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HUMAN RIGHTS & FOREIGN INVESTMENT

Joshua Curtis

Doctoral Thesis
Irish Centre for Human Rights, National University of Ireland, Galway, September 2014
No. 05116821
Supervisor: Professor Vinodh Jaichand
# TABLE OF CONTENTS

ACKNOWLEDGEMENTS .................................................................................. i
LIST OF ACRONYMS ................................................................................... iii

1 – INTRODUCTION .................................................................................. 1
  1.1 – ECONOMICS AND HUMAN RIGHTS ......................................... 12
    1.1.1 – Mutual Irrelevance or Separation by Design? .............. 12
    1.1.2 – Getting Closer: Rapprochement or Conflict? ............ 23
  1.2 – STRUCTURE OF THE STUDY ....................................................... 28

2 – FDI AS THE ‘ENGINE’ OF DEVELOPMENT ........................................ 34
  2.1 – THE CONTEXT OF THE NEO-LIBERAL DEVELOPMENT PARADIGM .. 37
  2.2 – THE EFFECTS ON THE SYSTEM OF FINANCING FOR DEVELOPMENT ........................................................................................................ 55
  2.3 – BENEFITS AND COSTS OF FDI FOR DEVELOPMENT ............. 77
  2.4 – IN WHOSE INTEREST EXACTLY? ............................................. 92
  2.5 – HOW THE POTENTIAL BENEFITS OF FDI ARE SYSTEMATICALLY REMOVED .................................................................................. 99
    2.5.1 – The Effects of Competition................................................ 102
    2.5.2 – The Nature of the Neo-liberal FDI Regime ..................... 112

3 – THE INVESTMENT REGIME ............................................................... 120
  3.1 – THE HISTORY OF INVESTMENT REGULATION ..................... 121
    3.1.1 – Custom .............................................................................. 123
    3.1.2 – Treaty .............................................................................. 135
  3.2 – CURRENT STRUCTURE OF THE INVESTMENT REGIME .......... 142
    3.2.1 – Substantive Provisions ..................................................... 142
    3.2.2 – Procedural Provisions ..................................................... 151
  3.3 - IMPACT OF THE INVESTMENT REGIME ON THE DOMESTIC PROVISION OF SOCIO-ECONOMIC RIGHTS ........................................ 165
    3.3.1 – Systemic Effects .............................................................. 165
    3.3.2 – Instrumental Rights of Assembly and Expression .......... 170
    3.3.3 – Land Reform and Redistribution .................................... 171
    3.3.4 – The Right to Health ......................................................... 174
    3.3.5 – Positive Discrimination .................................................. 176
  3.4 – THE AUTO-ENHANCED POWER OF TRIBUNALS ..................... 181
    3.4.1 – Financial Derivatives, Sovereign Bonds and Mass Claims ................................................................. 181
    3.4.2 – Creeping Unfair Treatment .............................................. 186
3.4.3 – Provisional Measures ........................................189
3.5 – BACKLASH .........................................................191

4 – HUMAN RIGHTS IN INVESTMENT ARBITRATION ........202
4.1 – THEORY ...........................................................204
  4.1.1 – Ripples.......................................................205
  4.1.2 – Troubled Waters .............................................214
  4.1.3 – A Storm Brewing ...........................................229
4.2 – REALITY PART I – VARIOUS CASES .......................238
4.3 – REALITY PART II – REVISITING ARGENTINA AS EXEMPLAR ....243
  4.3.1 – An Exemplary Neoliberal Pupil ............................244
  4.3.2 – Economic Crisis and the Avoidance of a Complete Meltdown ..................................................254
  4.3.3 – Paying Twice for the Crisis ................................261
  4.3.4 – Suez – People and Profit Come Head to Head ........267

THE NEED FOR A HOLISTIC SOLUTION TO THE PROBLEM...286

5 – THE OBLIGATION TO COOPERATE IN INTERNATIONAL LAW ..........................................................289
  5.1 – FROM COEXISTENCE TO COOPERATION .................289
  5.2 – THE UN CHARTER .................................................294
  5.3 – THE COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS303
    5.3.1 – The Drafting of Article 2(1) ...............................312
    5.3.2 – The Committee .............................................319
    5.3.3 – The Utility of the Optional Protocol ....................332
  5.4 – FURTHER THEORETICAL DEVELOPMENT ...............342
  5.5 – THE MAASTRICHT PRINCIPLES ...............................362
  5.6 – A PROVISIONAL FORMULATION ..............................366

6 – RENEGOTIATING THE INVESTMENT REGIME .............370
  6.1 – APPLYING COOPERATION TO THE CURRENT INVESTMENT REGIME ..........................................................372
  6.2 – INVESTMENT NEGOTIATIONS ................................393
  6.3 – THE NATURE AND PURPOSE OF AN INTERNATIONAL INVESTMENT REGIME ..................................................405
    6.3.1 – Constitutional Critique ...................................406
    6.3.2 – Global Administrative Law Critique ....................408
    6.3.3 – Hegemonic Law Critique ..................................411
    6.3.4 – Public/Private Critique ....................................416
    6.3.5 – Sustainability Critique .....................................418
    6.3.6 – The Investment Regime as a Development Partnership ..........................................................421
6.4 – Participation, the Importance of Multilateral Negotiations and the Choice of Forum .................................. 428
6.5 – The ‘Illegality’ of Certain Negotiating Positions and a Pre-Negotiation Phase .......................................................... 435
6.6 – Human Rights Impact Assessments .............................................. 446
   6.6.1 – Framework ........................................................................ 449
   6.6.2 – Precedent ......................................................................... 458
   6.6.3 – Objections ....................................................................... 464
6.7 – Substantive Issues .................................................................... 469

7 – The Process of Financing for Development ............... 473
   7.1 – The Process of Financing for Development .......................... 475
   7.2 – Core Concerns that are Marginalised ................................. 483
      7.2.1 – Net Financial Flows from South to North .................... 483
      7.2.2 – Domestic Resources .................................................... 489
   7.3 – Human Rights and Heterodox Convergence in Financing for Development .................................................. 500
      7.3.1 – General Application of Cooperative Obligations .......... 513
   7.4 – Leveraging ........................................................................ 527
      7.4.1 – Heterodox Analysis ....................................................... 528
      7.4.2 – Human Rights .............................................................. 544

8 – Conclusion ............................................................................. 554
   8.1 – Power and Change ............................................................. 562
   8.2 – Power and Human Rights ................................................... 580

BIBLIOGRAPHY .............................................................................. 602

I, the Candidate, certify that the Thesis is all my own work and that I have not obtained a degree in this University or elsewhere on the basis of any of this work.

Signed: ___________________________ Date: ________________
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J.C., BERLIN, SEPTEMBER 2014.
# LIST OF ACRONYMS

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<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>ALBA</td>
<td>Bolivarian Alliance for the Peoples of Our America</td>
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<tr>
<td>BEE</td>
<td>Black Economic Empowerment</td>
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<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<tr>
<td>BRICS</td>
<td>Brazil, Russia, India, China and South Africa</td>
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<tr>
<td>CAFTA-DR</td>
<td>Dominican Republic - Central America Free Trade Agreement</td>
</tr>
<tr>
<td>CCFTA</td>
<td>Canada-Colombia Free Trade Agreement</td>
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<tr>
<td>CCIC</td>
<td>Canadian Council for International Co-operation</td>
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<tr>
<td>CEDAW</td>
<td>Committee on the Elimination of Discrimination Against Women</td>
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<tr>
<td>CEO</td>
<td>chief executive officer</td>
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<tr>
<td>CERD</td>
<td>Committee on the Elimination of Racial Discrimination</td>
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<tr>
<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<tr>
<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<tr>
<td>CRA</td>
<td>Contingency Reserve Arrangement</td>
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<td>CRC</td>
<td>Committee on the Rights of the Child</td>
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<td>DCF</td>
<td>Development Cooperation Forum</td>
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<td>DFI</td>
<td>Development Finance Institutions</td>
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<tr>
<td>CSO</td>
<td>civil society organisation</td>
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<td>ECOSOC</td>
<td>Economic and Social Council</td>
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<td>ESC</td>
<td>Economic, Social and Cultural</td>
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<tr>
<td>ETAP</td>
<td>Expanded Technical Assistance Program</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>FCN</td>
<td>Friendship, Commerce and Navigation Treaty</td>
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<tr>
<td>FDI</td>
<td>foreign direct investment</td>
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<tr>
<td>FID</td>
<td>Financing for Development</td>
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<tr>
<td>FIDH</td>
<td>International Federation for Human Rights</td>
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<tr>
<td>GATS</td>
<td>Global Agreement on Trade in Services</td>
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<td>GATT</td>
<td>Global Agreement on Tariffs and Trade</td>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>GNI</td>
<td>Gross National Income</td>
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<tr>
<td>GNP</td>
<td>Gross National Product</td>
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<tr>
<td>HDI</td>
<td>Human Development Index</td>
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<tr>
<td>HRIA</td>
<td>human rights impact assessment</td>
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<td>IA Reporter</td>
<td>Investment Arbitration Reporter</td>
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<td>ICC</td>
<td>International Coordinating Committee (of NHRIs)</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>ICHRP</td>
<td>International Council on Human Rights Policy</td>
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ICJ  International Court of Justice
ICSID  International Center for the Settlement of Investment Disputes
IFC  International Finance Corporation
IFI  international financial institution
IIA  international investment agreement
IISD  International Institute for Sustainable Development
ILA  International Law Association
ILC  International Law Commission
ILM  International Legal Materials
IMF  International Monetary Fund
ISDS  inter-State dispute settlement
ITLOS  International Tribunal on the Law of the Sea
ITO  International Trade Organisation
LDC  Least Developed Country
MAI  Multi-lateral Agreement on Investment
MDG  Millennium Development Goal
MPRDA  Mineral and Petroleum Resources Development Act (South Africa)
NAFTA  North American Free Trade Agreement
NDB  New Development Bank
NGO  non-governmental organisation
NHRI  national human rights institution
NIEO  New International Economic Order
ODA  Official Development Assistance
OECD  Organisation for Economic Co-operation and Development
OHCHR  Office of the High Commissioner for Human Rights
OP-ICESCR  Optional Protocol to the ICESCR
PRSP  Poverty Reduction Strategy Paper
PSNR  Permanent Sovereignty over Natural Resources
PTIA  Preferential Trade and Investment Agreement
SUNFED  Special UN Fund for Economic Development
TNC  trans-national corporation
TPP  Trans-Pacific Partnership
TRIMs  Trade Related Investment Measures (WTO Agreement on)
TRIPs  Trade Related Aspects of Intellectual Property Rights (WTO Agreement on)
TTIP  Trans-Atlantic Trade and Investment Partnership
TWAIL  Third World Approaches to International Law
UDHR  Universal Declaration of Human Rights
UK  United Kingdom
UN  United Nations
UNASUR  Union of South American Nations
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<tr>
<th>Acronym</th>
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<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<tr>
<td>UNDESA</td>
<td>United Nations Department of Economic and Social Affairs</td>
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<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
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<tr>
<td>UNECA</td>
<td>United Nations Economic Commission for Africa</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<tr>
<td>US</td>
<td>United States of America</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<tr>
<td>WB</td>
<td>World Bank</td>
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<tr>
<td>WHO</td>
<td>World Health Organization</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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1 - INTRODUCTION

In many cases, the support for human rights will have to be balanced against other important goals of world order.¹

In the mid-1990s foreign direct investment (FDI) overtook world trade as the major dynamic in the evolution of the global economy.² As early as 1992 the United Nations Conference on Trade and Development (UNCTAD) stated in its second World Investment Report that “the volume of goods and services sold by foreign affiliates amounted to ... almost double that of world exports”.³


Foreign investment is comprised of two basic categories that are usually understood as distinct; portfolio investment and direct investment. Foreign direct investment is generally defined as ownership of at least a 10% interest in a given company or material holding. It may be acquired through ‘greenfield’ investment often creating new or additional facilities, or ‘brownfield’ investment that does not create new facilities (e.g., the merger with or acquisition of another company). It may take the form of equity or debt. In practice there are a multitude of forms of foreign investment that do not fit neatly into any one particular category. This is so even for the basic division between portfolio and direct investment, which is often understood to mark the very rough distinction between harmful (speculative) and beneficial (direct) foreign investment. It is widely noted that over the previous decades there has been a marked increase in the percentage of FDI which is not ‘greenfield’ or equity, but is in the form of debt and easily moveable finance, meaning that it behaves much the same way as speculative capital. See, Follow-up to and Implementation of the Monterrey Consensus and Doha Declaration on Financing for Development, Report of the Secretary-General, UN Doc. A/68/357, 3 September 2013, para 22; Jonathan Ostry (et al), ‘Capital Inflows: The Role of Controls’, IMF Staff Position Note, SPN/10/04, IMF, Washington DC. 19
Foreign direct investment, as managed by transnational corporations, is increasingly the driving force of international economic transactions. ... A fundamental change of perspective is needed to understand the new world economy fully and to devise policies that are appropriate for it.4

By now it is clear that the policies adopted with respect to investment will be those policies which most fundamentally shape our world.5 Over the last thirty years such policies have been informed by an attitude of deference and sometimes even reverence, reflecting widespread perceptions of the necessity of

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February 2010, p. 5. Furthermore, the definition of investment in bilateral investment treaties is extremely broad and open-ended, often including the phrase ‘every kind of asset’ whether controlled directly or indirectly by the investor, thereby protecting almost all forms of foreign investment. See, Barton Legum, ‘Defining Investment and Investor: Who is Entitled to Claim?’, Making the Most of International Investment Agreements: A Common Agenda, Symposium Co-organised by ICSID, OECD and UNCTAD, OECD Headquarters, Paris, 12 December 2005, p. 3. See further discussion at section 3.4.1. Arbitrators usually apply a threefold test requiring certain ‘inherent features’; an economic contribution to the host State (not necessarily a developmental contribution), a certain temporal duration of investment, and a certain level of risk incurred. Yet these have been read in an expansive manner favourable to potentially protected investors, regularly including intangible assets and investments where there is no physical presence in the host State and no activities carried out on its territory, again reflecting the nature of speculative investment (a small minority of tribunals have applied a slightly more restrictive definition; see for example, Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014, paras 76-113). In addition, the process of financing for development increasingly forces a dependence on all forms of foreign investment indiscriminately, even though it justifies this process by reference only to the supposed benefits of FDI. This overall picture is complicated by further factors which there is no space to detail here; such as the fact that FDI statistics usually include re-invested earnings of foreign affiliates even though the capital was produced in the host State. Therefore, the present study tends to use the terms ‘foreign investment’, ‘foreign direct investment’ and ‘FDI’ interchangeably, usually to designate all forms of foreign investment, unless where otherwise specified directly or contextually, in conformity with a reality that does not make any significant distinction in practice. The term ‘FDI dependent development paradigm’ for example, may be taken as sympathetic short-hand for the benefit of the reader, designating a development paradigm dependent on all forms of foreign investment, not only FDI, however this may be defined. The relevant distinction is between foreign and domestic sources of investment, as discussed in chapter 7.

4 UNCTAD, 1992, supra note 3, p. 6 (original emphasis).
foreign investment for economic growth, and the sanctity of international property for the creation of Hume’s “perfect harmony and concord.” These policies have recently given rise to an international treaty-based normative regime protecting foreign investors from the actions of States without placing any counter-balancing duties on them. This current investment regime serves the interests of a small but powerful class of foreign investors; that is, it protects the freedom of international capital.

In 1941 US President Roosevelt set out the four freedoms that ought to be enjoyed by people “everywhere in the world”, often referred to as a conceptual basis for modern human rights law; freedom of speech, freedom of worship, freedom from want, and freedom from fear. Roosevelt believed that this “is no vision of a distant millennium” but a “definite basis for a kind of world attainable in our own time.” The dominant policies with regard to this alternate vision for shaping our world have been informed by an attitude of selectivity and obstruction, reflecting a tension between the rhetorical acceptance of human rights as a necessary foundation for global peace and prosperity and a repeated deference to other values in practice. Nevertheless, international human rights law has evolved to serve the ground value of universal human dignity; that is, it protects the freedom of all people.

6 “No one can doubt, that the convention for the distinction of property, and for the stability of possession, is of all circumstances the most necessary to the establishment of human society, and that after the agreement for the fixing and observing of this rule, there remains little or nothing to be done towards settling a perfect harmony and concord.” Ernest Rhys (ed.), Philosophy & Theology: Hume’s Treatise of Human Nature, Volume II (J.M. Dent and Sons, London, 1920), pp. 196-197.
8 Franklin D. Roosevelt, State of the Union Address to the Congress, 6 January 1941.
9 Ibid.
This study is concerned with the interaction between these two normative categories and the broader complex of issues such a concern gives rise to, regarding the proper place of foreign investment in relation to development and human well-being. There is an endemic sense of a general failure to adequately balance human rights and ‘other goals of world order’ such as capital mobility, resulting in a shaky foundation of legitimacy on which to base a belief that the present compromise embodied in the investment regime is ‘right’ or ‘optimal’. A ‘crisis of legitimacy’ is often noted in the literature, and it describes perhaps the most fundamental issue which the current regime must someday overcome if it is to survive. From this perspective human rights law presents the regime with a paradox. It is both a deep challenge and

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simultaneously a primary source of legitimation, and perhaps salvation.

Nevertheless, it is widely perceived that the two categories are incompatible in their present manifestations. One, or the other, or both, will have to adapt in the near future. In a position of evident disadvantage, those seeking to maintain the full integrity of human rights law, preventing its instrumental use as an empty façade of legitimation, must utilise all of the conceptual and legal tools at their disposal, and must also form strong and broad alliances. The central argument of the study is that the emerging theory and practice of extraterritorial obligations on States to cooperate under human rights law, informed by a close alliance with heterodox economic theory, provides a holistic and principled resolution to this full complex of broader issues, which should be raised by a thorough critique of the contemporary approach to foreign investment. The following pages seek to illuminate a path towards a better balance, and a method by which to move from the challenging side of the paradox toward its promise of salvation.

As a first approximation the relevant research question pertains to the just balance between two important nodes in our world: How should human rights law and the regime for the protection of foreign investment properly interact? This research question is gaining some traction in the now copious literature on the investment regime.13 However, this study

proposes that the present human rights critique within this context generally suffers from a lack of depth.\textsuperscript{14} It has focused on one particular aspect of that regime, investment arbitration, which could be labelled its generative aspect. The solutions proposed tend to revolve around the addition of human rights clauses and procedural requirements within the extant framework of the regime, without seeking to change its fundamental nature, inevitably trusting arbitrators to apply and interpret these clauses appropriately.

This generative aspect is very important, yet the critique has largely ignored the formative aspect of the regime, that is, the context which creates it. This context is an overarching global development paradigm that increasingly views FDI as the ‘engine’ of development, and forces a dependence on foreign investment for the attainment of economic growth. The extant critique does not sufficiently address this background rationale for the regime. It is preoccupied with the extent to

\textsuperscript{14} It mirrors the observation by De Schutter, that there is a need to move from an established ‘micro-critique’ of the impact of transnational corporations on human rights to a ‘macro-critique’. Olivier De Schutter, ‘Transnational Corporations as Instruments of Human Development’, in Philip Alston and Mary Robinson (eds.), \textit{Human Rights and Development: Towards Mutual Reinforcement} (Oxford University Press, Oxford, 2005), pp. 405-406.
which foreign investment is protected, but not why it is protected to this extent or what alternative rationales there might be for extending such protection. As such it misses an important purpose of the regime. Aside from its role in protecting foreign investment against unjust State action, it also enforces one particular development paradigm, facilitating its expansion, locking it into law and preventing its reversal.

Although they do not utilise a specifically human rights lens the perspectives offered by Gill and Schneiderman are of particular importance in this respect. They provide a necessarily broader description of the nature of the regime that is essential to the development and effectiveness of a thorough human rights critique. Stephen Gill’s twin concepts of ‘disciplinary neo-liberalism’ and ‘new constitutionalism’ contain a wealth of insight into the workings of the global political economy. Gill conceptualises ‘disciplinary neo-liberalism’ as a concrete form of structural power centred on the liberation and protection of international

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capital.\textsuperscript{16} At the level of international economic law this discipline is exercised through limits set on social, economic and legal arrangements at the national level, utilising a set of norms informed by a neo-liberal ideology that serves and protects the interests of dominant international economic actors.\textsuperscript{17}

In an attempt to ensure its permanence, disciplinary neoliberalism is set and institutionalised in legal and quasi-legal codification. The purpose of this codification is “the restructuring of state and international political forms”.\textsuperscript{18} Or in other words, the production and reproduction of competition States, bounded and limited by the now ‘legislated’ dictates of economic imperative.\textsuperscript{19} This is the international nature of the ‘new constitutionalism’ according to Gill.\textsuperscript{20} The international legal regimes surrounding investment, trade and finance are primary forms of this phenomenon. The new constitutionalism has the effect of insulating the market economy from the influence of politicians and the mass citizenry through binding constraints on the conduct of fiscal, monetary and trade and investment policies ... [designed] to prevent national interference with the property rights and entry and

\begin{footnotesize}
\textsuperscript{17} Such actors constitute the core of Sklair’s ‘transnational capitalist class’. Leslie Sklair, Transnational Capitalist Class (Wiley-Blackwell, Oxford, 2001); Leslie Sklair and Jason Struna, ‘The Icon Project: The Transnational Capitalist Class in Action’ 10 Globalizations 5 (2013).
\textsuperscript{18} Gill, 2008, supra note 15, p 138.
\textsuperscript{20} Gill, 2008, supra note 15, pp 138-142. “The new constitutionalism can be defined as the political project of attempting to make transnational liberalism, and if possible liberal democratic capitalism, the sole model for future development.” Ibid, p. 139.
\end{footnotesize}
exit options of holders of mobile capital with regard to particular political jurisdictions.21

David Schneiderman theorises the investment regime as a quintessential element and a central achievement of the new constitutionalism, instantiating a set of pre-commitments in this area of economic policy having quasi-constitutional status at the global level.22 He highlights the fact that only investor’s expectations are elevated to such a level;

the expectation is that this regime of rules pre-commits states to a limited set of acceptable policy responses to social and economic problems, outlawing those considered extreme or beyond the threshold of normalcy.23

Echoing Gill, Schneiderman describes the containment of democratic processes, communities and peoples who are affected by the titanic movements of capital around the world.24

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21 Ibid, pp 139.
24 Although it is engaged with only tangentially in the present study, the perspective on the investment regime offered here also resonates with the wider literature on resistance, social movements and ‘globalisation from below’ emanating from what is referred to as the Third World, such as the perspective of the Third World Approaches to International Law (TWAIL). See for example, Bhupinder Chimni, ‘Third World Approaches to international Law: A Manifesto’ 8 International Community Law Review 1 (2006); James Gathii, TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography” 3 Trade, Law and Development 1 (2011); Obiora Okafor, ‘Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective’ 43 Osgoode Hall Law Journal 1 (2005); Antony Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge University Press, New York, 2005); Balakrishnan Rajagopal, International Law from Below: Development, Social Movements and Third World Resistance (Cambridge
In this way Gill and Schneiderman describe the formative aspect of the investment regime. This is its most far-reaching and important aspect, shaping the values and the very world in which a prospective human rights clause in an investment treaty, for example, will be applied and interpreted. If this disciplinary and constitutional environment is unchallenged, and if the larger project of FDI dependence characterising it continues unabated, what might seem a victory for human rights will soon ring hollow. Or in other words, without addressing the driving rationale of the investment regime and uncovering methods of shifting the context that creates it, only a hollow victory will seem ‘realistic’, as the fundamental perceived need for States to attract foreign investment will always mark the limit of what is ‘possible.’ The present human rights critique of foreign investment misses this point and its suite of proposed answers to the first research question are therefore insufficient to meet the professed goal of protecting people and respecting their rights. Moreover, it is submitted that this human rights critique could inadvertently legitimate a regime inherently prejudiced against rights realisation in practice. This is because we are addressing the wrong question.

The study therefore posits that the real overarching question is one that must involve consideration of the desired interaction between three nodes, not two; human rights law,
the investment regime and development economics. Put
another way, the challenge is to develop not only a human
rights critique of the investment regime but a holistic critique
of the present approach to foreign investment in development,
which then envelopes the former critique. This involves
moving well outside a legal comfort zone. Nonetheless, the
challenge must be met for human rights to provide an effective
balance to the observed excesses of the investment regime. In
this way an actual compromise might eventually be reached.
Anything less may ultimately be a capitulation. The basic
research question that should be addressed is then the
following: How can human rights law enlighten the proper
place of foreign investment in development and thereby
reorganise our approach to international investment
regulation? This question is not fully answered here, as it is
simply too large for a single work. The rationale for this study
is threefold; to illuminate the inadequacy of the preliminary
question and the answers proposed; to indicate that human
rights is capable of framing and informing an answer to the
full question; and to illustrate certain modalities by which it
can do this, both in general and in relation to selected
specifics.

In pursuing this limited aim certain concepts are of
essential importance and the remainder of this introduction is
devoted to their brief explication, serving also to further
situate the study in the extant literature. The evolving
relationship between human rights and economics forms the
immediate landscape in which the study is set. In the
following section this landscape is introduced, as is the critical
concept of a ‘market-friendly human rights paradigm’. In a
final section the structure of the study is outlined.
1.1 – Economics and Human Rights

1.1.1 - Mutual Irrelevance or Separation by Design?

The discovery of practical means inherent in a human rights approach requires a deep engagement with the dominant source of concepts and modalities for the creation of our present reality; economics.\textsuperscript{25} Human rights have long been viewed as marginal or irrelevant to essential decision-making processes increasingly dominated by an economic perspective,\textsuperscript{26} or have otherwise been actively excluded by


design as potentially troublesome to vested interests and established processes. Whether one takes a basically benign view or whether one sees malign intent, the fact remains that economics and human rights have traditionally been separate fields of knowledge generation and activity. Until recently a conversation between the two has fallen through the broader divide between the field of economics and the remainder of the social sciences, and more specifically the resultant rifts between economics and politics, and economics and law.


28 Fine and Milonakis detail the separation of the economic from the social in what they term the ‘marginalist revolution’ in the field of political economy, which occurred in the late 1800s. Dmitris Milonakis and Ben Fine, From Political Economy to Economics: Method, the Social and the Historical in the Evolution of Economic Theory (Routledge, London, 2009). In a second volume they detail the subsequent outward movement of the economics discipline, the process of ‘economics imperialism’. Dmitris Milonakis and Ben Fine, From Economics Imperialism to Freakonomics: The Shifting Boundaries between Economics and other Social Sciences (Routledge, Abingdon, 2009).


30 However, this division has always been very porous, allowing a migration of economic priorities into legal design and practice, usually to the benefit of the wealthy and influential, evincing the imperialistic power of economics over law rather than the other way around. This was in fact an explicit goal of the ‘law and economics’ movement instigated in the 1960s. See for example, Richard Posner, Economic Analysis of Law, Eighth Edition (Wolters Kluwer, New York, 2011); Steven Shavell, Foundations of Economic Analysis of Law (Belknap Press, Cambridge Mass., 2004); Ronald Coase, The Firm, The Market, and the Law (University of Chicago Press, Chicago, 1990). This movement formed the target of much of the criticism in the ‘law and development’ literature. See, for example, David Trubek and
The recent approximation of economics and human rights is no doubt due to a variety of factors, yet perhaps the most prominent is the rise of a specific development paradigm that elevates finance and markets, and demotes the human and the social. The subsequent emergence of calls for human


rights mainstreaming, the increased prominence of socio-economic rights, and the critical turn and approach towards the field of economics, all of which began in the 1990s, may then be viewed as a reaction to this systematic marginalisation of the social that began in the 1980s. At least in significant part, human rights have become the repository


of hopes for the defence of the social and the human being from both the market and the State. In Polanyian terms, they are presently a core part of a ‘double movement’ generated in reaction to the second attempt to remove markets and economic processes from their social context in the last 150 years, raising fundamental questions of how rights might perhaps permanently regulate our economic reality and prevent a third attempt.

