainty and transparency; and (7) the concept of proportionality or reasonableness.

Understanding the fair and equitable treatment standard as an expression of the concept of the rule of law shows how investment treaty disciplines aim at implementing structures of good governance for investor-State relations that are conducive to economic growth, and hence further the economic component of sustainable development. Similar considerations also apply to other investor rights in international investment treaties such as the protection against expropriation without compensation and national and most-favored-nation treatment. Even these principles can be understood as characteristics of a State that acts in accordance with the rule of law, respects the property interests and the freedom of its citizens, and restricts them only for overriding public

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[113] See in more depth Schill, *Fair and Equitable Treatment* (n 27).

[114] Cf, e.g., Tom Bingham, *The Rule of Law* (Penguin 2010) 8.

[115] United Nations, 'Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels, Report of the Secretary General' (16 March 2012) (UN Doc A/66/749) para 2 ('the rule of law [i]s a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.').

interests. An international investment law understood and applied in a way so as to require compliance with the concept of the rule of law could then be seen as part of a broader international legal framework that promotes (sustainable) development goals.

E. Interim Conclusion

As this section has highlighted, concerns for the notion and principles of development have been made too little explicit in international investment law so far. On the contrary, investment protection and development are often conceived as mutually exclusive objectives. At the same time, we have pointed out how even within the existing discourse on international investment law the interests of developing countries and concerns for sustainable development can find recognition and be integrated. International investment law, in other words, is not necessarily inimical to bridging the investment/development divide; instead, a closer nexus with the notion of development and developmental principles can be sought, and can guide the interpretation and negotiation of investment treaties.

In the end, much depends on the vantage point from which one conceptualizes the relationship between international investment law and development. After having clarified the different facets of the notion of development and having traced both the investment/development gap in international investment law, as well as potential gateways for development concerns to come into international investment law, we now turn to how the contributions in the present book approach the relationship. The attempt we make here is not to provide ready-made solutions to how the relationship between investment and development should be viewed. Rather this book provides different perspectives and attempts at clarification of the relationship of these concepts. The overarching objective is to bring the discourses on investment and development closer together and to explore whether and how the investment/development gap can be bridged.

IV. BRIDGING THE INVESTMENT/DEVELOPMENT GAP

As noted above, the book opens with a keynote by M. Sornarajah that contains a forceful and scathing critique of international investment law. By contrast, most of the subsequent chapters adopt a more nuanced approach. Rather than criticizing international investment law in a lump-sum fashion, these other contributions explore ways in which

investment law can be made compatible and reconciled with development interests. They do so from different angles, including both general and more concrete analyses of the relationship between investment law and development, focusing on both the application and interpretation of existing, and the making of new, investment treaties. They are grouped into three clusters. Part II of the book contains chapters that analyze the relationship of international investment law and development from different conceptual angles (A.). Part III contains chapters that take a closer look at how international investment law interacts with self-determination as one core aspect for the implementation of development strategies. It includes the classical topic of investment protection and natural resources as well as the more recent concern of how investment disciplines affect transitions to democracy (B.). Part IV, finally, looks at the interaction of international investment law and the social dimension of development, namely social inclusion and the participation of all members of society in the benefits of economic growth as an indicator of development (C.).

A. Reconceptualizing the Relationship between Investment and Development

Part II starts with an analysis by Yannick Radi of the conceptual history of the relationship between international investment law and development, which differs quite radically from Sornarajah's account. Pointing out the importance of the epistemological context in which the relationship between international investment law and development is analyzed, Radi argues that viewed from within the investment regime 'IIL has always been a "friend" to development.'[116] This is so, above all, because the principal objective of international investment law, he argues, has always been the promotion of development; the protection of foreign investment, by contrast, has been but a subsidiary objective. In Radi's view, the problem with the investment/development gap is therefore one of the epistemic limits of the investment arbitration community. which has simply forgotten or ignored the 'subsidiary' nature of the protection granted under investment treaties when elevating it to the prime objective of the investment regime.[117] In this perspective, the 'reintegration' of investment and development in modern, recalibrated investment treaties

[116] Yannick Radi, 'International Investment Law and Development: A History of Two Concepts', in this volume 69, 70.
[117] Ibid 71–72.

is a way to make the original *telos* explicit, rather than to lower the level of protection granted to foreign investment.