This particular project of approximation has only recently begun, and the terms and rules of such an engagement are now being explored, debated and formulated. Consistent

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34 In relation to the first attempt, the laissez fair of the mid-1800s to early 1900s, Polanyi theorised that the imperative of the market towards freedom from social constraint generated a resulting social movement aimed at its containment, thus giving rise to an overall double movement. Block and Somers have masterfully demonstrated the critical relevance of his analysis to our present neo-liberal era. Fred Block and Margaret Somers, The Power of Market Fundamentalism: Karl Polanyi’s Critique (Harvard University Press, London, 2014).


with Balakrishnan, Elson and Darrow, this study takes the position that human rights law offers “a nuanced and synthetic articulation of decision making principles” that may be drawn from the theory and practice of this branch of law.\textsuperscript{37} These principles form essential criteria in a just policy-making process by, for example,

focusing on the role of human rights in revaluing policy debates, challenging problematic assumptions of neoclassical economics, correcting market failures, strengthening accountability for policy choices, and repoliticising development, thereby opening space for social change.\textsuperscript{38}

The study is similarly guided by Salomon and Arnott’s work, demonstrating that human rights provide crucial normative guidelines and an orientation that “offers solutions to some of the specific areas of concern for economic decision-making in the context of development”.\textsuperscript{39} More specifically, it does so by providing mainstream economics


\textsuperscript{39} Salomon and Arnott, 2014, supra note 36, p. 44.
with the justice-centred guidance it lacks, moving it beyond
the conventional premises of economic efficiency and
aggregate social utility ... [helping to] set alternative norms
and value judgments that can act as an integral
complement to [mainstream] economic analysis. 40

From this standpoint the present study may be viewed as
building on and complementing Salomon and Arnott’s
analysis by dwelling on the potentially productive interaction
between human rights and the ‘remainder’ of the field, ‘non-
mainstream’ or ‘progressive’ schools of economic thought, with
respect to the limited subject area of foreign investment. 41

Some key conclusions regarding the rules of engagement
have surfaced from the debate so far. On the human rights
side: It is now clear that economics should not be seen as a
monolithic entity identified with one narrow school of thought.
Economics necessarily deals with hard choices and trade-offs,
and human rights will have to shed absolutist stances and do
the same. Simplistic statements of human rights’
deontological superiority and ‘self-evident’ ability to ‘guide’
policy cannot substitute for detailed engagement with specific
problems and alternative solutions. Finally, human rights
theory will not suffice alone; economics provides essential
tools and approaches for those serious about realising human
rights in practice, and socio-economic rights advocates in
particular must deepen their knowledge of economics and
engage directly in debates within the field.

40 Ibid.
41 However, a certain qualification may be required, inasmuch as the
border separating neo-liberalism from heterodox economics, as framed
here, would not seem to be coextensive with the border between
‘mainstream neo-classical’ economics and these other ‘non-neoclassical’ or
‘progressive’ schools as classified by Salomon and Arnott. Nonetheless,
these discrepancies in definitions of analytic and methodological borders
do not need to be exaggerated. The focus of this study would still seem to
be qualitatively different and therefore complementary, targeting human
rights synergies with these ‘non-neo-classical’ schools, even if the precise
drawing of conceptual borders also differs.
On the economics side: It is evident that human rights contain the means of making, as well as the means of judging, trade-offs in practice and cannot be dismissed on the grounds of deficiency in this regard. Human rights do not entail a displacement of economics as such, even if they require a serious rethinking of certain of its elements and a limit to its right to inform our overall value system. The importance of power, marginalisation, class and systemic effects cannot be excluded from the process of policy-making such that technical and abstract models blind us to real outcomes. And if human rights standards are applied properly certain economic policies will have to meet a high burden of proof to be viewed as publically justified, legitimate and acceptable, and some may ultimately be disallowed in an identifiably legal sense.

The role of the State is crucial in any discussion of human rights and economics. Its key position as both medium and mediator between the citizen and the market is perhaps pre-eminently theorised by Margaret Somers. Somers provides a penetrating analysis of the current opposition between market fundamentalism (here labelled neo-liberalism or the dominant development paradigm) on the one hand, and social inclusion and human rights on the other. She describes the conferral of social inclusion through recognition of a person as fully human and therefore part of a given community, as the essential precondition for realising human rights in practice through grounding a fundamental right to have rights. She

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42 Or, as two World Bank employees put it, human rights analysis draws attention to inadequately grounded methodologies on economics, whereby “it often turns out that these [causal economic] models are quite far from reality; and that, in some cases, we have merely let ourselves get carried away by ideological fashion rather than evidence.” Milan Brahmbhatt and Otaviano Canuto, ‘Human Rights and Development Practice’ 50 Economic Premise (2011), p. 3.

43 Somers, 2008, supra note 31. See also, Block and Somers, 2014, supra note 34.
details the inherently corrosive effects of neo-liberalism first on this prior right to social inclusion and subsequently on the possibility of human rights themselves. Human rights ultimately require a delicate balance between the State, the market and people, acting through a robust civil society. For rights to be realised “the market must be socially embedded in two ways – it must be regulated by laws, rules and ethics that constrain its practices, and it must be restricted from over-expanding its scope.”

Yet disproportionate power granted to the market disrupts the balance, State capture tilts it further, and insufficient protection of the social and civil realm sets it permanently off centre. A dynamic is created which collapses the triadic structure into a binary between the State/market on the one hand increasingly pitted against the people on the other. The rights framework that results is no longer inclusive but is now exclusive. Its meaning is distorted “from that of shared fate among equals to that of conditional privilege.” Those without market value, an ever increasing percentage under this dynamic, not only find themselves without rights, but are also stripped of the right to have them.

The rights that remain, and the extent to which they may be enforced, constitute what Baxi terms the ‘market-friendly human rights paradigm’, which is now threatening to

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46 These ‘left-overs’ are fit only to be sacrificed to the needs of the market and other economic ‘necessities’ to which, ‘unfortunately’, ‘there is no alternative.’ “The outcome has been an ever-growing superfluous population, no longer accommodated by a regime in which market value is the chief criterion for membership.” Somers, 2008, supra note 31, p. 5. See also, Anne Orford, ‘Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice’ 18 Leiden Journal of International Law 2 (2005).
supplant the vision of the International Bill of Human Rights\(^\text{47}\) based on Roosevelt’s four freedoms.\(^\text{48}\)

The emergent paradigm insists on the promotion and the protection of the collective human rights of global capital, in ways which ‘justify’ corporate well-being and dignity even when it entails continuing gross and flagrant violation of human rights of actually existing human beings and communities.\(^\text{49}\)

Yet, aside from a heavily qualified and controversial right to property,\(^\text{50}\) the human rights canon does not support a formulation of ‘human’ rights to global capital. Despite the

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existence of theories to the contrary,\textsuperscript{51} the position of this study, reflecting that of Baxi,\textsuperscript{52} is that to speak of human rights in this tenuous context does not make sense. Instead, an accurate understanding of current dynamics describes the growing institutionalisation of both legal rights and, crucially, financial, political and economic expectations for global capital. This process is crowding out a full conceptualisation of human rights, and is re-packaging them as another innocuous and servile market brand. The first casualties in this reformulation are inevitably socio-economic rights, or Roosevelt’s freedom from want.\textsuperscript{53}

As Baxi points out, a cornerstone of this dynamic is the protection of the rights of foreign investors, which

is to be of such a high order as to deconstruct all traditional and newly emergent human rights as ‘trade distorting’ policy obstacles that need to be overcome in the very title of making the future of human rights secure.\textsuperscript{54}


\textsuperscript{52} “[T]he view that the trade-related-market-friendly human rights paradigm is just an unfolding of the potential of the UDHR is plainly incorrect.” Baxi, 2008, supra note 48, p. 254.


According to this logic the protection of foreign investors is synonymous with development and the securing and advance of civilisation, bringing all the presumed benefits that entails, including the promise of a progressive and eventual realisation of human rights. The ultimatum, based on Hume’s logic, is clear: No investor protection, no development, no human rights.\textsuperscript{55}

1.1.2 - Getting Closer: Rapprochement or Conflict?

These viewpoints have fundamental implications for the currently debated terms of engagement between human rights and the field of economics as such. They prompt four deeply important questions. Should the approximation be seen as rapprochement or conflict? If we wish to roll back a current trend and forestall another attempt to dis-embed markets must we somehow place an international normative block on certain economic paradigms and specific economic policies? Must we effectively subordinate economics to human rights, to

some extent? And if so, are human rights capable of functioning as such an international and domestic legal restraint?

Regarding the first question, the present study answers that, from a human rights viewpoint, whether one sees malign intent and conflict, or benign lack and fundamental rapprochement, depends on the elements in the diverse field of economics that are focused on and engaged with. Due to its limited size, this study only engages with two broad categories of economics, the dominant neo-liberal school and the broadly classed and diverse ‘other’ or what may be loosely called the heterodox school. This study adopts the position that if we are to take socio-economic rights seriously and accord them equal significance with all human rights then there will always be an inherent conflict between human

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57 The term heterodox is employed here in an expansive sense, being defined primarily by what it is not (neo-liberal, ‘mainstream’, or market fundamentalist) rather than what specifically it is. In fact, an important value of heterodox economics thus defined, particularly from the viewpoint of cooperative obligations, is its high plurality, offering a broad range of alternative approaches and values for democratic debate rather than singular prescriptions. As a whole, Grabel notes that heterodox approaches provide a sort of “productive incoherence”, enabling a “proliferation of institutional innovations and policy approaches” that may start “to erode the stifling neo-liberal consensus” that has obstructed equitable and human rights-based development for decades. Ilene Grabel, ‘Financial Architectures and Development: Resilience, Policy Space, and Human Development in the Global South’, Political Economy Research Institute Working Paper No. 281, University of Massachusetts, June 2012, p. 1. Heterodox accounts demonstrate “particular concern for those worst off, and the ways in which financial arrangements can either exacerbate or work to ameliorate economic inequality. We will also find in all of these approaches a concern with the effect of financial arrangements on political voice ... and on national policy autonomy vis-à-vis external actors and domestic rentiers.” Ilene Grabel, “Financial Systems and Economic Development in the 21st Century: Are We All Keynesians Yet?”, in Philip Arestis and Malcolm Sawyer (eds.), 21st Century Keynesian Economics (Palgrave Macmillan, New York, 2010), p. 3. We may also add a greater appreciation for the potentially positive role of the State. Defined as such, the preoccupations of heterodox economics are therefore quite evidently aligned in a rough manner with those of advocates and theoreticians of socio-economic human rights.
rights and neo-liberal economics. The second and third questions above are then answered in the affirmative, and the fourth question is deferred.

Yet the study also posits that between human rights and heterodox economics there are marked signs of rapprochement and some deep commonalities. This may begin to mark the borders of the ‘extent’ to which economics as a field should be subordinated to human rights law, by indicating that many approaches to economics may already be aligned with human rights. The mutuality extends to a common aim; the preclusion of extreme neo-liberal policies. Inasmuch as this shared interest exists, a realistic answer to the last question also emerges. It would be tempting to hold that human rights have enough strength to function as a sufficient legal restraint on particular economic policies, no matter how powerful their supporters and proponents may be. However, this may be to focus overmuch on their future potential as opposed to their present reality. For now though, it would seem more than possible that the combined weight of legal human rights requirements with heterodox theory and empirical argument may be sufficient to displace the current paradigm and prevent its return.

Ultimately Somers’ critique above, through its inversion, provides a programme for the containment of the market that aligns with and informs the parallel project to subordinate economics (to a certain extent) to human rights law.

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58 "In this view the decline of human rights, or simply their lack of assertion, especially in so far as economic, social and cultural rights are concerned, should not be seen as the outcome of doing the right economics wrongly, but of doing the wrong economics rightly." Branco, 2009, supra note 26, p. 3.
59 Balakrishnan and Elson (eds.), 2011, supra note 26, pp. 2-3.
60 This would perhaps not remove the procedural need to still subject the field of economics as such to the requirements of human rights law.
Fundamentally, there is a need to recalibrate the balance of power, such that

the state, market and civil society all coexist in a pluralist universe, each able to sustain its own discursive logic. The one twist is that the discourses and practices of civil society must be a little “more equal” than those of market and state. In order to restrain the inherently expansionary tendencies of class and political power, the citizenship ethic must have normative influence over both market contractualism and state bureaucratization.\(^{61}\)

This clarifies the critical role of human rights law in the creation and maintenance of such a balance, and sets forth its central present challenge. It must serve as a source of such ‘normative influence’, marking legal boundaries and other administrative and economic limits derived from this body of law, to create and protect a space for people and for civil society, with its distinct ‘discursive logic’.\(^{62}\) Yet it cannot adequately set and patrol these boundaries on its own, it must be allied to heterodox economics.

Crucially, this alliance must have a direct effect on the creation of law itself. It must act to prevent

those who exercise market power from using the law as an “instrument of inequity and injustice,” ... [fortifying] the

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\(^{62}\) Fundamentally, this study takes a similar position as Langford and Darrow, Seymour and Pincus, and Balakrishnan and Elson: “[H]uman rights form the normative boundaries whereas economics provides the tools for choice-making and trade-offs within this frame,” Malcolm Langford and Mac Darrow, ‘Moral Theory, International Law and Global Justice’, in Malcolm Langford (et al eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, Cambridge, 2013), p. 426. See also, Seymour and Pincus, 2008, supra note 36, p. 400; Darrow, 2013, supra note 37, p. 100. As Balakrishnan and Elson note, while human rights do not provide all the answers, “it is equally important to recognize that an economic analysis cannot provide a definitive answer either.” Balakrishnan and Elson, 2008, supra note 37, p. 18.
boundary that protects civil society against political or market invasion. Civil society depends on this kind of boundary patrol ... [preventing] those who wield outsized instruments of market power (corporate property, assets and wealth) from converting these into mechanisms of civil domination.63

Human rights are designed to ensure that people are a little ‘more equal’ than the market or the State.64 If human rights and heterodox economics can succeed in the endeavour described, and institute alternate arrangements, they could also comprise a permanent bulwark against another surge of market fundamentalism.65 This is the greatest current test of human rights law, one on which the fate of many will depend.66

63 Somers, 2008, supra note 31, p. 49.
64 As Hausman and McPherson put it, in specific relation to international economic law; “The resolution of globalisation/human rights conflicts in a manner which enhances the effectiveness of human rights law is going to require ... some mechanism for a constitutional level of deference within international economic law toward at least certain elements of the International Bill of Human Rights ... Where some sort of trade off is inevitable, there must be clear recognition of the priority which human rights claims must have in any value conflict.” Hausman and McPherson, 1993, supra note 30, p. 86 (emphasis added). On the potential for human rights to incur a higher degree of deference than other elements of international or domestic law, see Dinah Shelton, ‘Normative Hierarchy in International Law’ 100 American Journal of International Law 1 (2006), p. 295; Dinah Shelton, ‘Hierarchy of Norms and Human Rights: Of Trumps and Winners’ 65 Saskatchewan Law Review 1 (2002).
66 Human rights are critical to the constitution and praxis of civil society, and as Somers states, “civil society’s ability to resist market fundamentalism and state coercion is not the optional fantasy of
Our economies are evidently not performing for the benefit of the majority, least of all the most needy. From our current vantage point, perched in the deepest global recession for eighty years, wrought by the imperialism of neo-liberal ideology, the words of John Maynard Keynes written in the parallel trough of the Great Depression reverberate heavily:

The decadent international but individualistic capitalism, in the hands of which we found ourselves after the War, is not a success. It is not intelligent, it is not beautiful, it is not just, it is not virtuous - and it doesn’t deliver the goods. In short, we dislike it and we are beginning to despise it. But when we wonder what to put in its place, we are extremely perplexed.67

In our present situation, modern human rights law, which was unavailable to Keynes and his contemporaries seeking a way out of the devastation of neo-liberalism’s earlier incarnation, can not only reduce the perplexity, but can also reduce the likelihood of humanity regularly revisiting the same depths.

1.2 – Structure of the Study

The remainder of this study is divided into two parts, comprised of three chapters in each part, followed by a concluding chapter. The first part describes a problem and the second provides a solution. The next chapter traces the broad sociologists and socialists; it is necessary for the survival of democracy." Somers, 2008, supra note 31, p. 117.

lineaments of neo-liberalism and elaborates the basis for viewing this narrow economic theory as a development paradigm. It then takes deeper note of the specific effects of this paradigm on the loosely formalised process of financing for development, positing its core characteristic as a process of creating FDI dependence. The remainder of the chapter argues that while FDI undoubtedly has the potential to positively stimulate development, a dependence on and a reification of this source of capital produces the conditions for it to escape utility in practice. The final sections describe how the competition for foreign capital among developing States, a competition created by Northern State design, has not only forced the ‘grand bargain’ between North and South instituted by the current investment regime, but has also forced its terms, which tend to strip the benefits of any investment gained.

Chapter three details the terms of this ‘grand bargain’, and investigates the interpretation of its standards by investment arbitration tribunals. It describes the deeper function and rationale of the investment regime as a legal system which, once submitted to, ensures the increasing ascendance of foreign investment, not simply its protection. In relating this narrative, special attention is paid to what Somers calls ‘new genealogies’, or in other words ‘minor, ‘repressed’ or ‘subjugated knowledges’, which although present in the dominant narrative “are often made invisible”.68 As such, the newness of the regime and its contingency are stressed, the specific effects of the regime on the provision of socio-economic rights are dwelt on, and certain specific excesses of investment arbitration are brought to the fore. Finally, the current backlash which this set of circumstances has

provoked is presented not as a moderate reaction to the normal ‘growing pains’ of a young legal regime that some see, but as a nascent effort at systemic rejection in reaction to a regime that is increasingly viewed as illegitimate at the core.

Chapter four focuses specifically on the place of human rights in the regime. It is divided into two parts, theory and reality. Through a discussion of three categories of theoretical critique, one of the core arguments of the study is presented in detail here; that in its present manifestation the investment regime is inherently hostile to human rights and will inevitably reshape them into a form conducive to the prime value of investment, as identified with development itself. Therefore, a thorough human rights critique is aligned with the category most sceptical of the regime, predicting dire consequences and calling for a fundamental renegotiation of the ‘grand bargain’. The second part of the chapter addresses the limited examples of the reality of human rights within the regime. It demonstrates that human rights have been systematically precluded from consideration in the rationale of tribunals, and severely compromised in practical outcomes.\(^69\) A short case study on Argentina also clearly demonstrates the holistic nature of the problem, as one that, although most visible in respect of the deficiencies of the investment regime, is nevertheless inseparable from the operations of the process of financing for development and the singular development paradigm it implements, definitively illustrating that the complex of problems identified must be treated as a whole.

\(^69\) This conclusion aligns with that of Schneiderman that the investment regime, as an international legal sub-system, does not display sufficient self-awareness and internalisation of external norms and concerns, leading to a deep deficit of external legitimacy that will require an interventionist response. See, David Schneiderman, ‘Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?’ 1 Oñati Socio-Legal Series 4 (2011).
The first chapter of the second part sets out the basis of the solution posited. The obligation to cooperate is described through an inquiry into its origins and its formulation within the context of the International Covenant on Economic, Social and Cultural Rights. The legal content of the obligation is built through discussion of the work of the Committee administering the Covenant and key scholars over the last decade and a half. Following which the Maastricht Principles are introduced as the clearest and most well-reasoned expression of this obligation to date. Finally the specific formulation of the obligation to be applied in the remainder of the study is set and its rationale is defended.

Chapter six begins to draw the contours of a solution based on this obligation. It applies the obligation to the formulation and operation of the investment regime. Initially, the regime is measured against the most pertinent clauses of the Maastricht Principles. On this basis it is argued that the obligation to cooperate necessitates a wholesale renegotiation of the regime. Yet more than this, the obligation provides a number of specific requirements and guides defining the process of such a renegotiation. The bulk of the chapter is devoted to an explication of these requirements and guides. The last sections draw attention back to the holistic nature of the problem, pointing out that this set of conditions for a human rights-based renegotiation will not be realisable in the absence of significant changes to the wider formative environment of financing for development.

Chapter seven turns to an application of the obligation to this formative environment. It is clear that this task is an extensive undertaking, and the intention is only to begin sketching a conceptual outline. There are a number of principles that can be discerned, and the chapter endeavours
to give both a general view and one specific example of how an obligation to cooperate may function within the complex process of financing for development. A core aim of the chapter is to demonstrate the synergies between human rights and heterodox viewpoints. A coordinated application will highlight certain areas of great concern which are generally marginalised and overlooked in the broad process, specifically the large net financial flows of capital from South to North and the maximisation of domestic resources in developing countries. A general approach will necessitate the conceptualisation of specific themes as prisms through which to analyse the process and the complex of issues involved. The theme selected and pursued here is that of the maximisation of domestic resources. However, certain other themes are identified for future analysis. In addition, one specific aspect of the approach is illustrated in detail, with respect to the particular issue of leveraging.

The solution presented envisions a possible situation where real and specific alternatives to the constituent policies of the dominant development paradigm are identified within the process of financing for development, and are mandated or at least significantly elevated in importance. This would help to affect a fundamental shift in that paradigm away from forced dependence on foreign investment. In turn this would open a space of freedom where developing countries could realistically adopt appropriate stances in the context of a renegotiation of the investment regime under cooperative principles. A new bargain struck through this process would contribute to the realisation of human rights and developmental priorities, and would also be of greater benefit to foreign investors through the creation of a truly predictable
environment, stabilised for the long term by appropriate expectations, mutual benefit and deep legitimacy.

The bulk of the conclusion is devoted to a defence of the obligation to cooperate against what are perhaps the most likely objections to its implementation. Two central objections are foreseen, both based on specific versions of ‘realism’. In defence of the obligation it is argued that in fact these versions are not realistic enough. A full account of the reality of human rights law (including the emancipatory and counter-hegemonic potential of socio-economic rights) and the reality of the global political economy (including the significant and ongoing shifts in State power), add to the relevance, potential and likelihood of an obligation to cooperate rather than detract from it. Once the critique inherent in the objections is learned from and internalised, it should not prevent a drive to implement a law of cooperative obligation that is self-consciously, realistically and carefully formulated. For the promise is large, and “[t]he spirit of new approaches is to begin.”\textsuperscript{70}

2 - FDI AS THE ‘ENGINE’ OF DEVELOPMENT

The great Chinese philosopher Lao Tzu ended his Tao-te Ching with these words: “Above all, do not compete”. The only actors in the neo-liberal world who seem to have taken his advice are the largest actors of all, the transnational corporations.1

As a practical, empirical matter, the major nations of the world are not to any significant degree in economic competition with each other.2

This upending of received wisdom begs the following question; if big business is fundamentally in alliance and so are wealthy nations, then who does compete? Under a domestic neo-liberal paradigm it is the poor and the middle class, and the small and medium sized enterprises that the majority of these people either own or are employed by, that are forced to battle over a diminishing portion of the national wealth. At the international level, in the context of structural inhibitions on internal or inward-looking development alternatives fostering domestic industry and savings, the same upward movement of wealth forces the mass of underdeveloped and middle income countries into competition over an insufficient, and often toxic, pool of external finance for development.

Liberalised trade and investment, privatisation and increased dependence on FDI as a source of external finance, then put local enterprises in developing countries, and often whole industries, in forced ‘competition’ with much larger multinational corporations and their home State industries. Most often such competition is purely nominal, as the multinational simply accrues a large slice of the market due to economies of scale and its advantageous resources and political influence.

The real competition is between the remaining domestic firms, farmers and street vendors, for the diminished portion of the market that remains to them. As George notes, mergers and acquisitions, accounting for roughly 80 per cent of global FDI, and are generally of no direct benefit to the host State or its people. Yet such a benefit was never the motivation. As mergers and acquisitions decrease competition for the multinational corporation they increase competition for everyone else, from developing countries to local companies and, ultimately, to increased numbers of unemployed competing for fewer jobs. In the motivation for mergers and acquisitions the true connection between competition and value in a neo-liberal order is revealed. The value is in avoiding it.

Competition is also a measure of those which the order itself values. If you find yourself in a debilitating competition, for work, for a decent standard of living, for food, or for your life, then you are not valued by the order. Needless to say the competition is made more unfair by the bias of the playing field and the rules of the game, in which the international

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investment regime plays a large part. Impoverished people, communities, populations and States, cannot take the sage advice of Lao Tzu. To survive they have no option but to compete. Yet there are no winners in this competition. All those States which are forced to compete lose, only to varying degrees. The only winners are Northern States who determine the structure and rules of the game such that they do not have to compete, because only in avoiding real competition can States actually develop. In this endeavour cooperation is essential, hence the name of the primary and exclusive Northern State forum, the Organisation for Economic Cooperation and Development (OECD).

However this is not the end of the story. Neo-liberalism is dynamic, but in one direction only. In persistently redistributing wealth and resources upward the neo-liberal rules of the game have the side-effect of ever narrowing the number of winners and shrinking the ring of exclusive co-operators. Conversely the number of losers left outside in the harsh climate of competition ever expands. Inevitably, neo-liberal policies have a habit of coming back to bite the public authorities that implement them. This occurs because the order empowers private international capital unbound by a connection to any State, and interested only in minimising public authority where it may limit profits and maximising it where it may help to increase them. The end of the story is a dystopia where all effective authority is held by private international capital. As more and more people find

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themselves in this dystopia on the wrong side of capital and competition they will see, even if their public authorities do not, that the only answer is cooperation; but this time it cannot be exclusive.

2.1 – The Context of the Neo-liberal Development Paradigm

The ear of most governments is held firmly by the ‘science’ of economics, and more specifically by neo-liberalism as the premier if not exclusive theory within this field. Broadly construed, neo-liberalism advances a complement of social, political and economic dimensions, and as such positions itself as a credible model for the organisation and future progression of human beings. It is therefore apt to describe it as a development paradigm. As Turner notes, from its inception the neo-liberal paradigm was intended to oppose the values of community, the collective interest and cooperation, with individual self-interest and atomised market

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5 For one of the earliest and most influential works criticising the notion of economics as a proper science see, Thorstein Veblen, ‘Why is Economics Not an Evolutionary Science?’ 12 Quarterly Journal of Economics 4 (1898). For more recent treatments covering the development of econometrics, or pseudo-scientific economic modelling, which came hand in hand with the rise of mainstream neo-liberalism giving it a patina of scientific credibility see, Steve Keen, Debunking Economics: The Naked Emperor Dethroned? Revised and Expanded Edition (Zed Books, London, 2011); Edward Fullbrook (ed.), A Guide to What’s Wrong with Economics (Anthem Press, London, 2004).

competition.\textsuperscript{7} There is no single definition of neo-liberalism,\textsuperscript{8} but for our purposes it may be generalised as follows.

The ideology has three major tenets from which flow a host of consequential economic policies and assumptions. First, the overriding human value is the unbridled pursuit of individual self-interest via the enforcement of private property rights and a contractual system,\textsuperscript{9} giving rise to markets. Second, markets are self-regulating and any resource or good is most efficiently and effectively distributed by their free operation. Third, given that it can be readily shown that free markets increase existing inequalities, neo-liberalism holds, as an article of faith, that while this may be so in the short-term, in the long-term upward wealth distribution will be re-balanced by an eventual ‘trickle-down’ effect, provided markets are left unregulated.

Accordingly, the State must be based on the rule of property and contractual rights. Government intervention in and regulation of the market must be minimised. Issues of

\textsuperscript{7} “[N]eo-liberalism is a complex ideology with many different strands, but, through their common enemy, collectivism, and through their conceptual boundaries, these strands come together to form a coherent whole.” Turner, 2008, supra note 6, pp. 216-217.
\textsuperscript{9} “The Programme of Liberalism, if condensed into a single word, would have to read: property, that is, private ownership of the means of production. All the other demands of liberalism result from this fundamental demand.” von Mises, 1985, supra note 8, p. 21. US Secretary of State Spruille Baden proclaimed in 1946, that “[t]he selective processes of society’s evolution through the ages have proved that the institution of private property ranks with those of religion and the family as a bulwark of civilisation.” Quoted in Joyce Kolko and Gabriel Kolko, \textit{The Limits of Power: The World and United States Foreign Policy, 1945-1954} (Harper and Row, New York, 1972), p. 13.
social justice and wealth distribution should be left to the operation of market forces. Fiscal discipline must be observed and spending cuts (especially to social welfare, health and education) are the preferred means of maintaining such discipline. Tax should be broad based and regressive, targeting the middle and lower strata of society, as tax cuts to the rich free ‘productive’ or ‘entrepreneurial’ capital for investment, which is the lifeblood of progress. Rising social and economic inequality is to be accepted, as the ‘trickle down’ will eventually bring balance. Macroeconomic aggregate data in the simple form of GDP growth is therefore the best measure of progress. Government, as a colluding collective, is inherently less efficient than the private sphere of competitive individuals, therefore, in the interests of efficiency, it must privatise State run entities and sell off public holdings to private actors.

Debt must be paid. Debt forgiveness is perhaps the most serious and intolerable interference with the market. Capital markets should be deregulated and financial and banking regulations loosened. Labour ‘markets’ must be deregulated and unions opposed or banned, such that wages can find their ‘natural’ market equilibrium. Finally, business in general and investors in particular must be given a special and privileged position in society, and in politics, as they are the drivers of the market and the precondition of entrepreneurial activity, progress and development. According to this ideology, investors stand at the apex of our society, as their nature and behaviour best reflect the core human value of the individual freely maximising its own self-interest through the exercise of

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10 Though not only with the market, but also with some of the most fundamental aspects of human relations, as Graeber demonstrates. David Graeber, Debt: The First 5,000 Years (Melville House, New York, 2011).
contract and property rights, upon which civilisation and progress itself is allegedly based.

This particular brand of development ideology rose to prominence in the 1970s in direct reaction to the perceived failure of the Western post-war social democratic, or welfare State model.\(^{11}\) The previous model was based on an American ‘New-Deal’ social compromise, and economic principles developed and advocated by thinkers such as John Maynard Keynes,\(^{12}\) linked to a contemporary resurgence of centre-left politics worldwide. From the end of the Great Depression to the mid-1970s the dominant Western model amounted to a liberal economic market system regulated by a politically imposed social conscience.\(^{13}\) The basic social compromise was reflected at the global level in the original form and intent of the Bretton Woods system, which Keynes was instrumental in designing.\(^{14}\)

This system formed by the World Bank, the International Monetary Fund (IMF) and the Global Agreement on Tariffs and

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\(^{13}\) See, David Plotke, Building a Democratic Political Order: Reshaping American Liberalism in the 1930s and 1940s (Cambridge University Press, Cambridge, 1996). This could also be viewed, from a Marxist perspective, as a new class compromise between labour and capital. Harvey, 2005, supra note 6, p. 10.

\(^{14}\) US policy-makers “believed that the maintenance of high levels of employment and the development of national planning throughout the world should take precedence over the opening of economies to the free flow of investment and trade.” They were “suspicious of private foreign investment; which they considered to be more destructive than constructive”. Fred Block, The Origins of International Economic Disorder: A Study of United States International Monetary Policy from World War II to the Present (University of California Press, London, 1977), p.36. This was to be what US Treasury Secretary Henry Morgenthau referred to as a “New Deal in international economics”. Quoted in Armand Van Dormael, Bretton Woods: Birth of a Monetary System (Palgrave Macmillan, London, 1978), p. 52.
Trade (GATT) was aimed at progressively freeing the international movement of goods, services and capital. A fundamental liberal market aim was balanced by the stability and national policy autonomy offered by a system of more-or-less fixed currency exchange rates and the freedom of governments to implement controls on international capital movements. Governments held substantial power and freedom to liberalise and integrate with other economies at their own pace.\(^{15}\) Government freedom regarding capital controls was of central importance in insulating weaker developing economies from possible disasters caused by international financial crises and the profit seeking of foreign investors.\(^{16}\)

The post-war system was designed in conscious recognition of the failures of the \textit{laissez-faire} policies of the mid to late nineteenth century. As extensively theorised by Karl Polanyi, the polar liberalism of that time had resulted in markets becoming ‘dis-embedded’ from their social and political context and re-embedded in another context more favourable to the wealthy. This had negative consequences on employment, equality and general welfare, especially that of the working class.\(^{17}\) Reflecting the return of a social conscience, John Ruggie thus coined the term ‘embedded liberalism’ to describe the post-war system.\(^{18}\) Liberal economic ideology was directed by its grounding in the broader social fabric through democratic political processes, which were


\(^{17}\) Karl Polanyi, \textit{The Great Transformation} (Farrar and Rinehart, New York, 1944).

facilitated at the international level by ample leeway for national economic policy space.\textsuperscript{19}

This system enabled alternative and relatively autonomous development paradigms, many focussed on building domestic capacity and industrialising from within, such as ‘import substitution industrialisation’.\textsuperscript{20} Developing economies were afforded the leeway to pursue a variety of more or less protectionist development policies. Certain industries were shielded from international markets, competition and investment. It was readily recognised that too much openness at the wrong time could lead to a depletion of domestic savings and perpetual dependence on external financing for development and growth.

The welfare State model in the West brought rapid, sustained and equitable economic growth, as did comparable alternatives in many developing countries, until limits began to be reached in the 1970s.\textsuperscript{21} Growth began to slow as capital was accumulated but not reinvested due to rising wages and the concomitant decrease in expected profit levels for the capitalist class. However, the crucial limit was seen as the inflationary tendency of the model, which was difficult for governments to control under populist pressure.\textsuperscript{22} On a global level, there was a push from those holding all the nationally

accumulated capital in the western world to free its movement overseas for foreign investment where there was the potential for far greater profits.\textsuperscript{23} Neo-liberalism was at that time very much a minority viewpoint in the economics profession. However, it nevertheless had ready-made and clear theoretical answers to these problems.

In a short time and with strong support from the political right and the wealthy, neo-liberalism was “plucked from the shadows of relative obscurity … and transformed into the central guiding principle of economic thought and management.”\textsuperscript{24} The core of this principle was to again dis-embed capital and markets, returning to the ideals of the nineteenth century that Polanyi had so valuably deconstructed.\textsuperscript{25} Thus, the previous class compromise, and Ruggie’s socially embedded liberalism, was reversed.

As an illustration, the average ratio of CEO pay to that of the lowest paid worker in US corporations was 36:1 in 1971. Following a half decade of neo-liberalism under President Reagan the ratio stood at 400:1 and by 2003 it had reached 1000:1.\textsuperscript{26} From a low of 22% in 1975 the share of the wealthiest 1% in the US, in terms of ownership of national assets, almost doubled to 40% in 1995,\textsuperscript{27} and the national income share of the top 0.1% trebled from 2% to 6% from

\textsuperscript{24} Harvey, 2005, supra note 6, p. 2.
\textsuperscript{25} Ibid., p. 11.
1978 to 1999. David Harvey, in his seminal work on neoliberalism, notes that these

[r]edistributive effects and increasing social inequality have in fact been such and persistent feature of neoliberalization as to be regarded as structural to the whole project. Gerard Dumenil and Dominique Levy, after careful reconstruction of the data, have concluded that neoliberalization was from the very beginning a project to achieve the restoration of class power.

Sir Alan Budd, a long serving officer of the British Treasury during the 1980s, and advisor to Margaret Thatcher, was candid on this point when reminiscing on the drastic economic reversals of that decade in the UK:

The Thatcher government never believed for a moment that [neo-liberal monetary policy] was the correct way to bring down inflation. They did however see that this would be a very good way to raise unemployment. And raising unemployment was an extremely desirable way of reducing the strength of the working classes. ... What was engineered - in Marxist terms – was a crisis of capitalism which re-

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28 Harvey, 2005, supra note 6, p. 16. According to Krugman, “[r]eal wages for most US workers have increased little if at all since the early 1970s, but wages for the top one percent of earners have risen 165 percent, and wages for the top 0.1 percent have risen 362 percent.” Krugman, 2014, supra note 27.

created the reserve army of labour, and has allowed the capitalists to make high profits ever since.\textsuperscript{30}

Despite negative effects on wealth distribution, social justice and democracy,\textsuperscript{31} governments have become convinced of the inevitability and necessity of this set of prescriptions, heralding the rise of the modern neo-liberal competition State.\textsuperscript{32} In the guise of a technocratic and value-free process of decision-making, the people are told from all quarters that there is no choice but the adoption of neo-liberal free-market policies.\textsuperscript{33} Regardless of the deep theoretical and practical challenge of the latest global financial crisis and ever mounting evidence of failure, neither their perceived necessity nor their implementation by government and international institutions is in any serious abeyance.\textsuperscript{34} Ideological


entrenchment of these policies and resistance to alternatives is a straight-forward reflection of their service to the privileged. As such the latest global crisis has been particularly good for business; “corporate profits have soared since the financial crisis began, while wages—including the wages of the highly educated—have stagnated.”

Through the ‘80s and ‘90s the fully neo-liberalised international financial institutions (IFIs), and their imposition of structural adjustment policies, played an essential part in the spread of this ideology. It was largely through their financial support, that developing countries and the newly independent East European States entered their dramatic ‘transition’ to the fully integrated and competitive model, a transition that has singularly failed to bring sustained economic growth. Yet despite the force with which it has been imposed, the spread of neo-liberalism has taken with it an enduring, if entirely misleading, association with the notion of necessity and the absence of ‘real’ alternatives.

35 Krugman, 2014, supra note 27.
The alternatives were forcefully precluded and neo-liberal policies installed at the behest of the dominant Northern States structuring the international economic order, mostly through economic coercion. In a speech to the Directors of the World Bank in 1983, President Ronald Reagan described these policies as the “magic of the market-place”, demanding that the institution fully accept and propagate the neo-liberal programme under threat of the withdrawal of US funding.41

The imposition was greatly facilitated by the debt crisis of 1982.42 Until then many developing countries had been successfully pursuing semi-autonomous development strategies and forging a broad based alliance at the international level to influence the dominant global ideological and power structures through cooperative action. The financial and macroeconomic restructuring of the developing world, enabled by the leverage gained by the wealthy nations as a result of the debt crisis and mediated mostly by the IMF, was the pretext to curtail this provocative trend and “remould the developing countries in the neoliberal image”, putting them on the ‘correct’ development path, through stringent

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conditions attached to bilateral aid from Northern States and loans from the IFIs.43

Yet the neoliberal medicine proved worse than the ailment. By the end of the 1980s, Latin America, the epicentre of the crisis, was beset by stagnant growth, higher and ever increasing debt,44 and dramatically escalating inequality in income and wealth distribution.45 From an average regional growth rate of 5.3% annually from 1950 to 1981, seeing a doubling of income per capita, growth dropped to 1.9% in the period 1991-2002.46 The region, in common with the vast majority of the developing world during this latter period, was increasingly wracked by financial and economic crises, due to the financial liberalisation enforced by the IFIs and increased dependence on the flux of external commodities and financial markets, also a direct result of loan conditionalities. The IFI’s response to the debt crisis was designed to save the


44 The IMF itself has found that while the 1950s and 60s saw only four sovereign debt defaults in twenty years, over the forty years of neo-liberal investment liberalisation the average has soared to four sovereign defaults every year. Eduardo Borensztein and Ugo Panizza, ‘The Costs of Sovereign Default’, IMF Working Paper, WP/08/238, October 2008, p. 7.


commercial banks of the West that were overexposed and would have collapsed without the re-scheduling of Third World debt, as opposed to its default or cancellation. As such, “the burden of debt was transferred from the banks of the First World to the banks of the Third World, to their governments, and eventually to their people.”\(^{47}\) The patterns created in the 1980s have been continued to this day.

From a perspective of human rights and social justice this all sounds loud alarm bells,\(^{48}\) and it is now widely acknowledged that the neo-liberal model of development has been a failure,\(^{49}\) detrimental to socio-economic rights in particular and development in general.\(^{50}\) The intensifying social tension, increasing instability, dramatic inequality, environmental degradation, and relegation of democratic processes characterising the neo-liberal era are well

\(^{47}\) Peet, 2007, supra note 41, p. 76.

\(^{48}\) “States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.” Declaration on the Right to Development, UN General Assembly Resolution 41/128, annex, 41 UN GAOR Supp. (No. 53) at 186, UN Doc. A/RES/41/128, 4 December 1986, Article 2(3).

\(^{49}\) For a full litany of the failures of neo-liberalism, see, Harvey, 2005, supra note 6, pp. 152-182.

recorded. Many neo-liberal theorists would concede these effects, but justify them by a faith in rapid and long term overall growth that would eventually more than compensate. Yet, what is not so widely acknowledged is the fact that this growth has simply not occurred.

On the contrary, comparing economic growth in nations before and after the advent of neo-liberalism reveals a substantial drop across almost all nations irrespective of the North-South divide. However, the loss of productive capacity as a percentage of previous growth has been significantly greater in the developing world. Developed economies slowed from 3.2% to 2.2%, comparing the periods 1960-1980 and 1980-1999, while growth in the developing countries fell from 3% to 1.5% overall, or to 1% if China and India are excluded. In the same periods Latin American growth dropped from 3.1% to 0.6%, while in the Middle East and North Africa it


even turned negative, from 2.5% to -0.2%, and the same in Sub Saharan Africa, from 2% to -0.7%. In other words, for Sub Saharan Africa income per capita grew by 36% in total over the whole of the first period and fell by 15% over the second.\textsuperscript{54} In the latter period, Professor Robert Pollin has estimated that the developing world lost $480 billion per year in potential GDP due to neo-liberal policies.\textsuperscript{55}

The former States of the Soviet bloc have arguably fared the worst, as, twenty years after the neo-liberal shock wave, they are yet to recover even half of the income levels they had under communism. Lawrence King found that among the transition economies of Eastern Europe those which had implemented the neo-liberal dogma the most thoroughly displayed the worst economic performance.\textsuperscript{56} At the global level, fifty countries registered lower per capita GDP in 2000 than in 1990.\textsuperscript{57} This has an identifiable human cost. The UNDP has found that “[i]n 2003, 18 countries with a combined population of 460 million people registered lower scores on the human development index (HDI) than in 1990 - an unprecedented reversal.”\textsuperscript{58} It must also be noted that China, India, Brazil and some other nations, in their enjoyment of remarkable relative success, have deviated very significantly from standard neo-liberal prescriptions.\textsuperscript{59}

\textsuperscript{54} Weisbrot (et al), 2000, supra note 53, p. 2.
\textsuperscript{59} So and Chu, and Chandrasekhar and Saad-Pilho concur that development success, where observed, has been accompanied by wide
Nevertheless, despite the litany of failures and defects observed in the literature,\textsuperscript{60} which the World Bank and the IMF both acknowledge,\textsuperscript{61} in the absence of breathing space for any alternative, and the tenacious grip of wealth and privilege on the political process, the neo-liberal development paradigm persists.\textsuperscript{62} Reflecting its service to the political influence and interests of “money and power, neoliberalism has established divergence from the neoliberal plan. Alvin So and Yin-wah Chu, 'The Transition from Neoliberalism to State Neoliberalism in China at the Turn of the Twenty-First Century'; C. P. Chandrasekhar, 'From Dirigisme to Neoliberalism: Aspects of the Political Economy of the Transition in India'; and Alfredo Saad-Filho, 'Neoliberalism, Democracy and Development Policy in Brazil': all in Chang Kyung-Sup, Ben Fine and Linda Weiss (eds.), Developmental Politics in Transition: The Neoliberal Era and Beyond (Palgrave Macmillan, New York, 2012). “[I]nstead of pushing countries towards efficiency, which was the principal goal, trade liberalization pushed countries into bankruptcy.” South Centre, 'Financing for Development from Monterrey to Doha: A South Centre Input into the Preparatory Process Leading to the Doha Meeting', Analytical Note, SC/GGDP/AN/GEG/7, July 2008, para 111.


\textsuperscript{62} For example, there has been almost no uptake by States of the Barcelona Development Agenda (an alternative global development proposal from 2004 that is far from radical yet would make some valuable changes), which was proffered by a number of economic luminaries. See, Narcis Serra and Joseph Stiglitz, The Washington Consensus Reconsidered: Towards a New Global Governance (Oxford University Press, Oxford, 2008). With regard to the continued employment of failed neo-liberal policies in the EU see, UNCTAD, Trade and Development Report 2012 (UN, Geneva, 2012), pp. iv-v.
a near total worldwide intellectual dominance’, making the emergence of a new paradigm a necessarily slow process. Over this period neo-liberalism has also been inscribed deeply into domestic and international legislation and administrative regulation, such that its deracination is now a major legal project in and of itself. Furthermore, there is the issue of institutional memory. By most accounts the international financial institutions, in particular, have not changed their policies in any significant way.

The IMF continues to implement roughly the same structural adjustment and austerity policies, as seen

64 For a recent internal evaluation of IMF procedure that found many employees felt pressure to conform to pre-set neo-liberal standards, theories and proscriptions see, Independent Evaluation Office, Evaluation Report: Research at the IMF - Relevance and Utilization (IMF, Washington DC, 2011).
recently in Greece and Ireland for example, even though, as reported, it is well aware that such policies will fail. The ‘response’ of the World Bank to the most recent global financial crisis, to which it greatly contributed, is neatly summarised by Bayliss, Fine and Van Waeyenberge; “we find that the impact of the crisis on the Bank has been one of business as usual, only more so.” Although certain adjustments to the paradigm may be discerned at the national level, the grip of neo-liberalism at the level of international economic governance would seem as strong as ever. Krever,


70 According to the Assistant Secretary-General of UNDESA, “including poverty on the economic development reform agenda has basically served as sugar-coating on the Bretton Woods institutions’ economic liberalization agenda despite their by now well known in-equitable and contractionary consequences.” Sundaram, 2005, supra note 60, pp. 11-18; See further, Ziya Onis and Fikret Senses, ‘Rethinking the Emerging Post-Washington Consensus: A Critical Appraisal’, Economic Research Centre Working Paper 03/09, Middle East Technical University, November 2003; Walden Bello, ‘The Post-Washington Dissensus’, Foreign Policy in Focus, 24 September
for example, demonstrates how the Bank’s turn to the ‘rule of law’ in development theorising is an attractive new discourse for the institution “precisely because it provides strong ideological support for the neoliberal agenda.” 71 In fact it is the case that one particular aspect of this agenda is being actively strengthened; the structural preference for external financing for development in the form of foreign capital.

2.2 – The Effects on the System of Financing for Development

The onset of neo-liberalism and the debt crisis of the 1980s also marked a general turnaround in the attitude toward FDI as a stimulant to economic growth. 72 Previously, in their growing confidence and independence, developing countries viewed FDI and foreign influence with high suspicion. 73 Now effectively subsumed by the neo-liberal mode of development, they have come to be corralled into a competitive struggle for FDI as the one and only remotely sufficient and relatively stable source of external funding for development. 74 Directly

74 “[F]oreign direct investment (FDI) has come to play an unprecedented role as a source of management, technology, and external funding for the developing countries and economies-in-transition. Five-sixths of all capital flows to the less developed world now originate in the private sector, with FDI by far the largest component, ... Surrounded by instability in equity markets and in international lending, FDI ... is also the most stable source
due to the actions of Northern powers, underdeveloped countries have no choice other than FDI by which to seek to increase government funds, pay off crushing debt, raise living standards and realise human rights.

The dominant paradigm has effectively come to dictate a reliance on foreign direct investment as the only viable development ‘solution’. As one author notes, certain goals are seen as essential to development, and FDI is often presented as the key to – and sometimes, at least implicitly, as the only means of – attaining them ... [T]his very positive view of direct investment has been embodied in strenuous efforts to promote it, led by the international financial institutions and the major developed country governments.

FDI assisted development (with a positive mainstream slant), or FDI dependent development (with a more realistic slant), is now increasingly perceived worldwide as either the only preferred, or the only possible ‘engine’ for economic growth.


77 Viewed from the neo-liberal perspective, “the challenge of economic development is reduced to three simple propositions. Economic growth requires foreign capital. Foreign capital requires removing sovereign risk. And removing sovereign risk requires a commitment not to play games with other people’s money. All this made for a coherent theory, even if it did not correspond to the actual development experience of any successful country larger than a city-state.” Dani Rodrik, ‘Argentina: A Case of Globalisation Gone Too Far or Not Far Enough?’, in Jan Joost Teunissen and Age Akkerman (eds.), The Crisis That Was Not Prevented: Lessons for Argentina, the IMF, and Globalisation (FONDAD, The Hague, January 2003), p 17.
‘cooperation’, Aguirre accurately laments that “investment is the backbone of international cooperation and it overshadows distributional justice both between and within States.”  

78 There is a ubiquitous perception that, despite clear recognition of its perils, “there is one thing which, for a developing country, is even worse than to attract foreign direct investment: it is to attract none.”  

79 Indeed, many developing countries are already “critically dependent on direct and equity investment flows as a source of [development] capital.”  

80 Commentators now regularly refer to “the reigning orthodoxy that FDI is an elixir for development,”  

81 and to processes of globalisation producing “a new model for economic modernisation based on foreign direct investments”,  

82 which form “the productive core of the global economy, precisely because [they reflect] the establishment of an integrated international production system.”  

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Recently, burgeoning FDI from Southern States has been heralded as the new “growth driver”,  

84 and the United Nations General Assembly has stated that

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[p]rivate capital is a major tool for achieving economic growth in a growing number of developing countries. Higher levels of foreign private investment should be mobilised given its mounting importance.\textsuperscript{85}

The World Bank, in its statement on the post-2015 development agenda, believes that “[f]or most developing countries, FDI is the preferred private financing modality”, despite admitting, only two paragraphs earlier, the seriousness of problems caused by “high levels of capital flight and limited capacity to collect revenues from multinationals”.\textsuperscript{86} The enthusiasm for FDI as the development solution only seems to grow, despite the existence of solid evidence showing that countries which grow more rapidly are those that are less reliant on foreign capital.\textsuperscript{87}

The rise of FDI is not an accident. Vandeveldé provides a concise snapshot, noting that in 1984, in the context of the debt crisis and very low levels of commercial lending, “the United States insisted on a 40 percent reduction in lending by the International Development Agency, the World Bank entity


\textsuperscript{86} World Bank, \textit{Financing for Development Post-2015} (World Bank, Washington DC, 2013), pp. ix-x. As private funds made up more than 80% of capital flows to developing countries in 2012, this preferred private financing modality is in fact the preferred \textit{overall} financing modality.

that lends to the poorest nations”. Then, “[b]etween 1980 and 1987, United States contributions to multilateral development banks dropped from $2.3 billion annually to $1.1 billion.” Since the 1980s other sources of development finance have become relatively more scarce, more volatile and more unappealing. From 5% of net financial flows to developing countries in 1980, FDI soared to comprise 43% of flows in 1996, and over the same period funding to the private sector, relative to the public sector rose from 15% to 75%.

Again, the problem begins with debt. As a whole, developing countries are under the strain of heavy, increasing and in many cases unsustainable debt, which has paradoxically been exacerbated by the neo-liberal ‘solution’ to the crisis of the 80s. As some indication, over the period of neo-liberal implementation overall developing world debt grew from $580 billion in 1980 to $2.4 trillion in 2002. Much of this debt is known to be unrepayable, and in 2002 developing countries paid $340 billion just to service the debt. This figure may be compared to the $37 billion they received in official development assistance from the North in that year. Their potential domestic savings are not realised and a great deal of their actual savings goes to interest payments alone.

89 Ibid, p. 389. “[R]eductions in lending combined with capital flight sharply diminished the capital available to developing states to finance economic development. Unable to borrow sufficient funds and with their domestic savings fleeing abroad, developing states found foreign direct investment one of the few remaining sources of capital available.” Ibid, p. 390.
92 See for example, World Bank, Global Development Finance: External Debt of Developing Countries (World Bank, Washington DC, 2010).
93 Debt and aid statistics from Harvey, 2005, supra note 6, p. 193.
This leads directly to the international process of external financing for development (FfD). In this context of debt bondage the policies of the international financial institutions and donor States have significant and determinative effects,\(^{94}\) which have only ensured an “increased recourse to foreign borrowing.”\(^{95}\) In conditioning the dispersal of existing funds, and some debt relief, on the opening of domestic markets to FDI and the creation of investment friendly economies, they essentially force the conditions for increased future reliance on FDI for development over other external financial flows, including their own. The multilateral development banks have increased their funding to the private sector ten-fold over the last twenty years, adopting an ‘investment climate approach’ that prioritises the attraction of foreign investment.\(^{96}\) In this way donors and IFIs have become simple conduits for the penetration of FDI into developing economies, simultaneously ensuring their own near irrelevance to development financing.

Financing for development comes from a number of sources; primarily from bi-lateral and multi-lateral official development assistance of Northern States (ODA), loans from the World Bank and IMF, and private flows (FDI, portfolio investment, and private bank loans). Levels and predictability of portfolio investment, loans from the World Bank, IMF and private banks have fluctuated significantly.\(^{97}\) In addition,


\(^{95}\) South Centre, 2008, supra note 59, para. 29. “[T]he international financial institutions viewed the notion of resolving the debt problem as basically one of creating conditions for a country to return to the world capital market for more borrowing.” Ibid, para 104.


dramatic movements of portfolio investment have caused numerous economic crises in countries that have relied on them in combination with the weak capital controls advised and conditioned by the IFIs and donor States. Interest rates of private banks are unappealingly high and variable in relation to loans from the IFIs. However, since the late 1990s many developing countries have been understandably reluctant to approach the IFIs given the evident danger and failure of the structural reforms they condition. ODA and FDI have therefore proven to be the most significant and stable sources of financing, and so form the focus here.\textsuperscript{98}

The following statistics show clearly the effect of neo-liberal ideology on the patterns of development financing.\textsuperscript{99} In gross terms, and on average despite a slight fall in the early 1990s, ODA has risen slowly and relatively marginally, from $70 billion per year in 1990 to $141 billion in 2011. ODA is best measured however in terms of its percentage of Northern State Gross National Income (GNI). Measured this way ODA saw a severe slump in the ‘90s, at the same time as there was a dramatic increase in flows of FDI.\textsuperscript{100} The percentage of ODA slowly picked up from 2000 to 2006 when it finally attained the same level as 1990. This was largely due to international pressure on Northern States from their own promises in the


\textsuperscript{99} Statistics on ODA from OECD Development Assistance Committee, Aid Statistics online, at \url{http://www.oecd.org/dac/stats/} (1-8-2014).

\textsuperscript{100} This drop and the continuing low levels of ODA could also be partly attributable to Northern state adoption of the neo-liberal ideology. For example, Bauer and others have argued that ODA is analogous to a domestic public subsidy, is an unjustified intervention in the global market causing inefficiencies, and therefore should be greatly reduced if not eliminated. See, Peter Bauer, \textit{Dissent on Development: Studies and Debates in Development Economics} (Harvard University Press, Cambridge Mass., 1972); Andrei Schleifer, ‘Peter Bauer and the Failure of Foreign Aid’ 29 \textit{Cato Journal} 3 (2009).
Millennium Development Declaration, which, despite an increase, they failed to keep. Marginal increases in the gross level of ODA have been far outpaced by the growth of GNI in Northern States, meaning that the wealthy have given less as they have become richer. In any event, these marginal absolute increases have been drastically overshadowed by the rise of FDI.

Since the early 1990s private capital flows have formed the largest contribution to financing for development and, more importantly, FDI has grown as a share of financing at the fastest and most stable rate. The average yearly flow of FDI to developing countries from 1997-2000 was $146 billion (slightly more than double ODA). Subsequently, levels increased dramatically and consistently to a high of $593 billion in 2008, dropping with the financial crisis to $358 billion. However, flows rebounded strongly and in 2011 reached a record of $684 billion, nearly five times ODA for that year.

The ongoing effect of neo-liberalism on financing for development is highly evident in the 2008 Doha Declaration on Financing for Development, one of the latest ‘consensus’ documents on the matter from the international community. In the Declaration State’s acknowledge that

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private international capital flows, particularly foreign direct investment, are vital complements to national and international efforts. We appreciate the rise in private international capital flows to developing countries ... and the improvements in the business climates that have helped encourage it. ... We will seek to enhance such flows to support development ... [W]e will strengthen national, bilateral and multilateral efforts to assist developing countries in overcoming the structural or other constraints which currently limit their attractiveness as a destination for private capital and foreign direct investment.\textsuperscript{103}

With regard to ODA it is clear that this source of funding is now to play a dwindling role in any direct financing for development. Instead a secondary, catalytic role is introduced.

We stress the importance that ODA plays, leveraging and sustaining financing for development ... We reaffirm the essential role that ODA plays, as a complement to other sources of financing ... ODA can play a catalytic role in assisting developing countries in ... promoting foreign direct investment. ... We also acknowledge that ODA is still essential for a number of these countries. ... We note that the aid architecture has significantly changed in the current decade. ... [T]he interplay of development assistance with private investment, trade and new development actors provides new opportunities for aid to leverage private resource flows.\textsuperscript{104}

\textsuperscript{103} Ibid, para 23. A summary document of a General Assembly review session leading up to the Doha conference notes simply that “[m]any representatives stated that the challenge was to stimulate foreign private flows which would lead to development.” ‘Mobilizing International Resources for Development: Foreign Direct Investment and Other Private Flows’, Summary of General Assembly Review Session 2 of the Monterrey Consensus, 15 February 2008, para 28.

\textsuperscript{104} Doha Declaration, 2009, supra note 102, para 40, 41, 45, 47. The ‘leveraging’ of aid to facilitate FDI is an oft repeated theme in the stance
The text speaks for itself and the subtext needs very little elaboration. FDI is portrayed as the future of development financing. As an extension of neo-liberal market logic even the process of financing for development is to be privatised. Promises elsewhere in the document for ODA levels to rise to 0.7% of Northern State GNI by 2015, and at least 0.5% by 2010, echo the same promises made since the 1970s and never even remotely met. ODA has never risen above 0.33% of Northern State GNI since 1990, and in 2012, following two years of steady decline it stood at 0.29%, little more than half the 0.5% promised in 2008.\footnote{OECD, ‘Aid to Poor Countries Slips Further as Governments Tighten Budgets’, 3 April 2013, at \url{http://www.oecd.org/dac/stats/aidtopoorcountriesslipsfurtherasgovernmentstightenbudgets.htm} [1-8-2014].} In any event the Declaration contains a definite subtext to the effect that ODA is to be phased out, though it may be ‘still essential’ in some circumstances. Referring to the investment regime, as a key motivator of development privatisation, one commentator describes it as “created to persuade private investors to supplement, and eventually replace, the State aid that was given following World War II.”\footnote{Christopher Ryan, ‘Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law’ 29 University of Pennsylvania Journal of International Law 1 (2007-2008), p. 736.} The phasing out of ODA could be seen as the complete victory of neo-liberal ideology at the global level of development financing, removing public influence and accountability and completely freeing the world economy to the operations and allocations of the market.