In investment treaty-making, envisioning a constructive relationship between international investment law and development is becoming the prevailing mindset. This requires us – as Markus W. Gehring and Marie-Claire Cordonier Segger show – to understand investment treaties as tools for 'harnessing FDI [i.e. foreign direct investment] for sustainable development.'[118] This is not only desirable from the perspective of sustainable development, but also possible. It requires, as Gehring and Cordonier Segger show, 'to situate investor rights within a wider normative context, to interpret investment agreements (especially early ones emphasising investor rights only) in a systematically integrated way, and to allow for reform from within.'[119] The integration of investment law into a broader sustainable development framework can be achieved through innovative procedural and substantive advances in how IIAs are negotiated. Participation of civil society and transparency in the negotiation of IIAs, capacity-building of negotiators of developing countries, and ex-ante development impact assessment of IIAs could enhance their sustainability. The contribution to sustainable development could further be enhanced through preambular language alluding to the development aspirations of IIAs, as well as including appropriate exceptions and reservations, provisions on development cooperation, and corporate social responsibility.

The formulation of development-friendly investment treaty policy is also at the heart of the involvement of the United Nations, in particular of UNCTAD. Andrea Saldarriaga and Kendra Magraw focus on UNCTAD's involvement in bringing investment law and development together.[120] They not only stress that various UN statements for a long time have set out a positive relationship of investment and development, but also explain how current challenges for sustainable development stemming from the investment regime are being addressed by UNCTAD. Thus, the sole focus of investment treaties on investment protection, the lack of transparency of and public participation in investment arbitration, vague rules in investment treaties that give arbitral tribunals broad discretion to

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[118] Markus W Gehring and Marie-Claire Cordonier Segger, 'Overcoming Obstacles with Opportunities: Trade and Investment Agreements for Sustainable Development', in this volume, 93, 99.

[119] Ibid 94.

[120] Andrea Saldarriaga and Kendra Magraw, 'UNCTAD's Effort to Foster the Relationship between International Investment Law and Sustainable Development', in this volume, 125.

restrict governments' policy space, and the lack of investor obligations inform UNCTAD's agenda for IIA reform. This has not only resulted in the IPFSD already mentioned, which aims at rethinking investment law and the content of IIAs in a development perspective, but continues as part of UNCTAD's ongoing work on IIA reform, which aims at encouraging investment for development.

An important guiding concept for IIA reform and the implementation of existing IIAs is that of good governance and the rule of law, to which the contribution of Celine Tan turns.[121] Indeed, investment treaty disciplines are often justified as providing the good governance structures that are necessary for increasing foreign investment and economic growth more generally but do not exist in many host States. Yet, Tan doubts whether a loosely institutionalized system, such as investor-State arbitration, is able to use the concept of good governance to justify its own existence, when it may not live up to the normative demands of the good governance concept itself. This is so because she questions whether arbitration is appropriate for settling private-public disputes from the perspective of the rule of law in the first place; furthermore, she wonders to which extent investment treaty disputes do not stifle domestic law reforms because the interpretations by arbitral tribunals may cause regulatory chill. Tan is therefore critical of whether good governance discourse should be used as guidance for reforming the international investment regime. Rather than leading to a more legitimate and balanced system, the use of good governance language to justify and reform international investment law may do nothing more than 'masking and further legitimising its systemic deficiencies.'[122]

The epistemic and ideological context of all analyses of the relationship of international investment law and development is also emphasized in Antonius R. Hippolyte's chapter on Third-World Approaches to International Law (TWAIL).[123] The TWAIL movement, which shares much of Sornarajah's ideological background, understands international law generally, and international investment law in particular, as a product of hegemonic dominance of Western capital-exporting States that is biased towards the developing world. While Hippolyte appreciates the

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[121] Celine Tan, 'Reviving the Emperor's Old Clothes: The Good Governance Agenda, Development and International Investment Law', in this volume, 147.

[122] Ibid 179.