ODA, now as ‘leverage’,\footnote{The World Bank, IMF, OECD and the Regional Development Banks define leverage in this sense as “the ability of a public financial} is clearly ‘essential’ not so much for the direct and publicly accountable realisation of basic
needs, goods and rights, but for ‘promoting foreign direct investment’. This profoundly alters the original nature of ODA. It was a source of development finance the effectiveness of which could be assessed according to basic public accountability criteria and a set of desired development outcomes, presumably related directly to an increase in the well-being of people as the beneficiaries. Instead it becomes a resource for the facilitation and benefit of foreign investors, to be assessed according to market principles and its success in attracting FDI.\textsuperscript{108} ODA is then to be used to remove ‘structural or other constraints’ to FDI, a term perhaps broad enough to encompass labour market regulations, minimum wage levels, and capital controls. It becomes money to make developing countries ‘attractive destinations’ for FDI and to ‘improve business climates.’ Neo-liberal ideology thereby informs the redirection of at least theoretically accountable public funds to unaccountable private gain. The same FDI promotion doctrine applies to the multilateral lending institutions, which are being urged by the OECD to “enhance the catalytic role they play in mobilizing long-term financing from other sources” most notably including FDI and public-private partnerships.\textsuperscript{109} One third of the funds directed through the IFIs are to be directed to the private sector by 2015.\textsuperscript{110}


\textsuperscript{109} Jesse Griffiths, ‘G20 starts Work on Long-Term Investment, But Will the IFIs Give the Right Advice?’, Eurodad, 28 February 2013.

As such, all development financing roads ultimately lead to Rome.\textsuperscript{111} Developing countries, if not all countries eventually, are being herded down a path of FDI dependency. Yet this picture of the current shape of financing for development must be fully contextualised by the gross effects of structural imbalances in the international economic order that completely nullify these ‘developmental efforts,’ no matter how they are viewed. A crucial aspect of the background reality to the narrative so far is the fact that net financial transfers between developed and developing countries have been negative since 1997, meaning that there has been an overall transfer of wealth from the under-developed nations to the Northern States over this time period.\textsuperscript{112} The scale of this transfer is alarming. At its recent annual peak it amounted to $881 billion in the year 2007.\textsuperscript{113} This is the net value, after all development flows are taken into account, including ODA of $95 billion for that year. Adding the value of these development flows tips the overall gross outflow over $1

\textsuperscript{111} Even UNCTAD push the FDI agenda, though they do so with the most reservations of any of these organisations. See, Gerald Epstein, ‘A Critique of Neo-liberal Globalisation?’, Third World Network, 1 October 1999. Yet advice from UNCTAD can be contradictory or simply confusing as in the case of a balance between maintaining host state policy space and “avoiding investment protectionism”. See, UNCTAD, 2011, supra note 101, pp. 109-110. This is further discussed in section 3.5 below.


trillion. The financial crisis, affecting particularly Northern States, balanced this situation slightly over the last few years. However, in 2010 it quickly levelled out to a transfer of $557 billion to the Northern States and rose again in 2011 to $826.6 billion.\textsuperscript{114} To this can be added smaller though significant net transfers to the North from the transition economies averaging around $90 billion per year from 1998-2010. In total, between 1997 and 2011, an overall net of roughly $7.3 trillion has been transferred from South to North.\textsuperscript{115} The UN notes that the “trend of increasing resource transfers from developing countries is set to continue.”\textsuperscript{116} Under the current paradigm the onus on the poor to subsidise the rich will only intensify. This may be thought of as the North’s neo-liberal dividend, and its dynamics are discussed further in section 7.2.1 below.

These blatantly inhumane figures numerically rationalise for palatable consumption, the poverty, starvation, death, disease, destitution and desperation of the vast majority of the

\textsuperscript{115} In this calculation the South includes developing countries and economies in transition.
world’s population.117 It is therefore a disturbing understatement to note that the North has obviously benefited the most from the sea-change in financing for development. In what, upon brief reflection is actually stomach-turning diplomacy, one commentator notes that the move to market-based solutions, private financing and an FDI driven development paradigm has resulted in a

pattern of North-South capital flows [that] is skewed away from those developing countries whose need is greatest. This tendency can be expected to become progressively stronger if direct and equity investment continue to grow in importance and aid flows continue to decline.118

This ‘tendency’ is currently an empirical fact.119 Furthermore, it is programmed into a number of publications by the OECD, and into the World Bank’s recent focus on infrastructure in developing countries. It is also arguably inherent in the global movement for sustainable development. These three instances indicate the probability of increased ‘skewing’ in the future, and are addressed in some further detail.

The leveraging of ODA for private benefit is a particular theme of the OECD, which set up an Initiative on Investment

119 The Bretton Woods Project notes that the recent refinancing of the World Bank’s International Development Association will result in a landmark first ever depletion of available funds for the lowest income countries “equivalent to a 6.6 per cent decline in real terms” over the period 2014-2017. In addition it was agreed among donors “to make IDA’s loan terms less generous for countries borrowing from it ... On top of that, the terms of concessional credits will be hardened with a smaller grace period and higher interest rates.” ‘First Ever Real-Terms Drop in IDA Agreed: Replenishment Negotiations Focus on Private Sector, Fragile States’, Bretton Woods Project, 18 September 2013.
for Development in 2003 based on providing policy guidance to donor governments on how to use ODA to promote private investment.\textsuperscript{120} Policies are advocated that “lower the costs of investment, reduce risks, improve competition, develop human and institutional capacities”, and promote public-private partnerships.\textsuperscript{121} Setting aside the apparent contradiction between reducing risk and improving competition, creating a favourable investment climate is the main aim, but it is warned that “reforming the investment climate requires political will, drive and leadership to take on entrenched interests and inertia.”\textsuperscript{122} As is clear in the Argentinean example in chapter 4 below, this is code for the fact that such policies are far from popular and beneficial to the vast majority of the population in developing countries and therefore usually meet broad-based resistance, even when a governing elite is in favour of them.\textsuperscript{123}

One of the central policy planks related to leverage is a demand for investment in infrastructure creating

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\footnote{This initiative is linked closely to the OECD’s Freedom of Investment Roundtable, which is another influential but little known platform for an FDI dependent development paradigm. See especially, OECD, \textit{Building Trust and Confidence in International Investment: Report by Countries Participating in the “Freedom of Investment” Process} (OECD, Paris, 2009).
\footnote{According to the Egyptian Center for Economic and Social Rights (ECESR), Law Number 32 of 2014 (22 April 2014), which prohibits anyone other than the parties to State-investor contracts from challenging them in administrative or other courts effectively gives legal protection to State and investor corruption. This law has been justified by the Egyptian government through the argument that the legislation is “necessary to promote a reassuring investment climate”. The propriety of foreign economic interests in Egypt has been a major point of social protest in recent years. Adam Kopper, ‘Investment Law Amendments Unconstitutional for Their Protection of Corruption: ECESR’, Daily News – Egypt, 6 May 2014.}
opportunities mostly for foreign higher-technology investors.\textsuperscript{124} Large infrastructure projects have often been highly controversial, displacing communities, creating prominent human rights risks and resulting in highly inequitable development outcomes.\textsuperscript{125} As one of the most important sources of public development finance it was therefore of serious concern when the World Bank’s International Development Association announced in March 2013 that it would concentrate its lending efforts on large infrastructure projects.\textsuperscript{126} This may amount to a focus on facilitating FDI, as the vast majority of the construction will be carried out by public-private partnerships in which private foreign investors are usually in the driving seat.\textsuperscript{127} Transnational corporations stand to benefit greatly from these lucrative deals. Furthermore, the infrastructure that is put in place is more often than not located, designed and directed towards the needs and interests of existing and future foreign investors rather than local businesses or populations, let

\textsuperscript{124} OECD, 2005, supra note 121, p. 28.


alone the poor. For instance, in the Democratic Republic of the Congo, despite billions in multilateral investment in electric projects only 6% of the population has access to electricity. Such projects run a serious risk of undermining the Bank’s own development agenda, as they rarely bring inclusive growth. However, this new focus of the World Bank fits the FDI dependent development paradigm perfectly.

The global movement for sustainable development also reflects this reliance on FDI. The foreword to a recent volume on the topic notes that,

> [t]he role of private foreign direct investments (FDI) in the implementation of the sustainable development agenda is immensely important. Much of the hope for achieving the United Nations Millennium Development Goals depends on the continuing flow of such international investments towards developing countries. Private international investment is considered to be one of the most important engines of development.

Agenda 21, one of the earliest documents expressing the voice of the international community on sustainable development states clearly that “[i]nvestment is critical to the ability of developing countries to achieve needed economic growth”, and that

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128 For a particularly illustrative case study of Iraq in this respect see, Likosky, 2006, supra note 125, pp. 69-88.
129 Biron, 2013, supra note 126.
[s]ustainable development requires increased investment ... Foreign private investment and the return of flight capital, which depend on a healthy investment climate, are an important source of financial resources.\textsuperscript{132}

In their 2009 Declaration of Responsible Leadership for a Sustainable Future the G8 placed great significance on the role of FDI. The Declaration noted that,

\textit{the current crisis has affected capital flows, including foreign direct investments (FDIs), which represent an important source of financing and a driver of economic growth and integration. We stress the positive role of long-term investments. We will work to reverse the recent decline in FDI, by fostering an open, receptive climate for foreign investment, especially in emerging and developing countries.}\textsuperscript{133}

As we shall see below, however, the demand for this ‘open, receptive climate’ effectively removes many of the mechanisms whereby host States can ensure that benefits flow from the investment attracted.

Furthermore, the Johannesburg Plan of Implementation, resulting from the 2002 World Summit on Sustainable Development is replete with references to the importance of promoting and increasing foreign investment, positioning “an enabling environment for investment” as one of the very


\textsuperscript{133} As quoted in Marcus Gehring and Andrew Newcombe, ‘An Introduction to Sustainable Development in World Investment Law’, in Cordonier Segger (et al eds.), 2011, supra note 131, p. 5.
foundations of sustainable development. As part of this environment there is a call for the provision of incentives for investment, for public-private partnerships, and for the promotion of foreign investment in everything from agriculture, to mountain ecosystems, to tourism, to water supply and sanitation. The “sustainable development of Africa”, is to be attained by ensuring “increased market access in order to create an attractive and conducive environment for investment.” Finally, all actors are urged to [c]reate the necessary domestic and international conditions to facilitate significant increases in the flow of foreign direct investment to developing countries, in particular the least developed countries, which is critical to sustainable development, particularly foreign direct investment flows for infrastructure development.

At its extreme, this logic of privatising development leads to patent absurdities. For instance, the International Finance

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135 Ibid, para 16 (b).
136 Ibid, para 21 (b).
137 Ibid, para 40 (j).
138 Ibid, para 42 (c).
139 Ibid, para 43 (c).
140 Ibid, para 66 (a).
141 Ibid, para 62 (g), see also, paras 67 (d), and 69.
142 Ibid, para 84 (a). Despite all of the foregoing, two prominent sustainable development scholars note innocuously that “[f]oreign investment is seen as one way to support, and indeed to fund, the sustainable development that is needed in developing States.” Marie-Claire Cordonier Segger and Andrew Newcombe, ‘An Integrated Agenda for Sustainable Development in International Investment Law’, in Cordonier Segger (et al eds.), 2011, supra note 131, p. 110. Yet it would seem clear that FDI is far more than just “one way” to “support” development. It seems more likely to be the way. Thus, development will be FDI dependent development, not sustainable development, no matter if it is still labelled as such. It is posited that if the full thrust of these documents towards an FDI dependent development paradigm, in the context of international political realities and the broader structure of financing for development, is not acknowledged, then a sustainable development approach will always miss its own mark. Increasing FDI, and not sustainable development, will always be the overriding real goal, and sustainable considerations, though perhaps aired, will not be adhered to.
Corporation (IFC), as one lending arm of the World Bank, is charged with financing private sector projects aimed at promoting development and poverty reduction, and is supposed to fill gaps in developing countries where finance is not otherwise available. Yet it provides cheap, publicly funded loans to some of the world’s largest corporations and richest individuals\(^\text{143}\) and is heavily criticised by academics\(^\text{144}\) and NGOs,\(^\text{145}\) not only for failing in its task of poverty reduction, but also of unfairly competing with local banks, and investing in a number of resource extraction and energy related projects having a directly negative effect on development.

Even the World Bank’s Independent Evaluation Group found that the IFC’s projects “do not provide evidence of identifiable opportunities for the poor to participate in, contribute to, or benefit from the economic activities that the project supports.”\(^\text{146}\) Only 13% of the 500 projects studied included objectives that explicitly focussed on poor people and of those that did pay some attention to poverty alleviation

\(^{143}\) Including the German supermarket chain Lidl, owned by the world’s 33\(^\text{rd}\) richest, and such companies as Coca-Cola, PepsiCo, Dow Chemical, DuPont, Mitsubishi and Vodafone. See, Claire Provost, ‘Turning Profits and Tackling Poverty not Contradictory, Insists IFC Chief’, Guardian, 28 February 2013; Cheryl Strauss Einhorn, ‘Can You Fight Poverty with a Five Star Hotel?’, Foreign Policy, 2 January 2013; Adam Lerner, ‘Are Human Rights Negotiable in Public-Private Partnerships?’, Globalpost, 14 August 2013.

\(^{144}\) Scott Pegg, ‘Mining and Poverty Reduction: Transforming Rhetoric into Reality’ 14 Journal of Cleaner Production 3 (2006).

\(^{145}\) See for example, a letter sent by 45 civil society groups from around the globe to World Bank President Jim Yong Kim stating the need for a fundamental overhaul of the purpose and modalities of IFC lending, especially to the financial sector, at [http://eurodad.org/1544927/](http://eurodad.org/1544927/) (1-8-2014). The letter was sparked by an internal World Bank audit that found the IFC had no real knowledge of the social and environmental consequences of its investments in banks and insurance companies, making up a large and growing share of its investment portfolio. See, Office of the Compliance Advisor Ombudsman, ‘Audit of a Sample of IFC Investments in Third-party Financial Intermediaries’, World Bank, Washington DC, 10 October 2012.

there was only limited success.\textsuperscript{147} The IFC also avoided substantive inclusion of human rights within its latest set of performance standards,\textsuperscript{148} in disregard of the principle of due diligence set by the UN Guiding Principles on Business and Human Rights.\textsuperscript{149}

The real absurdity however, is that from all of this dubious ‘business’ the IFC itself makes a healthy profit, generating “satisfactory returns”.\textsuperscript{150} In fact business is booming. In line with an FDI dependent development paradigm the IFC is the fastest growing section of the World Bank, doubling its investments between 2006 and 2012.\textsuperscript{151} Again reflecting the privatisation of development, Caliari notes that in the face of a decrease in funding for the World Bank as a whole, the IFC is reporting unprecedented growth. To the extent that the public sector financing arms of the World Bank are surviving, this is on condition of wider support to the subsidization of private sector activities in provision of services, resource extraction projects, etc. These trends are also noticeable in the dynamics between private and public sector arms of all regional development banks.\textsuperscript{152}

\textsuperscript{147} Ibid, pp. xviii-xix.
\textsuperscript{148} Substantive references to human rights in initial drafts were removed in the final version, which refers to these legal requirements only incidentally in three places. See, Bretton Woods Project, ‘IFC Standards Revision Leaves out Human Rights’, Update 74, 18 February 2011; International Finance Corporation, ‘Performance Standards on Environmental and Social Sustainability’, 1 January 2012.
\textsuperscript{149} Ama Marston, Anne Perrault and Kristen Genovese, ‘The IFC and Incorporation of Rights into its Performance Standards’, Submission to the UN Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises, 3 November 2009.
\textsuperscript{150} Independent Evaluation Group, 2011, supra note 146, p. xiv.
\textsuperscript{151} Strauss Einhorn, 2013, supra note 143. World Bank President Jim Yong Kim has announced that the IFC will again double its portfolio between 2014 and 2024. See, Paul Stephens, ‘World Bank to Appoint “Global Practices” Directors this Week’, DeveX, 1 April 2014.
Therefore the ultimate dependence on FDI is best explained by a coercive theory, when coercion is understood, not myopically as direct force, but as the intentional and effective removal of choice.\textsuperscript{153} Northern States are, if not directly then effectively, forcing developing countries into long-term dependence on FDI for development.\textsuperscript{154} To apply a point made by Marks to the present field of study, FDI dependent development then, “is not simply an occurrence but a policy option and a practical project. It is something that certain groups of people do to others.”\textsuperscript{155} The efficacy of this particular development project “is assisted by international legal regimes that both favour the powerful (trade and investment), while inadequately confining their worst tendencies (human rights).”\textsuperscript{156} The mechanics of the investment regime and its subordination of the human rights regime form the subject of chapters 3 and 4.

Furthermore, the national and international policy positions developing countries are pressured to adopt and conform to by Northern States, supposedly in order to attract sufficient levels of FDI for development, are in fact detrimental to that ultimate goal.\textsuperscript{157} They are designed to attract quantity

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\item \textsuperscript{153} ‘Financing for Development through Trade and Investment’, Economic and Social Commission for Asia and the Pacific, UN Doc. E/ESCAP/SCITI/2, 3 September 2004.
\item \textsuperscript{154} According to Rosa Luxemburg, ultimately “force is the only solution open to capital; the accumulation of capital, seen as a historical process, employs force as a permanent weapon.” Rosa Luxemburg, \textit{The Accumulation of Capital} (Routledge, London, 2003), pp. 349-351.
\item \textsuperscript{157} “[T]here are strong external pressures on most developing countries to conform with what in essence would be an investor-oriented agreement ... [T]he asymmetries are such that to accept the kind of national policies or a multilateral investment arrangement of the sort pressed for by the North would likely accentuate the differences.” South Centre, \textit{Foreign Direct}
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rather than quality, and there is now a clear understanding that it is the quality of FDI that is crucial if it is to have any positive effect. Though there is little evidence that creating an ‘investment-friendly’ regime alone will attract any FDI at all, there is substantial evidence to suggest that the type of FDI attracted will probably not be beneficial to development. Yet the marketing gloss that this coercion is coated with tells under-developed countries that there are many superior benefits to FDI over other forms of development financing or inward looking development policies and these benefits accrue automatically, without government intervention, which, it is argued, would be more likely to prevent benefits than to ensure them.

### 2.3 – Benefits and Costs of FDI for Development

There are many studies on the developmental costs and benefits of FDI. The debate in this area is an old and voluminous one, and the issues raised are numerous and complex. Only a very brief sketch can be presented here.

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159 See for example, Liesbeth Colen and Andrea Guariso, ‘What Type of Foreign Investment is Attracted by Bilateral Investment Treaties?’, in Olivier De Schutter, Johan Swinnen and Jan Wouters (eds.), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge, London, 2013).

160 For a concise distillation of the debate cast in terms of neo-liberal versus heterodox viewpoints see, Chang and Grabel, 2014, supra note 30, pp. 135-148.
Among the supposed benefits of FDI are increases in or delivery of the following; technology transfer and other ‘spill-overs’ such as management skills and operational knowledge; export earnings; job creation; indirect tax revenues; direct government revenue from privatisation; efficiency of domestic companies due to more and better local competition; international competitiveness of the host country itself through increased exports; and finally there is the supposed absence of a debt overhang in comparison to financing development through loans. While these benefits may apply in theory, in practical reality they do not materialise very easily. In addition, assuming the absence of a debt overhang is a dangerous oversimplification.

Furthermore, a number of potential costs are clear. Increased FDI may lead to environmental degradation, the displacement of peoples and communities, increased inequality, undue political influence, and human rights abuses.\footnote{For a particularly concise treatment see, Kenneth Vandeveld, The Economics of Bilateral Investment Treaties’ 41 Harvard International Law Journal 2 (2000).} Local businesses may collapse if they cannot compete, leading to job losses and monopolisation of markets by foreign investors,\footnote{Steeple and McBride, 2011, supra note 51, p. xv.} thereby driving up prices. There may be no technology transfer or ‘spill-over’ unless the host government forces it, as it more often than not enables the competition and is inherently against the profit motive of the investor. Where technology transfer does occur it is likely to be outdated and obsolete, conferring little benefit and no improvement in competitiveness. In addition, foreign investors can avail themselves of what are known as ‘restrictive business practices,’ such as parent companies restricting the

\footnote{George, 1999, supra note 1.}
licensing of technology to subsidiaries in host States, tied selling restrictions forcing subsidiaries to buy inputs from the parent instead of locally, and transfer pricing, which hides profits from revenue collection and also negatively affects a host State’s balance of payments by setting artificial prices for inputs and outputs traded between parent and subsidiary.164

All these practices have detrimental effects on a host State’s ability to realise the economic and social rights of its people, both directly, and indirectly through reduction of the resource base for development. The success of a State’s development policy is therefore highly dependent on its ability to curb these profit maximising actions of foreign investors through regulation. Of particular importance, States may also lose control over entire sectors of the national economy, such as natural resources or the provision of essential public goods. In sum, as Woodward observes, in relation to the aggregate effects of FDI on local investment, employment and technology transfer, it is “likely that the overall effect on indigenous development and the welfare of the population will be negative.”165

165 Woodward, 2001, supra note 76, p. 127. “Unfortunately, it is both difficult and rare, at least in recent Latin American economic history, for large surges of capital flows to lead to sustained growth.” Ricardo Frenich-Davis and Stephany Griffith-Jones, ‘Taming Capital Account Shocks: Managing Booms and Busts’, in José Antonio Ocampo and Jaime Ros
Empirical studies of the effects of FDI in practice show an extremely wide variety of results,\textsuperscript{166} many of which belie the rosy picture painted by the OECD when it states that “the benefits generally outweigh the costs by a wide margin.”\textsuperscript{167} Nevertheless some broad generalisations are possible to the effect that benefits very often do not materialise, and the costs often significantly outweigh those that do.

Basu and Gauriglia, for example, find that while FDI can have a positive effect on growth it also promotes inequality.\textsuperscript{168} In the same vein Beer and Boswell conclude that

dependence on foreign investment as a development strategy, especially compared to domestic and human capital investment, may be misguided for nations concerned with equality. Net of other factors, foreign investment dependence benefits the elite segments of the income-earning population over the poorer eighty percent. Our analysis provides evidence of a shift in capital/labor relations brought about by globalization that has


\textsuperscript{167}OECD, 2002, supra note 98, p. 3.

significantly contributed to the rise in income inequality seen throughout the world.\textsuperscript{169} Mortimore and Vergara point out that to reap any benefit developing countries must be highly selective to target specific types of FDI that “are more attuned to their developmental circumstances and industrial aspirations.”\textsuperscript{170} Nunnenkamp notes that it is far more difficult to benefit from FDI than to attract it, and that the vast majority of poor countries lack the institutional and other capacities to benefit from FDI in terms of growth and poverty alleviation, leaving domestic resource mobilisation as by far the more important source of development financing.\textsuperscript{171} In a prominent World Bank study, Blomström and Kokko, after reviewing a wide selection of empirical evidence, find that FDI “may” promote economic development, though the exact relationship between the two varies greatly depending on industry and country.\textsuperscript{172} They note that market dominance is likely if investors are accorded too much protection, that there is a very high risk of crowding-out and bankrupting local business,\textsuperscript{173} and that in addition “there is no clear proof of spill-overs.”\textsuperscript{174}

Agosin and Mayer find that FDI had a strong positive crowding-in effect in Asia, where neo-liberalisation policies were more watered down and the least stringent in the developing world,\textsuperscript{175} and a strong negative crowding-out effect in Latin America, where FDI regimes were fully liberalised,\textsuperscript{176} while in Africa there was no net effect in either direction. They conclude that “the effects of FDI on domestic investment are by no means always favourable and that simplistic policies toward FDI are unlikely to be optimal.”\textsuperscript{177} Narula shows that national governments must actively intervene to correct for market distortions introduced by the entry of FDI,\textsuperscript{178} and Rasiah similarly concludes that the role of the host State is critical in forcing the flow of benefits from FDI into the local economy through measures that may often have to favour local interests.\textsuperscript{179} In a study for the G-24 on International Monetary Affairs, Hanson finds that, 

[t]here is weak evidence that FDI generates positive spillovers for host economies. While multinationals are attracted to high-productivity countries, and to high-productivity industries within these countries, there is little evidence at the firm or plant level that FDI raises the productivity of domestic enterprises. Indeed, it appears that plants in industries with a larger multinational presence tend to enjoy lower rates of productivity growth over time.

\textsuperscript{175} Manuel Agosin and Ricardo Mayer, ‘Foreign Investment in Developing Countries: Does it Crowd in Domestic Investment?’, UNCTAD, 2000, UNCTAD/OSG/DP/146, p. 14.
\textsuperscript{176} See, Joao Carlos Ferraz, Michael Mortimore and Marcia Tavares, ‘Foreign Direct Investment in Latin America’, in Ocampo and Ros (eds.), 2011, supra note 165.
\textsuperscript{177} Agosin and Mayer, 2000, supra note 175, p. 1.
\textsuperscript{179} Rajah Rasiah, ‘Exports and Technological Capabilities: A Study of Foreign and Local Firms in the Electronics Industry in Malaysia, the Philippines and Thailand’, in Rajneesh Narula and Sanjaya Lall (eds.) \textit{Understanding FDI-Assisted Economic Development} (Routledge, Abingdon, 2006).
Empirical research thus provides little support for the idea that promoting FDI is warranted on welfare grounds.\footnote{Gordon Hanson, ‘Should Countries Promote Foreign Direct Investment?’, G-24 Discussion Paper Series, UNCTAD/GDS/MDPB/G24/9, United Nations, Geneva, February 2001, p. vii.}

Bell and Marin find evidence that technological spill-overs may even operate in reverse, originating in the host economy and being absorbed by the foreign investor, not only negating but also reversing received wisdom on the benefits of FDI in this regard.\footnote{Martin Bell and Anabel Marin, ‘Where Do Foreign Direct Investment-Related Technology Spillovers Come From in Emerging Economies? An Exploration in Argentina in the 1990s’ 16 European Journal of Development Research 3 (2004).}

French has found that FDI driven development brings with it western-style consumerism, which can have a serious negative effect on the health and food security of the host State.\footnote{Hillary French, ‘Capital Flows and Environment’ 3 Foreign Policy in Focus 22 (1998).} And a twenty-year empirical analysis by Alfaro found that the effect of FDI on economic growth depends heavily on the sector examined. FDI in the primary and extractive sector had a negative effect on growth and in the manufacturing sector it had a positive effect, while the evidence from the services sector was inconclusive.\footnote{Laura Alfaro, ‘Foreign Direct Investment and Growth: Does the Sector Matter?’, Harvard Business School, Boston, 2003. Moran also stresses the same point about the importance of sectoral analysis. Theodore Moran, Foreign Direct Investment and Development: Launching a Second Generation of Policy Research (Peterson Institute for International Economics, Washington, 2011).} Foreign investment in the poorest countries is heavily concentrated in the primary sector and extractive industries. Recent research has also found that inward FDI has been almost equally counter-balanced by
outgoing profit repatriation, and portfolio investment equally nullified by outgoing withdrawal of equity capital.\textsuperscript{184}

Furthermore, what is counted as FDI in these statistics also includes foreign corporate reinvestment within the host country, which, although its source is a foreign company, remains capital produced in the domestic economy and is not an actual inflow. This suggests that while FDI, so defined, is the single largest \textit{gross} source of capital for development it will more often eventually result in a \textit{net} financial loss, as demonstrated by the net capital flows from South to North detailed above. Over time, as increasing sections of a host economy are dominated by FDI, the likelihood of a net loss rises until it becomes inevitable.\textsuperscript{185} From this viewpoint it may in fact look like a disguised blessing that 70\% of FDI in developing countries went to only 10 of them in 2011, whereby China, one of the most able countries to extract a benefit from FDI due to its ability to flout Northern neo-liberal prescriptions, attracted over a quarter of the total.\textsuperscript{186} These considerations bring into deep question a programme to replace the predominance of ODA in the poorest of countries with FDI, as they are the least able to extract a developmental benefit.

There is also substantial evidence that FDI makes developing countries excessively vulnerable to economic


\textsuperscript{185} In the late 1990s average profit repatriation was around 50\% of inflows. Griffiths (et al), 2014, supra note 184, p. 14.

\textsuperscript{186} Ibid, p. 4.
crises. David Woodward, in studying the Mexican and Asian economic crises, effectively challenges the assertion by neo-liberal theory that FDI leaves no debt overhang, unlike international loans, and is in this sense risk-free. The causation is complex, however it boils down to the hidden negative effects FDI has on the foreign exchange position of the host country, tending to inflate the host’s currency. FDI may bring in foreign currency (through the investment itself and through exports associated with FDI) but will also create additional demand for it (e.g., through an increased need to import inputs and contract foreign loans). An imbalance can increase the host State’s current account deficit and precipitate a crisis.

In addition, profit repatriation is also a very important financial loss to the host and FDI flows are cyclical therefore increasing “both the frequency and amplitude of financial cycles”, causing gluts in good times and droughts in bad. FDI therefore has a financial cost, which is potentially much greater than an average loan. While international loans to finance development carry interest of 1.5 - 6.5%, rates of return on FDI in developing countries are far higher, ranging between 16 – 30%. The higher rate of return (profit repatriation) on FDI must be offset by equal inflows of foreign

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188 Chang also makes this same point. Chang, 2007, supra note 97, p. 89.

189 UNCTAD noted the same problem in 1999, stating that excessive liberalisation in Russia, Brazil and East Asia without adequate regulation, caused chronic balance-of-payment problems due to a surge of investment and associated imports that could not be matched by increases in export earnings, leading to further reliance on (and efforts to attract) additional investment inflows (largely speculative), which led to exchange rate appreciation and eventually uncontrollable financial instability. UNCTAD, *Trade and Development Report 1999* (UN, Geneva, 1999), pp. 49-52.


191 Ibid, p. 31.
currency if there is to be a balance of payments. As dangerous as debt-fuelled development through international loans has proved to be, dependence on FDI is statistically therefore six times more dangerous (taking average interest on loans as 4% and average ‘interest’ on FDI as 24%).

Furthermore, dependence on FDI is as self-augmenting as a dependence on loans has proved to be. To maintain a national balance of payments the rate of profit repatriation must be continually matched each year by new inflows of FDI. Yet more FDI means more profit repatriation the next year, and so there is then a need for an even greater inflow of FDI to maintain a balance in the next year, and so on. That FDI dependency is therefore unsustainable is obvious, as yearly profit rates (16-30%) are far higher than the possible expansion of the economy to accommodate the necessary balancing inflows of FDI.

Woodward concludes that for under-developed countries to avoid dangerous financial effects of FDI on current account deficits they must exercise a very substantial level of control over the amount and composition of inflows, as well as the performance requirements on FDI, particularly related to export levels, domestic purchasing requirements, and foreign exchange. Obviously this runs counter to the Doha Declaration’s demand for developing countries to overcome “the structural or other constraints which currently limit their attractiveness as a destination for private capital and foreign direct investment.”

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192 Doha Declaration, 2009, supra note 102, para 23.
Theodore Moran, notes that, in contrast to the neo-liberal line of the counter-productive nature of State action in the marketplace, for benefits to accrue from FDI “there is a larger, more energetic, especially vital role for host authorities in the developing countries and the economies in transition to play, certainly more activist, perhaps more interventionist.”193 Logically then, the host government requires the policy space and capacity to fulfil this role, and to mitigate “the possibility that FDI might lead to fundamental economic distortion and pervasive damage to the development prospects of the country”.194

Not only are the potential impacts of FDI varied and diverse, but host efforts to secure these potential benefits (and avoid potential damage) require particular types of policies to improve market functioning, supply public goods, set standards, and overcome idiosyncratic types of market failure.195

As a general indication of the importance of the precautionary approach, one recent collection devoted to the FDI dependent development paradigm poses the question of whether we need a new agenda on FDI and development. In response, the editors state that

the intricacies of these mechanisms need to be better understood if they are to prove beneficial. All the contributors here are also unanimous in their scepticism of the Washington consensus and the rather simplistic view taken by certain mainstream economists that FDI is a *sine

*qua non* for development. Market forces cannot substitute for the role of governments in developing and promoting a proactive industrial policy. ... In this regard, our contributors would suggest, we *do* need a new agenda if FDI is to be leveraged efficiently to promote development.\(^{196}\)

The few ‘clear’ FDI success stories, such as China and, to a lesser degree, Brazil and India, diverge greatly from the norm of FDI driven development in a number of respects and do not always provide realistic models for other far smaller developing countries to follow.\(^{197}\) In fact the ‘success’ stories tend to disprove the rule.\(^{198}\) In these cases liberalisation of the economy and relaxing of controls on the entry and activity of FDI happened in a very deliberate manner with a strong element of government direction and intervention.\(^{199}\) As well as the global distribution of FDI, going mainly to the upper middle income developing countries with only 1% received by


\(^{198}\) Among a number of common factors underlying success “two stand out: the implementation by strong states of policies favouring national economic development, not just international capital, and the development of materially productive industries.” Craig Calhoun and Georgi Derluguian, ‘Introduction’, in Calhoun and Derluguian (eds.), 2011, supra note 40, p. 10.

the 48 least developed countries, these cases lend a lot of credence to the belief that neo-liberal theory has it the wrong way around; increased FDI does not bring national development, it is national development that brings FDI. Therefore sacrifices of host State control over their own economy and the nature and pace of their integration into the global economy, and the direction of resources to attract FDI by liberalising the investment regime, could all be completely counter-productive. A focus on FDI effectively puts the cart before the horse. Therefore, according to Milberg and many others, it “should not figure as a central component of any development strategy.”

The evidence suggests that benefits are far from automatic, while costs often are. There is little evidence of technology transfer or other ‘spill-over effects’ unless they are forced by host State action. At an international and also increasingly

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203 Milberg, 1999, supra note 201, p. 100.
204 Ibid.
205 “In countries such as Singapore and China, where there is evidence of positive spillovers, they are likely the result of explicit policies pursued by
at a domestic level the intellectual property regime demanded by Northern States on behalf of their corporations mitigates strongly against this benefit, and ‘reverse’ technology transfer may even occur. Potential tax revenues are offset by tax breaks and other incentives offered by governments to attract FDI, as detailed below. Further potential revenue is lost through the practice of transfer pricing and the condoning of international tax havens. In addition, there is a marked increase in the percentage of FDI which is not invested in ‘greenfield’ or new production facilities and tangibles, but is in the form of debt and easily moveable finance, meaning that it behaves the same way as speculative capital.\(^{206}\) The ‘crowding out’ of domestic firms is “likely to be inevitable,”\(^{207}\) leading to job losses and inflated prices. Public companies are very often sold at below market value, and privatisations regularly result in job-losses.\(^{208}\) Finally, provision of public goods and services often suffers as foreign investors implement cost-cutting

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\(^{206}\) See, Follow-up to and Implementation of the Monterrey Consensus, 2013, supra note 205, para 22; and Jonathan Ostry (et al), ‘Capital Inflows: The Role of Controls’, IMF Staff Position Note, SPN/10/04, IMF, Washington DC, 19 February 2010, p. 5.  
\(^{207}\) Moran, 2011, supra note 183, p. 7.  
\(^{208}\) In illustration, the privatisation of six State-owned companies under the former Egyptian President, Hosni Mubarak, which formerly employed 27,370 workers, “resulted in the layoff of around 17,633 workers, through applying all means of pressure to force workers to leave the companies on early retirement. Current figures from those companies indicate that the number of workers today is 6,193 ... a decrease of 78%.” Press Release, ‘Corruption: Workers in Public Companies Reject Law Protecting Corrupt Deals’, Egyptian Center for Economic and Social Rights, 10 May 2014.
measures and other market rationalisations to maximise profits.

Broadly speaking, the interests of host States and foreign investors in relation to FDI can be seen as inherently conflictive. To maximise profits investors seek to minimise production costs (including the price of local labour), avoid financial and technological ‘leakage’ to host State economies (through taxation, performance requirements and other forms of regulation) and repatriate profits to parent companies in the home State or shell companies in offshore tax havens. In contrast the host State’s developmental priorities seek to maximise wages and retain finances within their economies. Unregulated FDI is most likely to have profoundly negative effects on host State economies. Therefore, in opposition to the desires of developed countries, and investors in particular, for extensive liberalisation, developing countries have long held that the retention of policy and regulatory space regarding investment is a necessity for development, and, consequently, for the realisation of their human rights obligations under international law. In other words, FDI must be properly harnessed to be developmentally effective. The State’s sovereign right to regulate and impose conditions and requirements through investment measures, constitutes its primary effective means of balancing the sometimes overwhelming power of foreign investors in such a way that the benefits of their investment outweigh the costs.

From the debate over benefits and costs three general points emerge that are widely accepted, even among ‘reformed’ neo-liberals who have softened their stance on the supposedly automatic benefits of FDI given the recurrence of crisis in
‘model’ neo-liberal economies. Firstly, to harness the benefits and to mitigate the costs, governments must have sufficient policy space and power to regulate the entry and activity of FDI according to local priorities. Secondly, the developmental objectives of host countries (which often overlap with human rights obligations) and the profit motive of the foreign investor are far more often in opposition than in alliance, again necessitating government policy space. And finally, a government is well cautioned to consider very carefully under what conditions it allows FDI into various sectors of the economy. Such sectors are obviously those closely connected to the public interest, for example, health, education, housing, utilities and natural resources, in addition to national security.

2.4 – In Whose Interest Exactly?

Adding to the concern over an FDI dependent development path are more radical critiques proposed by scholars writing from a neo-colonialist perspective. Yash Tandon, Shashank Kumar, Jason Hickel, Arthur MacEwan and David Harvey, for instance, argue that FDI, though marketed as a development solution, is in fact an important tool used by the North to control and dominate the South. Even a recent study from

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210 This economic perspective merges with the legal perspective of scholars taking Third World Approaches to International Law (TWAIL). For further discussion of these approaches in the present context of the critique of the investment regime see sections 4.1.3 and 7.3.3 below.

211 Tandon is one of the leading proponents of this view. See for example, Yash Tandon, ‘The Role of Foreign Direct Investment in Development’,
a panel of experts commissioned by UNCTAD refers to a ‘malign intent’ which may be inherent in globalisation’s advancement of “foreign aid and investment as a form of ‘neo-colonial embrace’.”

From this viewpoint, facilitating FDI is evidently in the direct interest of Northern corporations who have outgrown their domestic markets and are experiencing a marginalisation of profits at home due to increased pressure from the wage demands of workers, the expanded middle-class and increased living standards. In relation to developing world profit margins of 16-30% noted above, investors in the developed world could expect only 1-3%. Trade liberalisation and the structural adjustment of the World Bank and the IMF then performs the function of opening the markets of the under-developed world for the benefit of Northern corporations, which require them to continue to grow and maximise profits. Forced investment liberalisation, capital market deregulation and privatisation directly paves the way for these corporations to operate in the under-developed world, reaping increased profits due to lower wages and living standards, thereby maintaining dominance of both domestic and international markets. The resources


213 Tandon, ‘What is Foreign Direct Investment?’, 2004, supra note 211.


215 Arthur MacEwan, ‘Economic Debacle in Argentina: The IMF Strikes Again’, *Dollars and Sense Magazine* (March/April 2002). See further,
and profits accrued by multinational corporations in developing countries are then repatriated to the North. This last factor is a central element of what David Harvey refers to as the neo-liberal process of “accumulation by dispossession”, or what was termed above the North’s neo-liberal dividend.\(^{216}\)

Another crucial element of this dispossession has been the North’s repeated termination of attempts by developing countries to adequately regulate transnational corporations through international law. Efforts by the G-77 to establish a universal Code of Conduct through the UN Commission and Centre on Transnational Corporations, established in 1974, came to nothing due to opposition from the OECD. After twenty years of negotiations the Code was abandoned and the Commission dismantled. It was drastically downscaled and restructured, and its work was set in a frame of FDI promotion as a subordinate body within UNCTAD.\(^{217}\) History tells a comparable story of efforts to establish normative limits on TNCs through United Nations Declarations on a New International Economic Order and the Right to Development. Similarly, the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights\(^{218}\) met the same Northern intransigence and corporate vested interest.\(^{219}\) This venture


was also retired and replaced in 2005 with Ruggie’s softer approach of ‘principled pragmatism’. There is now an ongoing revival of efforts towards practical, rather than just principled, pragmatism from the South to establish a working group through the UN Human Rights Council to draft a treaty that would bind corporations to human rights norms. The frustration of international efforts at regulation has been matched by an equal impunity in Northern home State domestic legal systems for illegal acts and human rights violations committed by corporations in host countries.

Furthermore, from the neo-colonial perspective, it is argued that for Northern States FDI is necessary to provide a direct foothold and control of resources and markets in developing countries that might otherwise develop independently and on their own terms, producing rival economies, rival companies and cheaper products, with which the North will not be able to compete. Commodity markets are a prime example. Northern States are currently obliged to maintain high subsidies to domestic agriculture and other primary production because they could not otherwise compete with cheaper commodities from the under-developed countries. Direct influence in


production within these under-developed countries is then necessary to reduce the pressure for even higher subsidies, and is facilitated through the penetration of FDI into Southern economies. On this understanding, FDI is not an elixir for development but is instead a mechanism for Northern control of Southern economies, markets and resources.\footnote{Tandon, 2002, supra note 211.} As Kumar notes, “[a]fter generating much excitement about the concept of FDI, signs that the developed nations may now use FDI as a tool to the adverse effect of the developing world are many.”\footnote{Shashank Kumar, ‘Rethinking the Linkages between Foreign Direct Investment and Development: A Third World Perspective’ 5 Nalsar Student Law Review (2010), p. 86.}

Such considerations are compounded by an appreciation of the actual role of FDI in the development of the North. In short, it was actively excluded, and when allowed in it was strictly controlled. Ha-Joon Chang has done a great deal of work on this history.\footnote{See, Ha-Joon Chang, ‘Foreign Investment Regulation in Historical Perspective’ in Narula and Lall (eds.), 2006, supra note 179; ‘What is Wrong with the “Official History of Capitalism”? With Special Reference to the Debates on Globalisation and Economic Development’, in Edward Fullbrook (ed.), 2004, supra note 5; ‘Globalisation, Transnational Corporations, and Economic Development’, in Dean Baker, Gerald Epstein and Robert Pollin (eds.), Globalization and Progressive Economic Policy (Cambridge University Press, Cambridge, 1998); Kicking Away the Ladder: Development Strategy in Historical Perspective (Anthem Press, London, 2002). See also, Ha-Joon Chang and Duncan Green, The Northern WTO Agenda on Investment: Do as We Say, Not as We Did’, South Centre and Catholic Agency for Overseas Development, London, 2003.} He points out that in their own early stages of development Northern State governments intervened heavily in the domestic market, protecting infant industries, subsidising companies and sectors, and strictly controlling the entry, terms and activities of FDI. Only when the domestic economy, and particular industries and sectors, had attained a certain level of sophistication, size and strength did the now developed countries gradually open up and liberalise their FDI regimes to the current extent.
To get to that level they “systematically discriminated against foreign investment”, employing a wide range of restrictive policies enacted in domestic legislation and administrative regulation to ensure the benefits of FDI and minimise the costs.\textsuperscript{226} The UK and the US led the field in this regard, practicing the most protectionist and restrictive policies of the now developed world. However, almost all currently wealthy countries used discriminatory policies to promote and build their domestic industries in the early stages of their own development.\textsuperscript{227} Their development trajectory shows that it is only as domestic companies and industries learn and grow in complexity and size that government can step back slowly and reduce these controls and limitations step by step. Initially, strong government intervention and discrimination on behalf of national firms and investors was and is essential.

Chang and Green summarise the lessons learned from the historical experience of the North, illustrating clearly that a well-devised set of restrictions and performance requirements on foreign investment has been a key ingredient in their recipes for success. While only some of these countries were hostile towards foreign investment, none of them pursued policies that were uncritically welcoming to foreign investment, in marked contrast to what many of those same countries recommend to today’s

\textsuperscript{226} Chang, 2006, supra note 225, p. 241. These policies included; limits on ownership and managerial structure to directly influence control of investment; performance requirements mandating a certain volume of exports, the direct transfer of technology, and certain levels of local inputs and re-investment of profits; forced joint-ventures to ensure technology and managerial knowledge transfer; and controls on mergers and acquisitions as well as subsequent ‘asset-stripping’ and ‘downsizing’.

\textsuperscript{227} See, Chang, 2002, supra note 225.
developing countries. History also shows that a strategic and flexible approach is essential if countries are to use foreign investment to pursue long-term national interests. Rather than sticking to one rigid recipe, most successful economies have changed their policies towards foreign investment according to changes in their stages of development, national priorities, and the world economic environment. In the light of these lessons, we conclude that the current proposals made by the developed countries in the WTO in relation to foreign investment regulation go directly against the interests of developing countries.²²⁸

On this basis it is clear that forcing domestic investment liberalisation and an international investment regime such as the current one, founded as it is on the principle of non-discrimination, aiming to lock in, enforce and increase the intensity of an FDI dependent development paradigm, “is likely to harm the developing countries’ prospects for development.”²²⁹ This begs the question: Given the success of their own development path why would these Northern States now demand the opposite of those currently attempting to develop? As Chang concludes, unless it is a massive case of self-delusion on the part of the North, it can only be a deliberate effort to prevent the more vulnerable economies in the South from catching up; in short, active neo-colonial under-development.²³⁰

²²⁸ Chang and Green, 2003, supra note 225, p. 36.
²³⁰ Chang, 2002, supra note 225.
2.5 - How the Potential Benefits of FDI are Systematically Removed

There is no doubt that benefits can accrue from FDI. However, again, the ideology and the system perpetuated by Northern powers reduce the options such that it is only a particular form of FDI which is made available; largely unrestricted, undirected and unregulated FDI. By all accounts above, this form of FDI is very unlikely to provide the desperately needed developmental results. The conditions required for benefits to flow are systemically removed and replaced by another set of arrangements cutting off any potential benefits. Some conditions (such as infant industry protection, performance requirements and provision of an educated and healthy workforce) require actions by the host State, and these are generally disallowed by the system promulgated by the North. Other conditions (such as clamping down on transfer pricing and corporate tax evasion through offshore havens, ensuring home State liability for the wrongdoing of their corporations and international measures against corruption) must be realised by the actions of those powerful Northern States directly, and these are largely unrealised as a matter of course, as they are ‘sub-optimal’ from the viewpoint of Northern corporations. ²³¹

Moran, for example, notes that

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US policy to promote development through FDI has not grown more supportive over time, has not even stood still, but rather has grown increasingly restrictive. ... the United States today is seriously deficient in helping FDI play this positive role, restraining and sometimes weakening core US agencies that could help, while turning a blind eye to loopholes in the Foreign Corrupt Practices Act.232

What is true of the US is equally true of the North in general. As such, the conditions under which FDI may result in positive development, rather than increased underdevelopment, most often cannot be met. The one development option that poor countries are given is systematically reduced to non-existence. The vast majority of this set of circumstances is due to the direct or indirect effects of identifiable actions and omissions by powerful Northern States with foreseeable effects. In Margot Salomon’s words, “[i]t is difficult to conclude that the nature and scale of poverty and underdevelopment globally are anything but a policy choice of those people and States at the top.”233

It is widely recognised that the major determinants that initially attract FDI are a stable macro-economic environment, markets, growth prospects and a healthy and well educated workforce. All of these determinants are undercut by the broad operation of neo-liberal policies, as set out above. These

policies create increased susceptibility to economic and financial crisis, and increased inequality leading to social disintegration and the long-term destruction of productive markets. They have led to an across the board decrease in growth rates and forced social spending cuts directly detrimental to health and education. According to Crotty, Epstein and Kelly,

the process of foreign direct investment and capital mobility within the neo-liberal structure undermine those very factors that attract and sustain MNCs. In the neo-liberal regime, countries find it increasingly difficult to offer companies what they want. In the long run, companies may find it increasingly difficult to get the demand, infrastructure, and skills that they want. ... While there may be important benefits to be gained from FDI under the right circumstances, the neo-liberal structures that are being implemented and, in some cases, imposed on governments in many parts of the globe ... make it much more difficult for workers and communities to reap those benefits.

In further detail, the benefits of FDI are stripped in two main ways; through the intense competition among developing (as well as between developed and developing) countries over the pool of FDI that exists, and through the nature of the neo-liberal FDI regime imposed both domestically and

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235 In the case of South Korea for example, Chang Kyung-Sup explains how the global spread of neoliberal propaganda and policies caused the implementation of a social policy regime in the country which undermined the developmental conditions necessary for its own success. Chang Kyung-Sup, ‘Predicaments of Neoliberalism in the Post-Developmental Liberal Context’, in Kyung-Sup (et al eds.), 2012, supra note 59.
internationally by the North and the IFIs,\textsuperscript{237} an imposition greatly facilitated by the effects of competition.

\textbf{2.5.1 – The Effects of Competition}

According to William Milberg, the competitive struggle between national governments to lure FDI has not generally succeeded, but has instead lowered social, labour and environmental standards, suppressed the organisation of labour resulting in a declining share of the proceeds of production and growing wage inequality, and cut the capacity of States to tax corporate profits and regulate capital in general.\textsuperscript{238} Reflecting the damage it does to national economies Jagdish Bhagwati, a renowned trade and investment expert, notes that “international competition is fierce and feared.”\textsuperscript{239} The Stiglitz Report on the 2008 global financial crisis states that this competition has led directly to a rise in inequality through regressive redistribution of income and restrictions on the capacity of governments to provide public goods.\textsuperscript{240}

Yet, beyond tax advantages, the progressively enticing rounds of incentives offered by developing countries in an escalating cycle to attract FDI effectively bargain away a large

\textsuperscript{237} The furtherance of this regime is also a concrete objective of Northern States within the process of financing for development. See, Mobilizing International Resources for Development: Foreign Direct Investment and Other Private Flows, Revised Outcome Document, UN Doc. A/CONF.212/CRP.1 Rev.1, 29 October 2008, para 16.

\textsuperscript{238} Milberg, 1999, supra note 201. Hanson concludes that, “The impression from existing academic literature is that countries should be sceptical about claims that promoting FDI will raise national welfare.” Hanson, 2001, supra note 180, p. vii.


\textsuperscript{240} Report of the Commission of Experts, 2009, supra note 60, p. 27.
proportion, if not the entirety, of the benefits that could be derived.\textsuperscript{241} The benefit of technology is bargained away by the introduction of strong patent, copyright and intellectual property protections, as well as extensive expropriation and minimum treatment standards in domestic legislation to reassure foreign investors. The benefit of transferred managerial know-how and other spill-overs are bargained away by voluntary abdication of certain performance requirements, such as quotas for locally hired staff and local content requirements. The benefit of increased revenue is lost to tax breaks and holidays, lowering of corporate tax rates,\textsuperscript{242} removal of capital controls and restrictions on profit repatriation, and ‘fire sales’ of State owned assets. Finally, social and environmental costs are incurred by the relaxation of health and safety regulations, and licensing and permit procedures, not to mention the creation of a more ‘flexible’ labour market.\textsuperscript{243}

An OECD study on the effects of competition for FDI found that these incentives play a decisive role in the decisions of investors on where to locate.\textsuperscript{244} Incentives and competition has also escalated rather than diminished with the significant

\textsuperscript{241} “[W]hen FDI occurs in a context of low levels of aggregate demand and destructive economic and political competition in the absence of effective rules of the game, then FDI can have a significantly negative impact on workers in both home and host countries.” Crotty (et al), 1998, supra note 236, p. 119.


\textsuperscript{243} For deeper explication of these and other negative effects of competition see, Charles Oman, \textit{Policy Competition for Foreign Direct Investment: A Study of Competition Among Governments to Attract FDI} (OECD Development Centre, Paris, 2000); UNCTAD, \textit{Incentives and Foreign Direct Investment} (UN, Geneva, 1996); UNCTAD, \textit{Incentives: Series on International Investment Agreements} (UN, Geneva, 2004); Woodward, 2001, supra note 76, pp. 131-141

\textsuperscript{244} Oman, 2000, supra note 243, p. 4.
growth in global flows of FDI.\footnote{The investment regime then acts to lock-in this level of incentives once escalated, as detailed further in the following chapters. This can be seen clearly in a recent arbitration, \textit{Micula v. Romania}. In 1998 the Romanian State committed to providing subsidies to all businesses, domestic and foreign, operating in economically depressed regions, for a period of ten years. In 2005 the government was effectively forced to withdraw the incentives by the EU as part of Romanian accession, to align with EU competition law and limits on State-aid to business interests. The relevant investors sued under the Sweden-Romania BIT and were awarded compensation in the order of €250 million for breach of the treaty’s fair and equitable treatment provision. See, \textit{Ioan Micula, et al v. Romania}, ICSID Case No. ARB/05/20, Award, 11 December 2013.\textsuperscript{246} Oman, 2000, supra note 243, p. 4.\textsuperscript{246} Moran, 1998, supra note 193, p. 7. See also, Report of the Commission of Experts, 2009, supra note 60, p. 83.\textsuperscript{248} Oman, 2000, supra note 243, pp. 4-5.} The costs are even calculable. For example, the study found that the direct ‘cost-per-job’ of competition for investment in the automobile sector exceeds $100,000, whether located in the developed or the developing world.\footnote{Oman, 2000, supra note 243, p. 4.} As Moran points out, this cost is pushed up to such a high level by the fact that developed countries are in highly unequal competition with developing countries to maintain and attract investment. The greater incentives able to be offered by wealthy governments heavily distort the ‘FDI-market’ and “recast the shape of economic geography, often along paths contrary to what comparative advantage would dictate.”\footnote{Moran, 1998, supra note 193, p. 7. See also, Report of the Commission of Experts, 2009, supra note 60, p. 83.} Often incentives

will tend to attract the “wrong kind” of investor. They also tend to render the broader policy-making process more vulnerable to rent-seeking behaviour, perhaps including corruption, which can be very costly—and can even spread and become quite destructive for the economy, for democracy and the development of a modern state, and thus for the very process of development.\footnote{Oman, 2000, supra note 243, pp. 4-5.}

The OECD study concludes that,
[t]he prisoner’s-dilemma nature of competition for FDI creates a permanent risk of costly beggar-thy neighbour bidding wars and downward pressure on environmental and labour standards that cannot be fully addressed by national governments in the absence of strengthened international policy co-ordination.249

It is this competition-constructed prisoner’s dilemma that also explains the expansion of the international investment regime, as noted by Elkins, Guzman and Simmons.250 Forced reliance on FDI gives rise to the intense competition that in turn imprisons each developing country in a choice that is no choice regarding investment rules. These countries individually perceive their best interests to be served by competition rather than cooperation, even though this is not objectively correct. This effectively splits underdeveloped nations, which would develop more effectively if they could operate as a counterbalancing bloc, into individual and fierce competitors, the supposed winner being the one to implement the neo-liberal model to the greatest extreme.251 Elkins,

250 Zachary Elkins, Andrew Guzman and Beth Simmons, ‘Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000’ 60 International Organization (2006). Another complementary explanation is proposed by Yackee, whereby developing countries may have signed BITs based on the simple subjective belief that attracting FDI is good for them, even if objectively it is not. Jason Yackee, ‘Are BITs Such a Bright Idea? Exploring the Ideational Basis of Investment Treaty Enthusiasm’ 12 University of California, Davis Journal of International Law and Policy (2005-2006). Poulson and Aisbett argue, in addition, that developing countries simply ignored the risks when signing BITs and are now paying the price. Lauge Poulson and Emma Aisbett, ‘When the Claim Hits: Bilateral Investment Treaties and Bounded Rationality’ 65 World Politics 2 (2013). Neither of these alternative explanations absolve the Northern states and IFIs, as they actively encouraged a false belief that all FDI is good, and similarly obscured any risks. See, Daniel Calderimis, ‘IMF Conditionality as Investment Regulation: A Theoretical Analysis’ 13 Social and Legal Studies 1 (2004).
251 De Schutter describes the existence of exactly the same dynamic within a domestic context. Olivier De Schutter, ‘The Host State: Improving the Monitoring of International Investment Agreements at the National Level’, in De Schutter (et al eds.), 2013, supra note 159, pp. 185-186.
Guzman and Simmons also find some evidence of direct coercion to submit to the international investment regime through the use of IMF credits.\footnote{252} For example, there is a high correlation between the prevalence of bilateral investment treaties (BITs) and developing countries which are counted as deeply indebted and therefore reliant on re-financing from the IMF.