[123] Antonius R Hippolyte, 'Aspiring for a Constructive TWAIL Approach Towards the International Investment Regime', in this volume, 180.

theoretical depth TWAIL approaches display, he criticizes them for sticking to an outdated economic and political framework which is unable to make constructive contributions to reforming international investment law for the benefit of developing countries. According to Hippolyte, TWAIL should embrace investment law as an instrument that can potentially further developing countries' interests, rather than continue opposing it due to its North-South pedigree. Such a new openness is needed, in his view, not least because economic reality has undergone fundamental changes during the last decades. After all, we do not see autonomous national economies interstitially interacting anymore, but rather observe their integration into one global economic system. Switching from destructive analysis to constructive criticism would therefore, Hippolyte argues, be a true contribution of TWAIL to the interests of developing countries.

B. Development and Self-Determination

Part III of this book turns to the relationship between international investment law and development understood as self-determination. As Melaku Desta shows in his chapter,[124] self-determination has played a particularly prominent role in the natural resources sector during NIEO times in order to make developing countries politically and economically independent from their former colonial masters. In this context, claims for self-determination and sovereignty went hand in hand. Yet, once political independence had been achieved, reliance on unbounded sovereignty could become inimical to achieving development goals in cases where cooperation with foreign investors was necessary to exploit cost- and technology-intensive natural resources. This justifies restrictions on sovereignty, such as those contained in investment treaties. Yet again, absolute stability of investor-State relations would not be appropriate either as the social, political, and environmental circumstances may change during the life of a multi-decade natural resources project. The solution would therefore be to balance sovereignty and self-determination, on the one hand, and the protection of foreign investments in the natural resources sector, on the other. To achieve this aim, Desta argues, developing countries should actively contribute to making and reforming investment law and avoid fundamental opposition à la NIEO.

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[124] Melaku Desta, 'Sovereignty over Natural Resources and International Investment Law: The Elusive Search for Equilibrium', in this volume, 223.

Isabel Feichtner's chapter focuses on the method of resolving disputes over natural resources. She points out that during NIEO times there was a preference for the political resolution of such conflicts at the inter-State level, while legal norms and judicial as well as arbitral procedures played a lesser role.[125] This has changed fundamentally. Disputes about natural resources today are resolved through the application of legal principles in binding, allegedly de-politicized, procedures, including investor-State arbitration. Using the example of Zambia, Feichtner illustrates the problems of such a move to law and legal dispute resolution: in her view, the host State now is solely responsible for handling the complex private-public relations, which previously had been resolved in a political process involving host and home States. Moreover, Feichtner points out, the interests of the host State's population are not internationalized, but remain mediated through the host State and are thus not necessarily reflected in conflicts over natural resources. As a remedy, she emphasizes that the political element in resolving investor-State disputes, in particular in the natural resources sector, should not be forgotten: this would enable dispute settlement processes to be more socially inclusive and might lead to results that reflect the self-determination of an entire country.

Jonathan Bonnitcha then turns to another aspect relating to the interaction of international investment law and self-determination, namely the role investment treaties play in the transition from authoritarian rule to democracy.[126] This is a core concern for development because only participation of people in government will enable them to set their own development priorities and strategies. According to Bonnitcha, investment treaties can hinder this transition by protecting investments made during the preceding authoritarian rule, thereby complicating, or even preventing, the incoming government's own development strategies. At the same time, protecting investments against a new government's interference may also help break investor support for the old regime and thereby facilitate transition to democracy. To find the right balance between empowering incoming governments to implement new laws and policies, but also to break ties between the old regime and its economic supporters, is, as Bonnitcha argues, the task of those interpreting investment treaties. Such interpretations are, as he insists, possible.

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[125] Isabel Feichtner, 'International (Investment) Law and Distribution Conflicts over Natural Resources', in this volume, 256.

[126] Jonathan Bonnitcha, 'Democracy, Development and Compensation under Investment Treaties: The Case of Transition from Authoritarian Rule', in this volume, 285.