Despite the gains made collectively in ensuring their policy space to regulate FDI for developmental benefit in multilateral fora such as the UN General Assembly,\footnote{253} when pressured individually, each developing country tended to relinquish this aspect of their sovereignty for the promise of increased flows of foreign investment as effectively the only available and viable source of external financing for development.\footnote{254} Echoing this structural coercion, Woodward states that, individually,

developing countries are effectively forced to bid away the developmental benefits of direct investment merely in order to maintain their share of the flows available. The effects of this competitive process are likely to be particularly acute for poorer developing countries. ... [because] their foreign exchange constraints are particularly tight, their domestic savings rates particularly low, their access to commercial loans extremely limited, and the prospects for official flows are poor due to chronically declining aid budgets. This means that their need for such capital flows as are

\footnote{252 Elkins (et al), 2006, supra note 250, p. 840.}  
\footnote{253 See discussion in section 3.1.1 below.}  
\footnote{254 Andrew Guzman, ‘Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’ 38 \textit{Virginia Journal of International Law} (1997). With the notable exception of Brazil.}
available is generally more acute than for most middle-income countries.\textsuperscript{255}

To compound matters they have less capacity to compete in terms of markets, macro-economic stability, education levels, availability of supply chains, and financial incentives. Their only option then is to ‘signal’ their attractiveness to FDI by submitting to the international investment regime. Kenneth Vandevelde forthrightly states that the widespread turn to these treaties was “the consequence of a series of political and economic events during the 1980s that left developing States with seemingly no alternative but to liberalize their investment regimes in order to attract foreign investment”.\textsuperscript{256}

However, with BIT proliferation this signalling is a losing strategy. The competitive advantage of signing a BIT is progressively diluted, until “the apparent outcome is that developing States increasingly end up subject to treaty obligations which restrict their domestic regulatory capacity, with little or no competitive advantage to show for it.”\textsuperscript{257} The end result is of benefit only to investors and Northern States. For developing countries there is only harm.

Akin to the conditions in a perfectly competitive market that reduces the economic profit of sellers to zero, in this competitive dynamic between developing countries, “the

\textsuperscript{255} Woodward, 2001, supra note 76, pp. 133-134. Or, as discussed in chapter 7, what is truly acute is the need to protect and increase their domestic savings, to alleviate the dependence on foreign capital.


benefits of investment will all go to the investor, leaving no surplus for the host.”258

BIT proliferation is therefore a systemic technology of underdevelopment. BIT ‘signalling’ is not waving, but drowning.

The nominally voluntary submission to the BIT-based investment regime creating this state of affairs should not be seen as un-coerced.259 Superficially it may be argued that, in their sovereign capacity, developing countries willingly, if unwittingly, sign the benefits of FDI away. However, when the full context of forced FDI dependent development through the operation of a Northern designed system of international financing (or lack of it), is properly taken into account, the power of coercion is revealed in the systematic denial of choice. Furthermore, the wealth and economic supremacy of the North gives it “go-it-alone” power, as coined by Lloyd Gruber.260 Gruber, referring specifically to NAFTA as a prime example, successfully debunks the notion that all so-called ‘cooperative’ arrangements, such as bilateral treaties, must necessarily be mutually beneficial to exist at all. Some may be significantly detrimental to one party, especially where the other party is far more powerful and will be relatively less affected if there is no agreement at all, or if the weaker party defects from the agreement.

259 “This notion of consent implies a voluntarism, but there is no real freedom of action when choices are between lesser evils ... Rational consent should not be mistaken for approval.” Salomon, 2008, supra note 156, pp. 41-42 (emphasis added).  
In fact, the US in particular has been consistently clear that neither development nor cooperation were ever intended to be a part of its BIT programme. A former US State Department Official described the programme as “essentially a tool of ideology, of imposing US economic policy on other States.”

US BIT negotiators took an “uncompromising stance”, according to which the United States was candid with its prospective BIT parties that concluding a US BIT would not guarantee an increase in incoming FDI flows or necessarily produce tangible benefits such as higher employment. US negotiators were quite clear that the US BIT was not designed to promote economic development or employment as such but was intended to achieve one clear purpose: to protect foreign investment.

The US BIT programme’s three official aims are listed as; the “protection of investment abroad”, encouraging “the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way”, and supporting “the development of international law standards consistent with these objectives.”

Development and cooperation are notably absent. According to Vandevelde this belies the fact that the US, and Northern States generally, are not in reality pushing for international economic liberalism in regard to foreign investment, but are rather attempting to

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261 Salomon, 2013, supra note 233, p. 43.
impose their *economic nationalism* on a global scale. \textsuperscript{264} BITs follow a Northern nationalist objective and are meant to promote and protect the investors of the capital exporting States, rather than to create a substantively reciprocal liberal investment regime, much less to foster development in poor countries.

The timing of these agreements and the spread of the BIT-based regime is particularly inopportune for capital-importing developing countries. \textsuperscript{265} The effect of the regime is to lock in a level of deference to the interests of FDI at a particular time in history where it is seen in its most ‘flattering’ light, and when it is believed to be the most critical element for development financing. At this time the external context is at its worst, with export markets stagnating due to a global recession, domestic savings siphoned by the largest debts in history, the rapidly declining availability of any other source of external finance, and the height of intensity in the competition for the one source that is made available and encouraged. The deep concessions made when developing countries are at their greatest disadvantage with respect to foreign investment, are sure to be highly inappropriate at another time when the stars are no longer aligned for FDI. However, at that time it may be too late, as the legal structure may have locked in these deep concessions. At this alternative point in time they will be highly costly to retract. The point here though, is that these stars did not fatefuly align like heavenly bodies, but were forced into conjuncture by the deliberate actions of Northern

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\item \textsuperscript{265} Woodward, 2001, supra note 76, pp. 140-141.
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States, individually and through the international institutions they control.

Aside from the fact that the promised flows have not generally arrived, thereby undercutting the whole basis for submission, the cruel irony is that the legal regime itself removes many of the mechanisms necessary for the cultivation of any benefit from what FDI is attracted. Here we find another level of what Marks, in discussing international law and exploitation, describes as “the compulsion that comes not from violence, threats or deceit, but from the limitation of options and the denial of opportunities.”

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2.5.2 – The Nature of the Neo-liberal FDI Regime

There are a number of aspects of the investment regime imposed by the North which are notably prejudicial to development prospects and human rights realisation in the South, which are detailed further in the following chapters. Within the context of sustainable development, Karl Sauvant correctly underscores the governance function of investment agreements,

[w]ith ‘governance’ referring especially to the provisions in contracts and international investment agreements that define the distribution of the benefits associated with incoming investment between the host countries and investors. ... [they] govern after all the conditions under which sustainability effects can materialise; beyond that, they become the basis for the resolution of disputes should these arise.\(^{268}\)

The core terms of the investment regime are rarely departed from. These terms play a major role in constraining the host State’s potential ability to benefit from FDI.\(^ {269}\) Though instituted expressly by the leading members of the OECD, the investment regime blatantly contradicts the OECD Guidelines for Multinational Enterprises, which states that “[g]overnments have the right to prescribe the conditions under which multinational enterprises operate within their


jurisdictions.”\textsuperscript{270} The details of this contradiction form the subject of the following chapters.

However, it is the fundamental nature of the current regime as based on the principle of non-discrimination which has perhaps the worst effects on development.\textsuperscript{271} Difference is a comparative advantage to developing countries and their industries. One would logically think it should therefore be protected and fostered, even perhaps enhanced, in a form of positive discrimination to bolster development. Yet foreign investors bemoan such difference as an ‘unfair advantage’ held by domestic concerns and enterprises. As Bhagwati notes in the transposable context of trade,

\textbf{[t]he result has been a growing demand for ironing out any such differences ... as firms seek ‘level playing fields’, ignoring the fact that it is differences, whether of climate or skills or domestic institutions and policies reflecting local conditions, that lead to beneficial trade among nations.}\textsuperscript{272}

Non-discrimination is the weapon of choice, preventing the use of the strategy of infant industry protection, which has been essential in the development process of all Northern industrialised States. Without initial protection they will simply be put out of business or swallowed up by more

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\textsuperscript{271} Vandeveldt concludes that “BITs seriously restrict the ability of host states to regulate foreign investment and curb ... adverse effects.” Vandeveldt, 2000, supra note 161, p. 499. Vandeveldt’s primary advice is the amendment of non-discrimination provisions in BITs. For a deeper view of the complex relationship between a ‘clear and strong’ regime of property rights, and issues of distribution, economic development and social well-being see, David Kennedy, ‘Some Caution about Property Rights as a Recipe for Economic Development’, Public Law & Legal Theory Working Paper Series No. 09-59, Harvard Law School, Cambridge Mass., 1 September 2009.  \\
\textsuperscript{272} Bhagwati, 2004, supra note 239, p. 12. 
\end{flushleft}
powerful foreign corporations.\textsuperscript{273} The evidence above bears out the fact that this is the reality, notwithstanding the neoliberal myth that unequal and unregulated competition with large multinationals will ‘streamline’ local industry and ‘increase domestic competitiveness’. But protection requires discrimination between local and foreign firms.

Thus, from a purely developmental point of view, the demands of non-discrimination, disallowing entry and performance requirements and a host of other investment measures aimed to favour local firms and industries, is perhaps the most directly damaging consequence of the investment regime.\textsuperscript{274} As noted, these measures were essential to the development of the North, and a number of UNCTAD studies have also shown that, until recently, they have been equally beneficial to the South.\textsuperscript{275} For example, Korea and


\textsuperscript{274} This is also in direct contravention of the rights of developing States under the UN Declaration on the Right to Development, supra note 48, Article 2(3).

Taiwan, often upheld as the recent ‘star performers’ of FDI driven development in East Asia, in fact employed extensive entry and ownership restrictions, required strict contractual terms, forced technology transfer and local content requirements, and initially cordoned off 50% of their industries from foreign investment. Other exceptions that disprove the neo-liberal rule (China, Brazil and India) have been referred to above.

However as UNCTAD report, the incidence of performance requirements “has declined during the past decades” due mainly to the increasingly competitive environment for attracting FDI and “the need to comply with international commitments.” This is in thinly veiled reference to the fact that the agreement on Trade Related Investment Measures (TRIMs) at the WTO, the investment chapter of the North American Free Trade Agreement (NAFTA,) together with a number of other regional regimes, as well as many bilateral investment treaties, all prohibit the use of performance requirements and other industrial policy tools for development on the basis of a principle of non-discrimination, punishing them by trade sanctions or direct pecuniary compensation. For example, from 2002-2007 the Mexican government attempted to protect its domestic sugar producers from unfair competition and possible bankruptcy by taxing the import of corn syrup, prompting a claim under NAFTA by an American investor, Cargill, one of the world’s largest multinational food companies. The government’s objections were dismissed and it was ordered to pay $77 million to the investor plus interest.

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277 Echoing Chang and Rodrik, Kohli concludes that, “the preponderance of the evidence indicates that late-late-industrialisation has always commenced under conditions of protection.” Kohli, 2004, supra note 197, p. 6.
278 UNCTAD, 2003, supra note 275, p. 33.
and legal fees. The degree of constriction on industrial policy parallels the disparities in political and economic power between the parties to the negotiation of each agreement. The result is that the loss of ‘development space’ due to the disciplinary nature of BITs and NAFTA go well beyond that exacted from broader multilateral regimes such as the WTO.

Brazil and India have objected to the WTO TRIMs agreement on the grounds that it removes vital policy tools for developing countries to ensure the transfer of technology, counter excessive corporate power, further development objectives, stabilise external financial weaknesses, and address social and environmental concerns. In diametric opposition, the US favours the expansion of the measures prohibited in the agreement, and the developed countries within this forum have stated that compliance with the TRIMs agreement as it stands by banning performance requirements “would be in the self-interest of developing countries, as many requirements would have a deterring effect on inward FDI.” Evidently in order to attract investment these countries must remove the possibility of benefiting from it, as it is, somewhat illogically, in their interest to be attractive to Northern FDI that does not help them.

One important recent finding is that the nature of the investment regime tends to attract a certain kind of

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281 Communication by Brazil and India on the Need for an Amendment of the TRIMs Agreement, WTO Document G/C/W/428, 9 October 2002.

investment. Colen and Guariso hypothesise that due to the strength of the investment regime in protecting particularly those investments made in sectors with large primary investment, or ‘sunk costs’, and which have long life times, those countries more deeply enmeshed in the regime will be more likely to attract FDI in these sectors. \(^{283}\) Such sectors are typified by extractive operations and the provision of basic utilities, such as water and electricity. The literature strongly indicates that foreign investment in these sectors is the most problematic. Extractive industries have a higher likelihood of associated human rights abuse and corruption, and in addition a reliance on these sectors will often lead to the irony of the ‘resource curse’. Foreign investment in basic utilities is often accompanied by lax or absent regulation and often results in foreign monopoly control over a public good, providing the investor with substantial leverage to decide unilaterally on prices and quality to the detriment of service provision to the poor and marginalised (as detailed below regarding Argentina in chapter 4). \(^{284}\) The authors of the study confirm this hypothesis with regard to the extractives and mining sector in particular, \(^{285}\) therefore concluding that the type of investment attracted by the current investment regime on a spectrum from more to less developmentally beneficent is likely to be found at the latter end.

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\(^{285}\) Colen and Guariso, 2013, supra note 159, p. 156. However, negligible evidence is provided for an increase in investment in public utilities as a result of BITs.
In short, developing countries submitting to the investment regime, “drastically reduce their ability to harness foreign investment to the country’s development of higher value-added productive capacities,”\(^{286}\) and instead attract the type of investment most likely to have a negative net outcome, retarding rather than promoting development. The serious injustice of this situation could hardly be overstated:

Depriving current and future governments of the ability to implement a successful industrial policy aimed at developing national industry could consign future generations to poverty and underdevelopment. The stakes could not be higher.\(^{287}\)

In contrast to the convoluted logic of the US demonstrated within the WTO above, the relevant policy prescriptions would seem to be far simpler, as Crotty, Epstein and Kelly conclude;

First, there should be a moratorium on all international agreements promoted by international organisations or Northern countries to liberalize the laws governing controls over FDI, including those taken by the OECD, the World Trade Organization and NAFTA. ... Second, international


\(^{287}\) Chang and Green, 2003, supra note 225, p. 43.
organizations such as the World Bank and the IMF should stop pressuring developing and transitional countries to open their economies to foreign direct investment as a condition for receiving credit.\textsuperscript{288}

\textsuperscript{288} Crotty (et al), 1998, supra note 236, p. 141.
3 - THE INVESTMENT REGIME

In the modern world, the rules governing economic transactions – both nationally and internationally – are the most important causal determinants of the incidence and depth of poverty.¹

Absent the international investment regime under-developed States could opt out of the dominant development paradigm without any specific legal consequence and without having to pay in compensation for doing so. In the international economic environment alternative development paths may carry heavy consequences and may be all but practically impossible due to the systemic constraints discussed in the previous chapter. However, in this environment these paths are not yet ‘outlawed’. The current international investment regime changes that environment. It adds a legal layer, enforcing the neo-liberal ideology entrenched within the process of international financing for development with legal sanction and financial penalty in the case of non-compliance. As such, it not only protects foreign investors, but also entrenches and extends a dependency on foreign investment for development.

The next chapters illuminate the deeper rationale and purpose of the regime. This chapter first makes a brief foray into the history of international investment regulation. The temporal novelty, fragility and contingency of the current

regime are highlighted, and the absence of global consensual support is demonstrated. The current structure, nature and development of the regime are then set out, and its interaction with development and socio-economic rights is explored. Finally, the backlash against this regime is addressed, stemming from the evolution of new geopolitical alignments and a search for alternatives spurred by the excesses of the regime itself.

3.1 – The History of Investment Regulation

A brief look at the history of international investment law shows its malleability over time, its susceptibility to the global political balance of powers, the controversy over interpretations of custom, and the distinct novelty of the current regime as such.\(^2\) This serves to frame future possibilities by illustrating that the current structure is not set in any customary stone, but is just one incarnation in a constantly shifting and controversial area of international law.\(^3\)


The importance of a historical perspective was forthrightly expressed by Judge Padilla Nervo when, in 1979 in his separate opinion in the seminal *Barcelona Traction Case*, he wrote:

The history of the responsibility of States in respect of the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded.\(^4\)

The best indication of an enduring discord is the repeated and ongoing failure of efforts to formulate universal multilateral rules on investment.

It is apposite to separate a consideration of the history of international investment law into the evolution of customary law and that of treaty-based law. This reveals the disjuncture between the two in regard to their character and their provisional extent. The current treaty-based system has been realised as a recent and direct reaction to the deeply contested nature of custom regarding foreign investment and its generally dissatisfying standards from the point of view of investors and Northern States.\(^5\)

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\(^5\) If the desired rights "were already anchored in customary international law, it becomes difficult to understand why global capital increasingly seeks to inscribe its rights through treaty regimes." Upendra Baxi, *The Future of Human Rights*, Third Edition (Oxford University Press, Oxford, 2008), p. 256. At the turn of this century the current investment regime "was not yet born as an independent discipline ... [It was] a field that was part of international politics rather than international law." Stephan Schill, ‘W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law’ 22 *European Journal of International Law* 3 (2011), p. 884.
3.1.1 – Custom

The parameters of custom regarding the treatment of foreign investment are notoriously amorphous. Nevertheless, two features are now settled beyond debate. Firstly, States are obliged to respect the private property rights of both nationals and non-nationals. Secondly, this right is subject to valid infringement, or some qualification, in cases of nationalisation or other forms of expropriation related to matters of public interest or sovereign necessity. Controversy arises as to the extent to which customary law may inhibit the actions of the State.

A point of departure is provided by a highly influential position taken by Carlos Calvo in the late 19th century, whereby a foreigner in a given national jurisdiction held the same property rights as the citizens of that State under

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6 “The US Supreme Court was quite correct in 1964 when it said in Banco Nacional de Cuba v. Sabbatino that there were few if any issues in international law on which opinion was so divided as the limitations on a state’s power to expropriate the property of aliens.” Andreas Lowenfeld, ‘Investment Agreements and International Law’ 42 Columbia Journal of Transnational Law (2003-2004), p. 130. Many would argue that despite undeniable advances in treaty law, little has changed with relation to custom over the intervening fifty years.

7 In the words of one tribunal, “international law undoubtedly sets forth an obligation to provide compensation for property taken”. Ebrâhimi v. Islamic Republic of Iran, Iran-US Claims Tribunal, Award 560–44/46/473, 12 October 1994, para 51.

8 This ‘traditional formulation’ of customary international law can be traced back to the French Declaration of the Rights of Man and of the Citizen (26 August 1798), stating in Article 17; “Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.” Rosalyn Higgins, The Taking of Property by the State: Recent Developments in International Law’ 176 Collected Courses of the Hague Academy of International Law (1982), p. 275.
domestic law. Moreover, disputes must be settled in national courts in accordance with national law only. The doctrine is historically opposed by that of the international minimum standard of treatment for foreigners long asserted by the wealthy developed States. The core content of this minimum standard, in the tradition emanating from the US and Britain, is known as the Hull formula, which holds that according to custom expropriation must be, 1) for a public purpose, 2) non-discriminatory, 3) performed in accordance with the due process of law, and 4) accompanied by ‘prompt, adequate and effective compensation’.

However, acceptance of these four pillars as custom has been far from universal, with the fourth eliciting the most divergent State opinion and practice. For example, following the Bolshevik Revolution of 1917 the Soviet Union enacted a widespread nationalisation programme as an inherent part of the creation of the communist State, involving the effective refusal to pay any compensation to foreign property owners. The challenge to the Hull rule intensified in 1938 when Mexico

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10 See, Edwin Borchard, ‘The “Minimum Standard” of the Treatment of Aliens’ 33 Proceedings of the American Society of International Law (1939); Alwyn Freeman, ‘Recent Aspects of the Calvo Doctrine and the Challenge of International Law’ 40 American Journal of International Law 1 (1946). Although the notion of an international minimum standard was originally intended to protect against extreme threats to the life and liberty of aliens, “instead, it became the basis for a system of foreign investment protection which could hinder economic reforms undertaken by developing countries.” Sornarajah, 2010, supra note 9, p. 123.
11 This standard of compensation is referred to as such, after US Secretary of State Cordell Hull who declared this to be the content of customary law in representations to the Mexican Government on behalf of US landowners whose property was nationalised through sweeping agrarian reforms in the 1930’s. See, Oscar Schachter, ‘Compensation for Expropriation’ 78 American Journal of International Law 1 (1984), p. 121.
undertook large scale agrarian reforms and nationalised the US and British owned oil industry.\textsuperscript{13} In response to the US demand for compensation on behalf of its nationals the Mexican Government stated that, as a matter of legal obligation under international law, the State was under no duty to provide compensation for property expropriated “in the pursuit of a social reform programme upon which economic development, as well as the wellbeing of its people, was dependent”.\textsuperscript{14}

In response to this confusion over the content of custom the US had early on begun to codify its understanding by incorporation into bilaterally negotiated treaties, known as Friendship, Commerce and Navigation treaties (FCN).\textsuperscript{15} FCN treaties included the standard of prompt adequate and effective compensation and provided a textual ground for claims by foreign investors against host States, to be used in domestic courts as well as through State to State dispute settlement should the grievance be adopted by the home State.\textsuperscript{16} The last of these treaties was concluded in 1966 and the consensus in the literature is that they have played little

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part in the development of custom,\textsuperscript{17} although they have had significant influence on the development of BITs.\textsuperscript{18}

Accompanying decolonisation following the Second World War and the increasing bipolarity of the superpowers, a correspondingly clear divergence of opinion and practice regarding State’s positions on international investment evolved.\textsuperscript{19} The divide between developed, capital-exporting countries and the large majority of developing capital-importers was sharp. The former, led by the US, held to high standards of international investment protection, and the large majority of developing countries, following the general lead of the USSR, stressed national control of foreign investment. Despite strong adherence to the Hull formula by the West, developing and socialist countries took the stand that customary law did not contain any international minimum standard of treatment.\textsuperscript{20}

Decolonisation was perhaps the most decisive factor in the formulation of customary law in this area. It was the main reason why, “by the mid-1970s, the Hull Rule had ceased to be a rule of customary international law”,\textsuperscript{21} if indeed it ever had been. Even US Foreign Relations Law, though it

\begin{thebibliography}{99}
\item Ibid, pp. 9-11.
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unsurprisingly upholds the Hull Rule, acknowledges that the rule “has met with strong resistance from developing States and has not made its way into multilateral agreements or declarations or been universally utilised by international tribunals.”

Salacuse notes that the prevailing regulatory structure in the 1970s was “ephemeral”, “consisting largely of scattered treaty provisions, a few contested customs, and some questionable general principles of law.”

The first attempt at the formulation of multilateral rules in this area fell afoul of these deep divisions and came to nothing. The third pillar of the Bretton Woods Institutions was intended to be an International Trade Organisation (ITO) as set forth in the Havana Charter of 1948. This organisation was to regulate international investment as well as trade, and the Charter included Article 12 (International Investment for Economic Development and Reconstruction) to this effect. However the final document provided only very weak protection to foreign investors. The relevant section only offered foreigners “opportunities and security” for investment without discrimination. States were allowed to implement “any appropriate safeguards necessary” to protect their national policies. Domestic development policy was given a clear and high priority over the protection of foreign investors. Deeply unsatisfactory both to US business and the government, Congress refused to pass the Charter, in part because it was believed to exaggerate “the rights of the under-

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25 Ibid, Art 12 1(b).
26 Ibid, Art 12 1(c,i).
developed countries.” Without US support the whole ITO venture collapsed, to be survived only by the Global Agreement on Trade and Tariffs (GATT). Regardless of this ultimate failure attributable to one nation, the low standards of investment protection codified in the Havana Charter were approved in good faith by the representatives of 56 State members of the UN, at a time when the total membership of the organisation stood at 58 States. These standards can therefore reasonably be taken as representing customary law in 1948.

Customary protection for investors was further weakened by certain resolutions achieved by developing countries through the United Nations in the ‘60’s and ‘70’s. Three resolutions within the UN General Assembly are of particular import: The Declaration on the Establishment of a New International Economic Order; Permanent Sovereignty over Natural Resources; and the Charter of Economic Rights and Duties of States. The broad aim of the developing countries was to recalibrate the global economic system of management to more adequately reflect their needs and priorities, and to institute a system of international economic relations based

on justice and equity.\textsuperscript{32} With respect to investment the General Assembly rejected the ‘Hull formula’, stating that;

Nationalisation, expropriation or requisitioning ... shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to controversy, the national jurisdiction of the state taking such measures shall be exhausted.\textsuperscript{33}

This formulation was adopted by a vote of 82 to 2, with 12 abstentions. Those in favour included “a number of developed Western countries” including the US, and represented “all geographic regions and economic systems”.\textsuperscript{34} The Charter of Economic Rights and Duties states that every nation has the right

To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies.\textsuperscript{35}

Expropriation gives rise only to ‘appropriate’ compensation, the determination of which is heavily weighted in favour of the State.\textsuperscript{36} Furthermore the State’s right to regulate foreign investment was based on its “primary responsibility to promote

\textsuperscript{33} Permanent Sovereignty over Natural Resources, supra note 30, para 4.
\textsuperscript{34} Dattu, 2000-2001, supra note 14, p. 284.
\textsuperscript{35} Charter of Economic Rights and Duties, supra note 31, Article 2(b).
\textsuperscript{36} Ibid, Article 2(c).
the economic, social and cultural development of its people,” in accordance with State’s obligations under the International Covenant on Economic, Social and Cultural Rights. These UN resolutions in particular are can be viewed as strong evidence of custom at the time, precluding its identification with the Hull formula.

In reaction Northern States began to pursue concerted programmes in the mid-1980s to conclude multiple bilateral investment treaties with developing countries. BIT programmes were designed as a strategy of Northern States “to change the dynamics of this struggle [between investors and newly-independent developing countries] and protect the interests of their companies and investors.” However, custom would not seem very easy to change. For example, it has been noted as late as 2005 that it is still uncertain “whether the requirement of fair and equitable treatment forms part of customary law”, despite the fact that this has long been a demand of the North and a core provision of almost all BITs. This raises the question of the effects of a large number of bilateral treaties on the present parameters of custom.

37 Ibid, Art 7 (my emphasis).
38 In fact, in at least two important cases these resolutions and the voting pattern by which they were achieved explicitly formed a decisive part of arbitral calculation on the state of customary law on expropriation. See, Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, 17 ILM 1, Award on the Merits, 19 January 1977; Libyan American Oil Company v. The Government of the Libyan Arab Republic, 20 ILM 1, Award, 12 April 1977.
Mann, Lowenfeld and Schwebel argue that BITs are indicative of custom.\(^{41}\) Mann, for example, states that, the “cold print of these treaties is a more reliable source of [customary] law than rhetoric in the United Nations”, which developing countries were apparently forced to abandon “when it came to the crunch”.\(^{42}\) This begs the question of who ‘crunched’ these impoverished nations, why this was necessary, and whether ‘crunching’ should play any significant part in the development of custom. Lowenfeld engages in a very superficial and summary manner, preferring a more ‘positivist’ view on the supposed ‘conversion’ of the developing world.

The reason for the change - whether true conversion, herd instinct, or crass opportunism - while not irrelevant, is not dispositive. ... whether out of innate conversion, economic calculation, or some combination of the two, a large number of developing countries opted for a quite different approach to foreign investment in one-on-one negotiations than they had

\(^{41}\) Francis Mann, ‘British Treaties for the Promotion and Protection of Investments’ 52 British Yearbook of International Law 1 (1981); Lowenfeld, 2003-2004, supra note 6; Stephen Schwebel, ‘The Influence of Bilateral Investment Treaties on Customary International Law’ 98 Proceedings of the American Society of International Law (2004). A passage in the award delivered in the CMS case is often relied on. In referring to BITs as \textit{lex specialis} the tribunal opined that “\textit{lex specialis} in this respect is so prevalent that it can now be considered the general rule ... To the extent that customary international law or generally the traditional law of international claims might have followed a different approach - a proposition that is open to debate - then that approach can be considered the exception.” CMS Gas Transmission Co. \textit{v.} Argentina, ICSID Case No. ARB/01/8 48, Decision on Jurisdiction, 17 July 2003, para 48. How custom can be tantamount to exception is a very difficult concept to apprehend given the plain meaning of the words, and in all probability it is an oxymoron. It is important to note, in relation to the award of this tribunal, that a subsequent Annulment Committee came to the conclusion that it displayed “a series of errors and defects”, that it “contained manifest errors of law,” and that it suffered from “lacunae and elisions.” CMS Gas Transmission Co. \textit{v.} Argentina, ICSID Case No. ARB/01/8 48, Decision of the Ad Hoc Committee on the Application of Annulment of the Argentine Republic, 25 September 2007, para 158.