Walid Ben Hamida complements Bonnitcha's analysis by focusing specifically on the revocation of contracts and concessions agreed to by a former authoritarian regime.[127] Ben Hamida argues that international investment law, in principle, is agnostic towards the reasons leading to a transition of power. Whether change takes place from democratic to autocratic rule, or vice versa, is immaterial for the protection of investments under investment treaties. Accordingly, contracts and treaties concluded by a non-democratic government must be honored by the successor government. Developments during the Arab Spring may however have led to a gradual qualification of this time-honored rule, Ben Hamida suggests. Notably, he points to a number of multilateral Arab investment treaties, which require foreign investors to observe public order and morality. Such provisions, according to Ben Hamida, may give rise to arguments that contracts with undemocratic governments are themselves immoral and cannot be enforced. Another source for such an argument are references to the need for democratic forms of government, inter alia in agreements concluded by the European Union. The application of investment treaties to governmental transitions may therefore itself be in transition.

C. Development and Social Inclusion

The final Part of the book brings together contributions that address the relationship between investment law and development from the perspective of social inclusion. It opens with a chapter by Diane A. Desierto on the right to development, as articulated in the 1986 UN Declaration on the Right to Development.[128] As she points out, understanding development – in line with the Declaration – as an inclusive process, rather than as achieving a specific end result would do away with the need to provide an objective and uniformly applicable definition. Instead, what development means could differ from country to country, similar to the idea of development as self-determination, provided that the process for concretizing self-determination into specific policies involves all stakeholders and represents all social interests. In this context, the right to development, as Desierto argues, corresponds with the 'specific responsibility of States to build in an enabling environment for international human rights

[127] Walid Ben Hamida, 'Investment Treaties and Democratic Transition: Does Investment Law Authorize Not to Honor Contracts Concluded with Undemocratic Regimes?', in this volume, 309.

[128] Desierto (n 52) (in this volume).

protection as part of the State's economic decision-making processes.'[129] This responsibility must also be met in the negotiation of IIAs and investor-State contracts and in the management of investment disputes. This would require States to move away from an inter-State approach to investment relations and towards a more inclusive system that allows people to participate in decision-making processes and put their interests center stage.

Social inclusion also plays a core role in Krista Nadakavukaren Schefer's assessment of international investment law's relationship to the fight against poverty.[130] In her view, international investment law is problematic from the perspective of poverty reduction because it does not empower the poor, neither substantially, nor procedurally; instead it fosters inequalities by granting special protections for foreigners against the redistribution of existing resources. Nadakavukaren Schefer is right when arguing that investment law does not actively combat and reduce poverty. At the same time, it is important to note that investment law does not prohibit wealth redistribution as such. While uncompensated expropriations are prohibited, other redistribution instruments, such as taxation, remain available.

Social inclusion is also the theme of the contribution by Vid Prislan and Ruben Zandvliet.[131] Focusing on the interaction between investment protection and labor standards, they note that a comprehensive notion of development cannot be limited to enhancing benefits for investors. Instead, a development-friendly investment law needs to ensure that investor benefits do not come at the expense of labor standards. As Prislan and Zandvliet observe, for this reason, references to labor rights can increasingly be found in international investment treaties. Some of them prohibit contracting States to use the deregulation of labor standards as an investment incentive; others aim at ensuring that enhancing labor rights at the domestic level will not constitute breach of investment treaty disciplines. Other clauses go further: they actively encourage, or even require, governments to adopt internationally recognized labor standards. Finally, investment treaties now increasingly also consider ways of enhancing compliance of foreign investors with labor standards through better enforcement mechanisms, mostly in the form of soft

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[129] Ibid 338.

[130] Krista Nadakavukaren Schefer, 'The Law of Investment Protection and Poverty Reduction', in this volume, 369.

[131] Vid Prislan and Ruben Zandvliet, 'Mainstreaming Sustainable Development into International Investment Agreements: What Role for Labor Provisions?', in this volume, 390.

obligations as part of corporate social responsibility. Some of these obligations may well mature into hard law obligations in the future. As Prislan and Zandvliet show, investment treaties today, in particular in the context of broader economic governance agreements, 'no longer allow the goal of economic development to be achieved at the expense of social concerns, but instead promote a more holistic concept of sustainable development.'[132]