\(^{42}\) Mann, 1981, supra note 41, p. 249.
taken previously and continued to take (though less dramatically) in most multinational fora.43

Lowenfeld does not mention any form of coercion or exercise of power, structural or otherwise, which clearly changes the game in the bilateral setting, and seems to rely on the fact of signing up to these treaties to indicate opinio juris, despite admitting to the evidence of different opinions in different fora, leaving his ultimate position shaky. This shakiness is more than evident in his conclusion, which he admits

may be inconsistent with the traditional definition of customary law, which holds that the practice of states becomes customary law only if the practice is taken from a sense of legal obligation. I am suggesting, at least tentatively, that the undertaking of legal obligations by a large group of states, even from a mixture of motives, has resulted in something like customary law. My suggestion is that perhaps the traditional definition of customary law is wrong, or at least in this area, incomplete.44

It is clear why one would want only to ‘tentatively suggest’ that an established foundational rule of international law be discarded to the sole benefit of a small group of already extraordinarily privileged foreign investors, and that in its place motivations such as potential economic submission imposed by the absence of alternatives, or, less ominously, short-term economic experimentation, could lead dubiously to the creation of ‘something like’ custom.

Those less convinced of BITs as evidence of custom argue BITs may be regarded more as “the reciprocal arrangements of

44 Ibid, pp. 129-130.
the parties engaged in their own isolated trade and financial gains,” and therefore would have little to do with the parties’ views on international norms generally applicable to all States.\(^{45}\) The picture is complicated further if it is accepted that the determination of economic self-interest is not a free one, and is in fact more accurately characterised as coercion. According to Sornarajah claims of BITs equalling custom are exaggerated due to the crucial fact “that different aims and concerns underlie them.”\(^{46}\) McLachlan notes that a standard approach to the determination of custom would discount any significant potential contribution from the substance of bilateral treaties.\(^{47}\) Specifically regarding the claim of BIT standards to custom, the International Law Association deems that there is “no special reason to assume that this is the case, unless it can be shown that these provisions demonstrate a widespread acceptance of the rules set out in these treaties outside the treaty framework.”\(^{48}\) Given continued developing country resistance to the multilateralisation of these rules in the WTO such external acceptance cannot be demonstrated.

\(^{45}\) Dattu, 2000-2001, supra note 14, p. 285. Guzman argues that “because BITs are signed by developing countries in pursuit of their economic self-interest rather than out of a sense of legal obligation” the standards therein cannot be equated with custom. Guzman, 2009, supra note 21, p. 76.

\(^{46}\) Muthucumaraswamy Sornarajah, ‘A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration’, in Karl Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, New York, 2008), p. 47. He also points out the fact that, of all the BITs signed, nearly one third remain unratified. See also, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014, para 83; “Each treaty or international agreement is a different bargain struck and based on different sets of circumstances.”


\(^{48}\) International Law Association, 2000, supra note 47, p. 759.
Contrary to the position of the tribunal in CMS, the Iran-US Claims Tribunal has stated that, while international law undoubtedly sets forth an obligation to provide compensation for property taken, international law theory and practice do not support the conclusion that the ‘prompt, adequate and effective’ standard represents the prevailing standard of compensation. Rather, customary international law favors an ‘appropriate’ compensation standard.  

And the tribunal in *UPS v. Canada* has stated that, “in terms of *opinio juris* there is no indication that [bilateral investment treaties] reflect a general sense of obligation”, citing their limited coverage despite large numbers, and significant variations in the substantive obligations. Neither submission nor acquiescence necessarily equate with agreement. Indeed there is already a marked backlash against the BIT-based regime, which clearly demonstrates the dissatisfaction of a wide range of States, and, as direct evidence of State practice

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49 *Ebrahim v. Islamic Republic of Iran*, Iran-US Claims Tribunal, Award, 12 October 1994, paras 51-52. This statement by the Tribunal was made in 1994, over twenty years after the resolutions surrounding the NIEO, yet echoes their substance in the middle of the neo-liberal apogee of the 90s.

50 *United Parcel Service of America Inc. v. Canada*, 7 ICSID Rep. 285, NAFTA/UNCITRAL, Award on Jurisdiction, 22 November 2002, para 97. In support of this view, the International Court of Justice, in 2007, stated that “[t]he fact . . . that various international agreements . . . have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.” *Case Concerning Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), International Court of Justice, Preliminary Objections, 24 May 2007, para 90. For further rebuttal of the BITs-as-customary law thesis see, Bernard Kishoiyian, The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law’ 14 Northwestern Journal of International Law and Business (1993-1994); Patrick Dumberry, ‘Are BITs Representing the “New” Customary International Law in Investment Law?’ 28 Penn State International Law Review 4 (2010); and Tarcisio Gazzini, ‘The Role of Customary International Law in the Field of Foreign Investment’ 8 Journal of World Investment and Trade 5 (2007).
and opinion, is perhaps the strongest argument against an identification of the substance of this regime with custom.

In sum, the push and pull over custom arises from the fundamental and essentially unchanged division between the economic situation of developed and developing countries. It is essentially these divisions that have caused the ruin of several attempts to codify rules on investment into a universal treaty.

3.1.2 – Treaty

As described above the first attempt to codify multilateral investment rules in treaty form died with the Havana Charter at the hands of the US Congress in the late 1940s. Approximately two decades later the effort was revived within the OECD. A Draft Convention on the Protection of Foreign Property was produced as an annex to a resolution of the organisation in 1967. However, the Draft Convention did not


52 Resolution of the OECD on the Draft Convention on the Protection of Foreign Property, OECD Publication No. 23081, 7 ILM 117, 12 October 1967. The eventual convention was to be applied to all countries outside of the OECD following its presumed acceptance among the members of that organisation. Dolzer and Stevens, 1995, supra note 17, p. 2. This convention was based on the Abs-Shawcross Draft Convention on
even get sufficient support within the OECD to be opened for signature. The shaky ground on which the Draft Convention claimed to be “a clear statement of recognised principles relating to foreign investment” was thereby exposed. Nevertheless, due largely to the action of the OECD Committee on International Investment and Multinational Enterprises, its principles and structure went on to directly inform the basis of later BITs, explaining their current homogeneity.

Within the GATT the close relationship between trade and investment meant that the issue of investment was never properly divorced from that institution. In the mid ‘80’s investment was again pushed by the ministers of developed countries through inclusion in the agenda of the Uruguay Round of negotiations begun in 1986. There was strong opposition to any consideration of this issue from developing countries. Nevertheless, championed by the US, these issues were pushed through, and at the conclusion of the Round in 1994 the Marrakesh Agreement Establishing the World Trade Organisation contained an agreement on Trade Related Investment Measures (TRIMs) and a Global Agreement on Trade in Services (GATS) as annexes.

Investments Abroad, named after its principle creators; Herman Joseph Abs was then Chairman of Deutsche Bank, and Lord Hartley Shawcross was then Director of the Shell Petroleum Company. See, Lowenfeld, 2003-2004, supra note 6, p. 123; Rainer Hofmann, Stefan Schill and Christian Tams (eds.), Preferential Trade and Investment Agreements: From Recalibration to Reintegration (Nomos, Baden-Baden, 2013), p. 9. These two draft conventions were templates for the production of the first model BITs by the OECD nations. Stephan Schill, The Multilateralization of International Investment Law (Cambridge University Press, Cambridge, 2009), pp. 35-40.

53 Dolzer and Stevens, 1995, supra note 17, p. 2.
54 Draft Convention on the Protection of Foreign Property, supra note 52, Preamble.
55 Dolzer and Stevens, 1995, supra note 17, p. 3.
57 33 ILM 1144, 15 April 1994.
Investment is protected to a certain extent under both these agreements and there are consequent incursions on sovereignty, though these are relatively limited. TRIMs prohibit only some measures of regulation of foreign investment, and only apply to regulation affecting trade in goods.\(^{58}\) This resulted from a strong defence by the developing countries of their need to impose certain restrictions on foreign investors, such as entry and performance requirements, and to curb certain business practices to produce positive development outcomes.\(^{59}\) In the end the TRIMs agreement reached a compromise that was unsatisfactory to both camps. The US aimed at prohibiting virtually the whole range of measures by which investors could be controlled to the benefit of host State development. In the end however, less than 40\% of these were included in the agreement.\(^{60}\)


\(^{60}\) See also, the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, UNCTAD/RBP/CONF/10/Rev.2, UN, Geneva, 2000.

\(^{60}\) Laura Collinson, ‘Explaining Pareto-Inefficient International Cooperation Using Argentina’s Bilateral Investment Treaties’, Development Studies Institute, London School of Economics and Political Science, Working Paper Series No. 08-87, 2008, p. 10. The partial prohibition of investment measures does not extend to issues of initial screening and establishment, or restrictions on the repatriation of capital and profits, nor does it cover issues of expropriation and compensation, or institute investor-State dispute settlement. Matsushita (et al), 2006, supra note 58, pp. 845-848. As such it is far less restrictive than an average BIT.
The North American Free Trade Agreement (NAFTA), concluded in 1993 between Canada, the US and Mexico, governs investment as well as trade between these countries. An early and greatly influential example of a preferential trade and investment agreement (PTIA), NAFTA contains extensive protection of foreign investment in its Chapter 11. The provisions of Chapter 11 are very similar to those of BITs, yet they arguably amount to a generally higher level of protection. For example, the definition of investment in Chapter 11 is extremely broad, covering many forms of intangible assets that are not covered in many BITs. A strong investor-State dispute settlement (ISDS) procedure is instituted that provides a prompt and highly effective means whereby investors can secure their substantive rights under the treaty. By 1995 foreign investment was already protected

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61 32 ILM 289, 17 December 1993. There are numerous other PTIAs, such as the Dominican Republic–Central America Free Trade Agreement, 42 ILM 1026, 6 June 2003. Similar agreements of a mixed trade-commercial-investment type are exemplified by the European Energy Charter Treaty, 34 ILM 360, 1 February 1995.
62 See generally, Hofmann (et al eds.), 2013, supra note 52.
63 It should be mentioned here that almost all PTIAs concluded recently, since 2000, prohibit restrictions on entry. Eric de Brabandere, ‘Co-existence, Complementarity or Conflict? Interaction between Preferential Trade and Investment Agreements and Bilateral Investment Treaties’, in Hofmann (et al eds.), 2013, supra note 52. For a view whereby PTIAs represent “an opportunity to go beyond the narrow ‘economism’ of first generation IIAs” see, Peter Muchlinski, The Role of Preferential Trade and Investment Agreements in International Investment Law: From Unforeseen Historical Developments to an Uncertain Future, in Hofmann (et al eds.), 2013, supra note 52, p. 226.
65 This procedure had been long institutionalised and open for mutually consensual use by investors and States under the World Bank's Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965. ICSID Convention, 4 ILM 524, 18 March 1965. This Convention instituted a permanent forum called the International Center for the Settlement of Investment Disputes (ICSID) as an arm of the World Bank in Washington, which is by now the central institution for international investment arbitration and dispute resolution. The many problems related to the ISDS procedure are explored below (see sections 3.2.2, 3.3, and 3.4). The circumvention of the otherwise general requirement for the prior exhaustion of local remedies created by this procedure is undoubtedly one of the core issues in the current controversy over the international investment regime. See, George Foster, ‘Striking a Balance between Investor Protections and National Sovereignty: The
through NAFTA and some 80 other PTIAs,\textsuperscript{66} in addition to the limited protections under the then newly minted WTO regime. Believing this to be a propitious moment for another attempt at a global treaty, Northern States quietly began preparations for a Multilateral Agreement on Investment (MAI), again under the auspices of the OECD.

The provisions of the Draft MAI closely tracked those of NAFTA’s Chapter 11.\textsuperscript{67} However, once the negotiations and the text became public knowledge an unprecedented wave of international public opinion rose in opposition.\textsuperscript{68} The UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities also expressed deep misgivings, particularly about the extent to which the Agreement might limit the capacity of States to take proactive steps to ensure the enjoyment of economic, social and cultural rights by all people, creating benefits for a small privileged minority at the expense of an increasingly disenfranchised majority.\textsuperscript{69}


\textsuperscript{67} OECD, The Multilateral Agreement on Investment: Draft Consolidated Text, DAFFE/MAI(98)7/REV1, 22 April 1998.

\textsuperscript{68} Encompassing many of the objections, one Canadian NGO, for example, took a court action aimed at stopping the Canadian government from being involved in negotiations on the MAI, arguing that the proposed agreement was contrary to the Canadian constitution. Michel Chossudovsky, ‘Fighting MAgalomania: Canadian Citizens Sue their Government’ \textit{29 The Ecologist} 8 (1999), pp. 449-51.

Organised worldwide opposition from civil society played a large part in the termination of negotiations and the abandonment of the project in 1998. In addition, OECD members were unable to agree on certain fundamental issues, such as Canadian and French proposals of exceptions for cultural protection and German calls for “social and ecological compatibility.” Sornarajah observes that

the long years of negotiation of the MAI showed the developed states that the rules they seek to impose on the developing world may prove too onerous to bear when applied to themselves. They could not brook the loss of sovereignty that the MAI entailed.

Lastly, developing countries were also uninterested in the possible future accession to a multilateral treaty which they had absolutely no part in formulating.

Following the failure of the MAI the issue subsequently returned to the WTO. The Singapore Ministerial of 1997 set up a Working Group on Investment as a compromise between the developed and developing worlds. The latter, led by India, did not wish to negotiate further on investment within the WTO at all. However, as a negotiating tactic, developed countries succeeded in getting investment on the agenda so that subsequent movement on this and other ‘Singapore issues’ could be traded for reductions in agricultural subsidies.

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72 Sornarajah, 2010, supra note 9, p. 261.
73 Cosbey (et al), 2004, supra note 71, pp.24-5.
by wealthy nations.\textsuperscript{75} This leverage allowed language on investment to be inserted into the Doha Ministerial Declaration.\textsuperscript{76} The Declaration sets out the vague parameters of negotiation on a multilateral agreement similar in scope and provision to a standard BIT, however, different in important respects.\textsuperscript{77} References to investment in the Declaration are currently in limbo following the collapse of the subsequent Ministerial in Cancún (2003), where negotiations broke down entirely, in large part over the Singapore issues.\textsuperscript{78} Developing country resistance to investment negotiations had increased due to greater awareness of the limitations of BITs and other international investment agreements, raised by the increasing number of claims being made by investors under these treaties in cases where the public interest and human rights are at issue.\textsuperscript{79} In addition these countries may have begun to reconsider the wisdom of surrendering sovereignty in this area in the face of a continued lack of solid evidence


\textsuperscript{76} Doha WTO Ministerial 2001, Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001.

\textsuperscript{77} In referring to “long term cross border investment” the definition of investment would seem to be narrower. Furthermore, a broader balance of rights and obligations would seem to be envisaged as provisions for development are mentioned, and because negotiations must “reflect in a balanced manner the interests of home and host countries and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest”. Ibid, paras 20, 22. On the right to regulate see, Catharine Titi, \textit{The Right to Regulate in International Investment Law} (Hart, Oxford, 2014).


supporting the assertion that entry into investment treaties results in greater inflows of FDI.\textsuperscript{80}

Mired in the deep and persistent divisions between developed and developing countries, the quest for universal consensus and global rules on the regulation of foreign investment has to date come to naught, and the standards of custom remain highly debatable. Yet the imperative of transnational capital to achieve the maximum level of protection of its own interests has nevertheless resulted in a third-best scenario, in the form of the BIT-based regime to which we now turn.

3.2 – Current Structure of the Investment Regime

In the mid ‘80’s annual global flows of foreign direct investment began to rise markedly,\textsuperscript{81} with a dramatic almost six-fold increase between 1994 and 2000, from $256 billion to $1,400 billion. Later, in 2007, flows reached close to $2 trillion. By far the largest part of FDI originates from developed countries, although this picture is recently changing somewhat. In 2001 these countries accounted for

\textsuperscript{80} See generally, Sauvant and Sachs (eds.), 2009, supra note 21. Yackee concludes that BITs do not increase investment inflows, and that their presence or absence does not significantly factor into executive investment decisions or into calculations by political risk insurance companies. Jason Yackee, ‘Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence’ 51 Virginia Journal of International Law 2 (2011).

\textsuperscript{81} Measurements of FDI can vary according to definition and methodology, as between the IMF, UNCTAD and the OECD for instance. The following statistics, unless otherwise indicated, are taken from UNCTAD data. See, UNCTAD, FDI Statistics Table, at http://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx?sRF_ActivePath=P,5,27&sRF_Expanded=P,5,27 (1-8-2014).
93.5% of outgoing FDI\textsuperscript{82}, and the figure was around that level for the ‘90’s, coinciding with the most intensive period in the formation of the current regime.\textsuperscript{83} The share of outgoing FDI originating from developing countries has risen significantly since that time and now stands at 39% of the total. In the 1990s the majority of FDI found its destination in other developed countries, however, the share to developing countries has also been rising. It now accounts for the majority, amounting to a record $778 billion in 2013. It is important to note that while yearly flows have risen and fallen, overall stocks of FDI have constantly accumulated, rising six-fold since 1995 to a current total of $20.4 trillion, 6.6 trillion of which is invested in developing countries. Yet, there is reason to believe that FDI flows to developing countries are set to plateau in the near future, at around $700-800 billion per year.\textsuperscript{84}

The international framework of investment law that currently protects rather than regulates this bulk of capital is instituted essentially by a network of thousands of bilaterally negotiated investment treaties.\textsuperscript{85} The clear lines of self-interest which are feasible in a collective environment become blurred and ‘unrealistic’ from the developing country perspective when each is negotiating on its own. This is especially so as adequate capital inflow for development is not forthcoming.

\textsuperscript{83} UNCTAD, 2008, supra note 19, p. 23. The share of outgoing flow from developing countries has risen since 2001 to a level of 16% in 2008, though this share will certainly drop again as developed countries recover from the last financial crisis; UNCTAD, \textit{World Investment Report 2009} (UN, Geneva, 2009), p. 16.
from other sources. The result can be characterised as a BIT-based international investment regime. The overall picture resembles a partial and de-linked, though extensive, international legal framework, the provisions of which are commensurate with the developed country stance on protection of foreign investment. As a recent UNCTAD study understates in relation to the fact that all international investment agreements (IIAs) establish rights only for investors;

Developing countries have tried for many years unsuccessfully to impose greater obligations on foreign investors in IIAs. How to ensure adequate corporate contributions to development remains a key challenge for many developing countries.... Existing IIAs do not specifically address development concerns.

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86 Compare $620 billion inflow of FDI to developing economies in 2008, to just over $100 billion in overseas development assistance (ODA) in the same year. Note that this is far below the amount of ODA required from developed countries under the UN Millennium Development Declaration and Goals. See further, OECD, Promoting Private Investment for Development: The Role of ODA (OECD, Paris, 2006); OECD, ‘Mobilising Private Investment for Development: Policy Lessons on the Role of ODA’ Development Assistance Committee Journal 2 (2005).

87 The regime may be regarded as ‘based’ on BITs despite the fact that the provisions of BITs have been roughly copied into increasingly numerous preferential free trade and investment agreements (PTIAs), some bilateral and others multilateral. See, David Gantz, The Evolution of FTA Investment Provisions: From NAFTA to the United States - Chile Free Trade Agreement’ American University International Law Review 4 (2004). While the conclusion of BITs is on the decline the rate of negotiation of PTIAs is increasing, marking a trend towards a regionalisation of investment rule-making. Stephen Woolcock, ‘Making Multi-Level Rules Work: Trade and Investment Rules in Regional and Bilateral Agreements’, in Philippe de Lombaerde (ed.), Multilateralism, Regionalism and Bilateralism in Trade and Investment (Springer, Dordrecht, 2007). In 2012 UNCTAD noted that 331 such agreements had been concluded. UNCTAD, 2012, supra note 85, p. xx.


89 UNCTAD, 2008, supra note 19, pp. 45-6.
And to the degree that they fail to substantially increase developmentally effective financial inflows, they may, as currently structured, even be detrimental to those concerns.\footnote{Luke Peterson, ‘Bilateral Investment Treaties and Development Policy-Making’, International Institute for Sustainable Development, Winnipeg, 2004.}

For this reason, among others, the current BIT-based regime is “becoming increasingly controversial and politically sensitive.”\footnote{UNCTAD, 2012, supra note 85, p. xx.} In the words of one commentator,

> over the coming years, governments and users of investment arbitration will re-evaluate their priorities. This shift could have profound implications for the foreign investment regime. The current crisis might turn a minority’s critique into the mainstream, and catalyze change that has long been in the offing.\footnote{Michael Waibel (et al), ‘The Backlash against Investment Arbitration: Perceptions and Reality’, in Michael Waibel (et al eds.) \textit{The Backlash against Investment Arbitration: Perceptions and Reality} (Kluwer Law International, The Netherlands, 2010), p. 1.}

Differing viewpoints on the seriousness of this crisis and on what to do about it however, are numerous.\footnote{“The field is now replete with suggestions for the future course of the foreign investment regime.” Asha Kaushal, ‘Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime’ 50 \textit{Harvard International Law Journal} 2 (2009), p. 495.}

### 3.2.1 – Substantive Provisions

BITs typically include provisions on most favoured nation treatment, national treatment, minimum standards of treatment (“fair and equitable treatment” and “full protection and security”), the repatriation of profits and other related...
finances, the prohibition on performance requirements, and full compensation in event of nationalisation and expropriation (direct and indirect). National treatment mandates that foreign investors must be treated the same as nationals of the host State. This provision can cause problems with certain forms of positive discrimination legislation aimed at redressing societal imbalances, attending to the human rights of marginalised groups and correcting the legacies of previously unjust regimes.

As a safety net, and often referred to as overarching principles, minimum standards of treatment are applied, which must be determined in the event of a dispute on the merits of each case. These standards are notoriously vague and subjective. However, there is seemingly strong agreement among arbitrators that ‘fair and equitable treatment’ and ‘full protection and security’ provide a remarkably high standard of protection, despite the ongoing controversy as to what these

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96 ‘Fair and equitable’ has been determined by one tribunal to mean a duty “for the host state to act in a consistent manner, free from ambiguity, and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investments and comply with such regulations." Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para 154 (emphasis added). See further, Catherine Yannaca-Small, Fair and Equitable Treatment Standard in International Law, OECD Directorate for Financial and Enterprise Affairs, Working Papers on International Investment No. 2004/3, September 2004. Arbitrators have included in this standard an obligation not to violate an investor’s ‘legitimate expectations’, however there is no general agreement on how far this concept extends. See, Luke Peterson, ‘Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration’,
standards imply and whether they attract strict liability. The requirement of ‘full protection and security’ can very obviously lead to situations in which the host State is obliged to use its security apparatus against its own people in defence of foreign investors whose projects may be peacefully opposed in ways that nevertheless cause economic loss to the investor. The enthusiasm of arbitrators in over-interpreting and thus effectively creating new substantive rights for investors has recently been curbed by some governments, amending their model BITs to limit these standards of protection to the understanding found in customary law.

Provisions on repatriation of profits and funds allow for the unimpeded removal of finances from the host State. This also applies to any compensation paid to a foreign investor in the event of a positive award as a result of a dispute settlement, and to any debts owed to an affiliate by local interests. Restrictions on host State use of capital controls,

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98 Peterson, 2009, supra note 96, p. 34.

99 See for example, 2012 US Model Bilateral Investment Treaty, Article 5(2). Canadian BITs also follow this approach; Article 5 of the 2004 Canadian Model Foreign Investment Promotion and Protection Agreement.


and forced financial liberalisation generally, can easily precipitate and/or worsen financial crises, as was demonstrated in the case of the Asian financial crisis of the late 1990s. These negative effects on economic stability and development are discussed further below.

Restrictions on performance requirements preclude the host State from placing certain demands on investors that would have the effect of limiting their economic and profit-making freedom in the interests of facilitating host State development. These requirements can take a wide range of forms and are usually precluded in investment agreements through use of a positive list approach. As discussed earlier (in sections 2.3, 2.5 and 2.6), performance requirements can be of great value to the host country in extracting

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103 Section 4.2.2.

developmental benefits from FDI, and moreover were pivotal and used extensively in the development trajectory of the now industrialised Northern States. These States still use performance requirements, but now call them by different names. There is evident hypocrisy in the demand of some developed States, for those wishing to achieve the same status to forego the methods which enabled their own development, in the sole interest of their own investors. Unsurprisingly, Bolivia’s President Evo Morales has announced his government’s intention to “revise the 24 BITs it holds with other nations one-by-one as they expire to broaden the scope for performance requirements.”

Going further than the ‘adequate’ demand of the Hull formula, BITs mandate that expropriation must fulfil four criteria; it must be for a public purpose, non-discriminatory, enacted through the due process of law and fully compensated, usually determined at full market value. In another advance on the Hull formula, this includes indirect expropriation, also known as ‘creeping expropriation’ or ‘regulatory takings’. The extent of the concept of indirect

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110 Creeping expropriation is defined as the use of a series of measures in order to achieve a direct or indirect expropriation over time. In this case, no individual measure in itself would amount to an expropriation but the sum of the measures could.  
111 Regulatory takings refers to the process whereby a regulation can amount to an expropriation obliging compensation by the sole fault of
expropriation is unclear, yet is being read very broadly in some arbitral awards to include negative effects on foreign investors that are not discriminatory and are a result of government actions in the public interest. For example, one tribunal ordered compensation for the expropriation of a timber export business due to non-discriminatory regulations on forestry management.\textsuperscript{112} This case employed a well-used ‘sole effects’ doctrine, whereby, in the determination of expropriation the purpose of the government action is irrelevant and the economic impact is the essential criteria.\textsuperscript{113} Another tribunal found in favour of a Belgian investor in Burundi, awarding full compensation despite the argument that regulation was enacted in response to “the imperatives of public need ... or of national interest.”\textsuperscript{114} One US corporation claimed $550 million in damages alleging that an Argentinean government health warning, to avoid consumption of and contact with the local water supply due to an outbreak of toxic bacteria, amounted to indirect expropriation.\textsuperscript{115}

Finally, and famously, global water giant Bechtel Corporation sought $25 million from Bolivia for alleged expropriation when the government was forced to reverse a privatisation agreement regarding the water supply to the city.

\begin{itemize}
\item\textsuperscript{112} Pope \& Talbot \textit{v. Canada}, NAFTA/UNCITRAL, Award on the Merits of Phase 2, 10 April 2001.
\item\textsuperscript{113} Ben Mostafa, ‘The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law’ in \textit{Australian International Law Journal} 1 (2008).
\item\textsuperscript{114} Antoine Goetz \textit{and others v. Republic of Burundi}, ICSID Case No. ARB/95/3, Award, 10 February 1999.
\end{itemize}
of Cochabamba. The decision was taken following riots by locals and a declared state of emergency, resulting from Bechtel’s unjustified doubling of water bills.\textsuperscript{116} Interestingly, the World Bank reportedly threatened to withhold $600 million in debt relief unless Bolivia privatised the water system in Cochabamba, and encouraged significant price increases by Bechtel.\textsuperscript{117} Following a massive international public outcry against the blatant injustice of the claim Bechtel eventually settled for a symbolic amount of 30 cents in 2006.\textsuperscript{118}

3.2.2 – Procedural Provisions

Finally, BITs all contain provision for investor-State dispute settlement (ISDS). Consequently, foreign investors have recourse to take the host State directly to arbitration, generally without requiring any previous attempt to resolve the dispute within the domestic legal system. The ISDS procedure is a serious incursion into State sovereignty, as well as the general principle of subsidiarity that governs almost all other forms of international treaties involving State and non-State actors, and is of particular importance regarding human

\textsuperscript{116} Agus del Tunari S.A. (Bechtel) v. Republic of Bolivia, ICSID Case No. ARB/02/3.


rights treaties. The removal of the local remedies rule should not be understated. It is a customary rule of international law and lies at the core of State sovereignty. The erosion of this rule, or, as some may argue, the outright rejection of it in the modern system of investment arbitration, is of serious concern from the point of view of democratic determination of national public policy and economic development, neither does it augur well for the long-term stability of the current investment regime.

Investors can take issue with any kind of host government action taken at any level that is claimed to have breached any provision of a BIT, or, in many instances, of an underlying investor-State contract. In the event of a dispute a tribunal is formed of three arbitrators, one chosen by the investor, one by the host State, and a third by the two original arbitrators

or appointed by a supervisory body.\textsuperscript{124} The result of this process of selection, whereby participants to a dispute directly influence the likelihood of proceedings and outcomes, is of serious concern in regard to the truism that justice should be blind.\textsuperscript{125}

These \textit{ad hoc} tribunals are not bound by any rule of precedent and are given scant textual direction with regard to interpretation within BITs. Each tribunal has considerable latitude in deciding the extent of any particular provision.\textsuperscript{126} This situation has proved particularly problematic with regard to disputes over indirect expropriation\textsuperscript{127} and the extent of minimum standards of treatment.\textsuperscript{128} The supervising body depends on the set of arbitral rules chosen. Usually there is a selection of these rules available under a BIT, to be chosen by the investor.\textsuperscript{129} The most commonly used are those rules

\textsuperscript{124} One Spanish arbitrator notes the remarkable submission of states to such broad review; “When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all [...] Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament.” Thomas McDonagh, ‘Unfair, Unsustainable and Under the Radar: How Corporations Use Global Investment Rules to Undermine a Sustainable Future’, The Democracy Center, San Francisco, 2013, p. 7.