Finally, Christina Binder addresses a specific and often overlooked aspect of the inclusive function of development, namely the rights of indigenous peoples.[133] According to her, a truly development-friendly regime has to do more than recognize the host State's right to national self-determination. Focusing on the effects of investment projects and investment disputes on indigenous peoples and their (land) rights, Binder emphasizes that the host State's population is not necessarily a homogenous group with a uniform majoritarian public interest. Instead, (sustainable) development must mean 'inclusive development',[134] so that 'the protection of indigenous peoples as culturally distinct peoples is a necessary part of sustainable development.'[135] Similar considerations may also apply to other vulnerable groups within a host State if development is to benefit all parts of a society. International investment law has to meet that challenge through procedural and substantive accommodation of the interests of indigenous people, such as making use of principles for their protection in the interpretation of investment treaties and through the promotion of amicus curiae submissions by indigenous people. None of this requires any treaty reform; the options are available under the existing legal framework – but of course they need to be used.

V. CONCLUSION: MAINSTREAMING DEVELOPMENT IN INTERNATIONAL INVESTMENT LAW

This broad survey of the relationship between international investment law and development yields a mixed picture. On the one hand, investment and development appear to be closely inter-connected from an economic perspective. Achieving the aims of sustainable development in

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[132] Ibid 422.

[133] Christina Binder, 'Investment, Development and Indigenous Peoples', in this volume, 423.

[134] Ibid 424.

[135] Ibid.

particular seems barely possible without investment, including foreign investment. After all, only by means of additional investment will it be possible to transition to more environmentally-friendly technologies without cutting back economic, cultural, and social development. On the other hand, the discourse on investment and development, especially in international legal scholarship, has rarely sought to integrate investment and development. Although those who practice and analyze international investment law and investment dispute settlement are aware of the development implications of the field, they seldom understand their practice as part of an international law of development.

Things may change, however, with the conclusion of a new generation of investment treaties that draw more explicit links between investment protection and development, with the interpretation of investment treaty disciplines in light of the concept of sustainable development, and with the emerging analysis of the impact of the right to development on international investment policies. Nevertheless, a significant part of the scholarship on international investment protection law remains stuck in a conceptual framework that is structured by the contrasts between interests of capital-exporting and capital-importing States, investors and States, claimants and respondents, pro-State and pro-investor arbitrators, neo-liberalism and neo-communitarianism, and that views international investment law and development as antagonists rather than as mutually supportive disciplines.

As the preceding discussion indicates, there are numerous possibilities to strengthen the link between investment and development in international investment law, both methodologically and thematically, and to overcome the existing isolation and polarization without fundamentally changing the functioning of the current investment regime. This could involve changes in treaty practice that stress the development-dimension of investment treaties, such as ensuring policy space, including environmental and human rights safeguards, and inclusiveness in the procedures for negotiating investment treaties and settling investor-State disputes. It could also see a more active involvement of developing countries in debates about the making and reforming of international investment law and empowering host States to effectively regulate foreign investment in a balanced manner. All this requires, first and foremost, a willingness to think about international investment protection and development not as antagonists, but as two aspects of a common project. Overcoming the existing 'silo-thinking' that separates investment protection from development concerns would allow scholars and practitioners to mainstream development concerns in international investment law and investment

dispute settlement and to reconceptualize international investment law as a regime that forms part of international development law.

This having been said, perhaps the dispute is less one about an abstract relationship between two notions than about the proper means of ensuring that investment benefits (sustainable) development. Even the most ardent supporters of investment protection are likely to accept that not all investments are always beneficial, and that some in fact adversely affect sustainable development goals. In particular, investments that are not well regulated by the host country may adversely affect the environment, the local population and its living conditions. There are numerous examples, especially in the area of natural resources, in particular in oil and gas exploitation and mining (but also in other high-risk ventures), where actions of foreign companies have resulted in damage to the environment, living conditions, or the health of local populations. As a consequence, it is necessary to distinguish between beneficial and detrimental investments and to ensure that potential harm is prevented. This not only requires effective regulation by the host country, but is also dependent on the companies, their home countries, and the international community as a whole.

Joint and concerted efforts at all levels in linking the admission of foreign investment to host countries development strategies, in regulating foreign investment projects effectively, and in ensuring sufficient policy space for legitimate government (re-)regulation will enable investment law to serve as an important component of international development law. Under these conditions, international investment law and development would be friends, not foes.