\textsuperscript{128} UNCTAD, \textit{Fair and Equitable Treatment} (UN, New York, 2012).

\textsuperscript{129} In addition to the ICSID and ICSID Additional Facility Rules, there are also sets formulated by the United Nations Commission on International Trade Law and the London Court of International Arbitration. Another set
administered by the International Center for the Settlement of Investment Disputes (ICSID), run as an arm of the World Bank and situated in Washington DC. The institutional setting and the funding of ICSID by the World Bank engenders a number of serious concerns regarding perceptions of Northern State, and ideologically, neo-liberal and commercial bias within investment arbitration.  

Such issues are not simply academic. Argentina has recently requested that the question of the impartiality of the ICSID Secretariat, and proposals for reform, be added to the agenda of one of the World Bank’s annual meetings. The country did so in response to a separate opinion released by one arbitrator on an annulment committee who was “fiercely critical” of the Secretariat for imposing its views on the deliberations of the arbitrators in the case of *Vivendi v. Argentine Republic*. The separate opinion expressed allegations that ICSID sought to interfere in the drafting of decisions, as an inappropriate “*jurisprudence constante*”, in order to better ensure a consistent body of investment case law within the boundaries of the Washington Consensus.

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of rules are proffered by the Stockholm Chamber of Commerce, used primarily for disputes under the Energy Charter Treaty.


133 Ibid, paras 16-18.
It is clear that the Secretariat wants to obtain for itself a greater role in the conduct of ICSID cases and in the process also wants to involve itself in the drafting of the decisions. So also in this case.\textsuperscript{134}

In the opinion of the arbitrator they did so by overtly discussing the substance of draft decisions with individuals, seeking to amend and “streamline” the text.\textsuperscript{135} The ambitions of the Secretariat and its powers of appointment are questioned, and it is urged that the Secretariat review and restrict its role and powers of appointment in arbitral proceedings under its auspices, and constrain itself to a function of support only.\textsuperscript{136}

The issue of transparency has long been a central point of critique of the current investment regime.\textsuperscript{137} The default setting for investor-State disputes is closed hearings, making it very difficult for proceedings of ongoing cases to become public, even if one of the parties would greatly desire public knowledge and discussion on the subject of the dispute.\textsuperscript{138} The rules are limited and highly conditional with regard to permitting amicus briefs and allowing standing to interested third parties, and are, in other respects, problematic from the perspective of transparency.\textsuperscript{139} Participation of non-parties

\textsuperscript{134} Ibid, para 2.
\textsuperscript{135} Ibid, paras 9-10.
\textsuperscript{136} Ibid, paras 21-23.
extends only to the submission of written briefs. Presence at oral hearings has so far been strictly limited to the parties concerned and their direct counsel (with the exception of arbitrations under the Central American Free Trade Agreement, noted below). Once again due to a bias of confidentiality, an amicus curiae would generally not be allowed knowledge of specific arguments by the parties and would have to structure a brief independently and in the dark, reducing the likelihood of its effectiveness. Nevertheless, briefs have been allowed in certain cases.

With respect to individual arbitrators the representative level of knowledge of human rights law and experience at its adjudication is low. Even expertise in general public international law is not widespread. Most arbitrators come from a background in commercial arbitration and arguably are heavily influenced by the received neo-liberal wisdom still dominating this field.

Their concern for the values of the international community is weaker than their concern for contractual sanctity and the securing of their next appointment to a tribunal on the

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140 Journal of International Law 1 (2011). Levine notes that petitions for third party intervention were originally routinely denied by tribunals (as in Aguas del Tunari, 2005, supra note 116). Subsequent amendments to the ISCID rules may be due largely to public protest over this extreme seclusion of the workings of international investment law, and are, in any event, not free from contradictory and heavily restrictive rulings on amicus petitions. See for example, Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, and Border Timbers Limited and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/25, Conjoined, Procedural Order No. 2, 26 June 2012.

141 For example, in this context John Ruggie has stated the following; “The international arbiters are three contract lawyers who don’t give a damn about human rights obligations. Their job is to enforce contracts.” Interview at the Carnegie Council, transcript published by Policy Innovations, 28 October 2008, at http://www.policyinnovations.org/ideas/briefings/data/000089 (1-8-2014).

142 Schill, 2011, supra note 5.
basis of their display of commercial probity and their loyalty to the values of multinational business.\textsuperscript{142}

Judges in standing courts are stringently vetted for suitability and are subject to strict rules regarding conduct, impartiality and conflict of interest. Such processes and rules do not apply to arbitrators. Consequently, opportunities are rife for persons simultaneously acting as counsel and arbitrator to shape the interpretation of substantive provisions in the interests of their clients.

The literature widely acknowledges a clear tendency of arbitrators to interpret the provisions of BITs broadly in favour of investors.\textsuperscript{143} Sornarajah argues that the process enables these decision-makers to “outdo each other in their ability to recognise new expansionary doctrines favouring neo-liberal trends,” and furthermore, that arbitrators are motivated to rule in favour of investors in order to sustain and grow the lucrative business of investor-State arbitration.\textsuperscript{144} This business is entirely dependent on investor perception of its utility, as only investors’ claims give it life. The indeterminacy and clear substantive preference toward investor protection within the law itself has provided fertile ground for this


business to grow into a veritable arbitration industry, existing firstly for the service of foreign investors.\textsuperscript{145}

Investor-State arbitration was pressed by Northern States as a crucial element of their BIT programmes, the argument being that it provides an objective and neutral forum for the resolution of disputes, necessitated by the supposedly endemic corruption, political control, and nationalistic bias of domestic courts. A report from Corporate Observatory Europe and the Transnational Institute provides extensive evidence that the major players in the arbitration industry are highly active in vigorous defence of the investment regime, and are powerful lobbyists against reform.\textsuperscript{146} These actors are not just limited to arbitrators themselves, but include a relatively small coterie of Northern-based law firms, academics and, increasingly, hedge funds and other financiers. The report demonstrates a host of fundamental concerns; a revolving door between law firms and government departments tasked with investment policy-making, a dominance over academic discourse on investment law and arbitration, the existence of specialised departments within law firms dedicated to seeking opportunities for litigation and encouraging suits against governments in crisis, and an increasing integration between the arbitral system and the speculative financial world.\textsuperscript{147}

This last point is of significant import, as it indicates that the arbitral industry has begun to create its own market.\textsuperscript{148}

\textsuperscript{145} Pia Eberhardt and Cecilia Olivet, ‘Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom’, Corporate Europe Observatory and the Transnational Institute, Brussels, 2012.

\textsuperscript{146} Ibid, p. 7.

\textsuperscript{147} Ibid, pp. 8-9.

\textsuperscript{148} “The whole theory is to take the legal system and turn it into a stock market.” William Alden, ‘Looking to Make a Profit on Lawsuits, Firms Invest in Them’, New York Times, 30 April 2012.
Disputes themselves are becoming commodified, such that they are now invested in by financial speculators seeking a return in high stakes arbitrations by covering the investor’s legal costs.\textsuperscript{149} Reportedly, in 2011, one investment fund made a profit of $32 million, roughly doubling their investments in a total of nine disputes.\textsuperscript{150} Reminiscent of the causes of the global financial crisis of 2008, one manager of an investment fund states that,

There are other products we’re considering ... Anything from derivatives, where we fund a single motion rather than the entire case, to a basket of five or six cases put together as a mini-portfolio to give some security through diversification. There is even the possibility – heaven forbid – that we could fund a case and then resell it to third parties, a bit like credit default swaps.\textsuperscript{151}

The lack of regulation around this speculative third-party funding means it has the potential to unreasonably increase the number of investment disputes by discouraging settlements and encouraging frivolous claims. Given that the only possible financial ‘winners’ in disputes are investors there is no incentive to fund State defences resulting in a kind of legal aid system available to only one of the parties.


\textsuperscript{150} Alden, 2012, supra note 148.

\textsuperscript{151} Eberhardt and Olivet, 2012, supra note 145, p. 58. One arbitrator has described a “new industry of mercantile adventurers”, sharing in the success of claims but taking none of the risks, creating a “gambler’s Nirvana”. Jarrod Hepburn, ‘Investor Moves to Disqualify Arbitrator on the Basis of Recent Comments on Third-Party Funding of Arbitration Claims’, IA Reporter, 10 September 2014.
Northern States of course will need no such aid therefore this fact further exacerbates the systemic bias against developing countries. Even the US Chamber of Commerce has been heavily critical of the rise of third-party litigation funding, warning that it poses “substantial risks of litigation abuse.”\textsuperscript{152}

One influential commentator and lawyer regularly representing States at international arbitration argues that this dispute resolution system could well be viewed as ‘broken’,\textsuperscript{153} He notes that,

\begin{quote}
[p]erhaps the clearest indication of bias in the system is that experienced practitioners too often can predict the outcome of an investor-state arbitration based upon the composition of the tribunal, not the merits of the case. In other words, the same facts can lead to different outcomes depending upon the tribunal’s proclivities, especially those of the president or chairman of the tribunal, which can be gleaned from prior decisions or writings on the subject of investor-state relations. That is why it is so difficult for experienced claimants’ and respondents’ counsel to reach agreement on the third arbitrator.\textsuperscript{154}
\end{quote}

Due to its genesis in commercial arbitration the rules on conflict of interest in investor-State arbitration are widely noted as lenient. Higher standards of arbitrator conduct, impartiality and independence are essential in these cases.\textsuperscript{155}

\begin{footnotesize}
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  \item \textsuperscript{153} “It is my personal experience and that of many of my colleagues ... that leads me to say that what is needed, and what seems further away now than ever, is a complete overhaul of investor-state arbitration, top to bottom, beginning to end.” George Kahale, ‘Is Investor-State Arbitration Broken?’ \textit{Transnational Dispute Management} 7 (2012), pp. 1-2.
  \item \textsuperscript{154} Ibid, p 3.
  \item \textsuperscript{155} “This type of balancing is done on a regular basis by dedicated domestic institutions, including the judiciary and various governmental bodies.
\end{itemize}
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Yet, under the ICSID system, the standard for disqualification of arbitrators is set at a “manifest lack” of such impartiality and independence, presenting a “very high bar to disqualification”, a standard “higher than under most commercial arbitration rules”, which usually require only a reasonable or justifiable doubt of impartiality. Unsurprisingly then, disqualification motions rarely succeed. Regarding the initial selection of arbitrators, Chalker notes that while standards under the ICSID system are better than under the UNCITRAL or Stockholm Chamber of Commerce rules, they are nevertheless general, unenforced, and stacked against developing countries.

The vicissitudes of arbitration are undoubtedly the primary reason for a range of measures recently taken by States attempting either to exit the system, or to modify it such a way that arbitral excesses are less likely. Such reactions are not limited to developing countries. Australia provides an eminent example, where the government has recently decided to exclude altogether the investor-State dispute settlement mechanism from its future investment agreements. The

There is, however, a striking contrast in the attributes of these well-developed institutions and the arbitration model described”. Cosbey (et al), 2004, supra note 71, p. 8.

156 ICSID Convention, supra note 65, Articles 14, 57.
157 Margaret Moses, ‘Reasoned Decisions in Arbitrator Challenges’, ABA Section of Litigation, 2012 ABA Annual Meeting, 2-4 August 2012, p. 6. See also, ConocoPhillips Co. et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify Arbitrator, 27 February 2012, at para 56; “The decisions also recognise that the term ‘manifest’ … imposes a relatively heavy burden on the party proposing disqualification.”
160 Australian Government, Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity, 14 April 2011. For commentary see, UNCTAD, ‘Recent Developments in Investor-State Dispute Settlement’, IIA Issue Note No. 1, May 2013. For background to this blanket rejection presaged in the
decision was taken on the basis of a 2010 report by the Australian Productivity Commission, which found a range of concerns regarding the institution of investor-State arbitration.\textsuperscript{161} Important additional concerns were also canvassed, such as the issue of ‘regulatory chill’,\textsuperscript{162} the granting of rights to foreign investment not shared by domestic investors, the undermining of the democratic process, inconsistency of decisions, and the costs incurred by the parties to the disputes.\textsuperscript{163}

One year after the release of the report Australia became a respondent for the first time when a claim was brought against the country by the tobacco multinational Philip Morris.\textsuperscript{164} The company claims that plain cigarette packaging legislation introduced by the government in the interests of public health violates its rights under the Hong Kong-Australia BIT.\textsuperscript{165} The government argues that the litigation is spurious.\textsuperscript{166} Furthermore, the legislation is non-
discriminatory, clearly in the public interest, and obviously in accord with due legal process. Philip Morris also blocked Australia’s request for open hearings in the dispute, being held under the UNCITRAL rules.\textsuperscript{167} A previous challenge to the legislation was brought in the High Court of Australia by Philip Morris and three other foreign tobacco multinationals, arguing that the companies should receive compensation for public health initiatives and advertisements.\textsuperscript{168} The Court rejected the challenge, noting that the arguments made by the foreign investors were “delusive”,\textsuperscript{169} “unreal and synthetic”,\textsuperscript{170} and fatally defective in logic and reasoning.\textsuperscript{171} The initiation of the international BIT claim, directly seeking to override the national High Court, has no doubt heavily influenced the government’s final decision to exclude investor-State arbitration from any future international agreements.

The number of known cases brought to international arbitration by investors has risen sharply since 1997 from a handful to 514 in 2012.\textsuperscript{172} Between 2002 and 2012 an average of 37 new cases were brought every year, with 58 cases initiated in 2012 alone, indicating a growing awareness of the protection offered by BITs and the utility of financing a dispute in relation to probable returns in the form of a favourable award.\textsuperscript{173} Developing and transition economies outnumber developed countries as respondents in these

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\textsuperscript{167} Luke Peterson, ‘Philip Morris Vetoes Open Arbitration Hearings in Australia Case, But Filings May be Released and Tribunal Decisions will be Published’, IA Reporter, 10 January 2013.
\textsuperscript{169} Ibid, para 47.
\textsuperscript{170} Ibid, para 124.
\textsuperscript{171} Ibid, para 44.
\textsuperscript{172} UNCTAD, 2013, supra note 160, p. 1.
\textsuperscript{173} Ibid, p. 2.
\end{flushright}
recent cases by 38 to 15, 64% of investors initiating the claims are from developed countries, and in 70% of cases the investor’s claims have been vindicated.\textsuperscript{174} The imbalance against developing countries and in favour of investors is more than evident.\textsuperscript{175}

Given the proliferation of these disputes it is not surprising that arbitrators have been required to decide on issues bearing directly on internationally recognised human rights, even if these issues are often not framed in human rights terms by governments. These cases are generally defended in terms of public order, national security, or economic necessity, in furtherance of national developmental policy, or of narrower public interest concerns such as public health, culture or the environment. Nevertheless, human rights are clearly at issue. The full range of human rights are potentially

\textsuperscript{174} Ibid, p. 1.
affected by the activities of foreign investors, and in the
substance of many investment disputes a very wide variety of
these rights have been at issue. However, not least due to
the effects of widespread privatisation of public services,
those rights most often affected in this regard are socio-
economic.

3.3 - Impact of the Investment Regime on the Domestic Provision of Socio-Economic Rights

3.3.1 - Systemic Effects

Investment agreements are having a systemic effect on the
general provision of socio-economic rights, particularly in
developing countries. With respect to these countries, this
general negative impact is closely connected to the usually
scant resource base to fund progressive realisation of these
rights. The systemic effect is very important to note first, in

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176 Peterson, 2009, supra note 96; Bachand and Rousseau, 2003, supra
note 82; Ursula Kriebaum, ‘Privatizing Human Rights: The Interface
Between International Investment Protection and Human Rights’, in
Ursula Kriebaum and August Reinisch (eds.), The Law of International
Relations: Liber Amicorum Hanspeter Neuhold (Eleven International
Publishing, Utrecht, 2007); Pierre-Marie Dupuy, Ernst-Ulrich Petersmann,
and Francesco Francioni (eds.), Human Rights in International Investment

177 Koen De Feyter and Felipe Gomez Isa, ‘Privatisation and Human Rights:
An Overview’, in Koen De Feyter and Felipe Gomez Isa (eds.), Privatisation
and Human Rights in the Age of Globalisation (Intersentia, Antwerp, 2005).

178 Bruno Simma, ‘Foreign Investment Arbitration: A Place for Human

179 “That the inherent long-term nature of foreign investment contracts will
implicate the host State’s international duties stemming from economic
and social rights appears to me inevitable.” Ibid, pp. 578-579.
addition to the more specific effects in concrete circumstances, some of which are examined below.

In the provision of socio-economic rights the need for a substantial margin of regulatory autonomy is felt by all States, North and South, and while one international legal regime may mandate the exercise of this aspect of sovereignty another may preclude it.

The fact that a number of specific rights of foreign investors are protected by an external legal regime, which generally operates in isolation to other legal regimes governing the host State, and the fact that investor legal regimes are generally more agile, more efficient and receive greater political priority from State actors and ministries promoting economic development, indirectly implies that human rights are at times ignored by and at other times trumped by the commercial interests of foreign investors.\(^{180}\)

However, the consequences of restrictions in this area due to the action of the provisions of international investment law, the complexity of its structure and costs of necessary engagement with it, are felt far more keenly by developing countries.\(^{181}\) This is primarily due to their lack of resources

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\(^{181}\) “Earlier this year, the Czech Republic found itself on the losing end of a mammoth award—amounting to more than a third of a billion dollars (US)—which effectively doubled the country’s public sector deficit and necessitated an urgent debate over the appropriate fiscal policy response (i.e., an increase in taxes, increased borrowing or serious cuts to public spending).” Peterson, 2004, supra note 90, pp. 25-26, 28. The detrimental structural effects of BITs on development are further detailed by Choudhary and Kulkarni with respect to two prime examples, the Dahbol Power Corporation case in India and the Bechtel case in Bolivia. Biplove Choudhary and Parashar Kulkarni, ‘Re-crafting Bilateral Investment Treaties in a Developmental Framework: A Comprehensive Regional Perspective’, in Ashwini Deshpande (ed.), Capital without Borders: Challenges to Development (Anthem Press, India, 2011).
and other capacities to fund programmatic and other measures taken to balance the effect of strong investor protection, as well as other characteristics of the system. Developing countries often simply cannot afford to fund economic and financial State departments needing large amounts of human resources, technical knowledge and other capacities to adequately negotiate agreements, keep track of obligations, monitor possible governmental infringements of existing agreements, and defend government actions in far off and expensive arbitration.

All of these constraints simultaneously increase the likelihood that developing countries will find themselves as respondents in a dispute, and decrease the likelihood of success in arbitration. Large awards are being made on behalf of investors bringing the real risk that compliance with the system may severely deplete the resources of some countries. Argentina, for example, has a large number of awards and pending claims held against it for actions taken in defence of human rights and the public interest during its economic collapse in the early 2000s. If all claimants are granted relief, payment could precipitate another collapse.

183 Ecuador was recently ordered to pay $1.76 billion to US oil company Occidental for terminating an oil production investment. This award was granted despite the fact that Occidental was found to have “acted both very imprudently and illegally” by violating Ecuadorian law and the terms of the immediate investor-State contract. *Occidental Petroleum Corporation v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, quote from Dissenting Opinion of Brigitte Stern, para 7. See, Luke Peterson, ‘Ecuador Must Pay $1.76 Billion US to Occidental for the Expropriation of Oil Investment: Largest Award Ever in Bilateral Investment Treaty Case at ICSID’, IA Reporter, 5 October 2012. Sornarajah also notes, in this regard, that the combined claims of three investors against Pakistan amounted to more than the national reserves of the state. Sornarajah, 2008, supra note 46, p. 40, footnote 3.  
184 Van Aaken estimates that “over $20 billion in damages are claimed in approximately 44 originally pending cases, amounting to approximately an annual budget of Argentina.” Anne van Aaken, The International
Even in less severe cases it still remains that payment of these awards, plus legal expenses, draws heavily on government funds that, could otherwise be used to further development and human rights. This poses a highly disturbing irony. Measures taken by the government in order to progressively realise the human rights of its people may fall foul of international investment law, causing a loss of revenue and the necessity of abandoning existing rights-based and public service programmes, resulting in an overall regression in development and human rights realisation. Given the nature and disciplinary effects of the investment regime, government efforts to further socio-economic rights may have the net effect of setting them back.

Developed countries, on the other hand, are firstly less likely to lose as respondents in arbitration, and secondly will have the far greater capacity to compensate both the investor and the public. It can be expected then, that the developed countries in control of shaping the entire system will not be sensitive to these issues felt so keenly by the developing world. The negatives of the system strongly reinforce each other from the perspective of developing countries. For example, problems of economic and negotiating expertise and capacity reinforce problems of legal content within the investment regime. The provisional content of the regime is devoid of obligations on investors that would allow developing countries to properly channel FDI to sustainable developmental ends. Furthermore, that content reduces


185 For example, Gallagher and Shrestha note that the US has never lost a case as a respondent. Gallagher and Shrestha, 2011, supra note 175, p. 8. Most arbitrations were brought by Canadian investors under Chapter 11 of NAFTA, who have lost every claim brought against the US. Gus Van Harten, 'Free Trade Deals Lack Foreign Safeguards', Montreal Gazette, 24 October 2011.
regulatory autonomy with the same result, allowing for the unrestricted flow of profits, capital and other funds out of the host economy, barring the use of performance requirements, and generally ignoring what is termed the ‘development dimension.’

The systemic effect of the investment regime is exacerbated by the legal nature of socio-economic rights as rights to be realised progressively. Governments are under an obligation to increase the level of realisation of these rights that is “specific”, “constant and continuing”, ensuring that full realisation be achieved as “expeditiously and effectively as possible”. Furthermore, they must not act in ways that have retrogressive effects on these rights without a full justification, which would need to show the necessity of such action in terms of respect for other human rights, and would require “the most careful consideration.” The need of a broad scope for government intervention and regulation in the economy is evident. The fact of widespread privatisation of public services only makes this need more apparent. Necessary government intervention will inevitably impact on private actors and foreign investors, yet the heavily restrictive effects of the international investment regime on the scope of government

\footnote{For a fuller discussions of this dimension see, UNCTAD, 2008, supra note 19, pp. 78-85; UNCTAD, 2003, supra note 107; and UNCTAD, Development Implications of International Investment Agreements, IIA MONITOR No. 2, UNCTAD/WEB/ITE/IIA/2007/2, United Nations, Geneva, 2007.}


\footnote{Committee on Economic, Social and Cultural Rights (CESCR), General Comment 12, The Right to Adequate Food, UN Doc. E/C.12/1999/5, 12 May 1999, para 44.}


\footnote{Ibid.}
regulation present substantial barriers to such intervention, as detailed above. This core aspect of the regime therefore pits it systemically against the progressive realisation of socio-economic rights.

3.3.2 - Instrumental Rights of Assembly and Expression

In addition to its general impact the investment regime has a number of more specific effects on the realisation of human rights.\footnote{Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, Article 5.} Freedom of assembly and expression are well understood to be instrumental to the attainment of socio-economic and other rights. FDI can be highly controversial in relation to local communities, having potentially negative effects on the rights to health, water, standard of living, culture, and housing, among others. In such cases communities will naturally organise and voice their grievances. The host State is obliged to allow its people to do so and even to facilitate this process, however it is often also under an obligation to provide ‘full protection and security’ to the foreign investor, including police protection. Some arbitrators have understood this provision to include not only protection from physical damage but also from other forms of harassment which pose no physical threat.\footnote{See, \textit{Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic}, ICSID Case No. ARB/97/3, Award, 20 August 2007, paras 7.4.13 – 7.4.17.} On this understanding simple, non-violent demonstrations, and even simple lobbying, could be construed as harassment, conceivably requiring the government to ban demonstrations and/or collective organisation in opposition to an investor.
There is already a great deal of evidence of police brutality and even killings in defence of foreign investors. Such an understanding of investor protection appears to encourage and licence such behaviour on the part of the State. As it is, certain governments cannot resist the pressure from investors to quell physical as well as procedural protests for fear of breaching legal commitments made under BITs.

3.3.3 - Land Reform and Redistribution

Government policies on land reform are generally aimed at improving the distribution of wealth in a State, providing homes for the poor, and addressing the injustices of past governments or grossly inequitable patterns of distribution over time. Land reform has a direct bearing on most socio-economic rights. Expropriation or nationalisation of foreign owned land for this purpose is not prohibited by the BIT-based regime. However compensation is required under all circumstances. BITs generally require ‘fair market value’ as the level of compensation required, while many domestic legal systems have much lower standards. This situation effectively, and counter-productively, requires discrimination.


195 In relation to a highly controversial mining concession in Guatemala, one author notes the deep concern of a government official to “honour the mining concession, or risk a huge lawsuit by the company.” Peterson, 2009, supra note 96, p. 33.

against local people in the event of large scale reforms. The scale of redistributionist reform policies seeking to make a real difference to social equity may be precluded due to a State’s inability to cover the full costs incurred if all compensation must be at the market rate.197 In cases where large tracts of land are foreign owned the financial burden will often make the policy non-viable.198 In this way the strict requirement of fair market value can directly block the progressive realisation of socio-economic rights. This is recognised by the European Court of Human Rights, which states in relation to the protection of property afforded by the first Optional Protocol to the European Human Rights Convention, that Article 1 of the Protocol does not guarantee a right to full compensation in all circumstances, since legitimate objectives of ‘public interest’, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.199

In contrast, a recent tribunal has declared the full market standard as the minimum level of compensation, and has furthermore granted itself “discretion to impose additional sanctions to punish Treaty violations of particular

198 The probability of foreign ownership is greatly increased by the recent phenomena of land grabbing, prevalent around the world but especially in Africa. See, Shepard Daniel and Anuradha Mittal, The Great Land Grab: Rush for Worlds Farmland Threatens Food Security for the Poor, The Oakland Institute, Oakland, 2009.
199 Lithgow and Others v. The United Kingdom, European Court of Human Rights, Application No. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81; 9405/81, Judgement, 8 July 1986, para 121. See also, James and Others v. The United Kingdom, European Court of Human Rights, Application No. 8793/79, Judgement, 21 February 1986, para 54, referring to “the State’s wide margin of appreciation in this domain.”
seriousness, such as discrimination or breach of specific undertakings.”

This issue has arisen in relation to expropriation of foreign owned land for redistribution to landless locals in Venezuela, where a UK investor took issue over the level of compensation provided under the BIT between these two countries. Similar cases involve German nationals and a Namibian land re-distribution programme, and a Swiss investor challenging a South African land-claims process. Arbitration will probably be the main channel whereby foreign investors challenge redistributionist socio-economic programmes in the future as the protections under BITs become more widely known. These considerations have figured prominently in Venezuela’s decision to remove itself from the investment regime, and South Africa’s reappraisal of its bilateral investment treaties.

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204 “The rigid compensation rule in most BITs and a high risk of arbitrators rigidly enforcing it, thereby leading to outcomes perceived as unacceptable, unfair and unsustainable financially at home, push countries like Venezuela to look for ways to get out of the system.” Sergey Ripinsky, ‘Venezuela’s Withdrawal from ICSID: What it Does and Does Not Achieve’, Investment Treaty News, 13 April 2012.
3.3.4 - The Right to Health

The human right to health is often at issue in investment disputes, sometimes linked with environmental regulation. In one case a Spanish investor purchased a landfill to operate a hazardous waste dump in Mexico. Subsequently the government enacted more stringent environmental and health legislation requiring the relocation of the landfill further away from a neighbouring urban centre. Confronted with a refusal to renew its operating permit on health and safety grounds, the foreign investor, Tecmed, initiated arbitration claiming expropriation and unfair treatment. The tribunal found in favour of Tecmed and directed Mexico to pay $5.5 million in compensation. The verdict was based on the conclusion that despite denouncing clear code violations the Ministry of the Environment had failed to identify said violations explicitly as public health hazards. Perversely, the denial of the permit as a response to community concerns regarding health and safety was seen as an improper basis for a decision by a governmental body. The tribunal ruled that, to avoid the burden of compensation States must provide investors with treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment...to act in a consistent manner, free from ambiguity and totally transparently ... [such that the

207 Ibid, para 124.
208 Ibid, para 130.
investor] may know beforehand any and all rules and
regulations that will govern its investments.\footnote{209}{Ibid, para 154.}

This passage has been seminal in the development of the
document of ‘legitimate expectations’, of particular import in the
*Suez* case, discussed below in chapter 4.\footnote{210}{Campbell McLachlan, ‘Investment Treaties and General International Law’ 57 *International and Comparative Law Quarterly* 2 (2008), p. 376.} This is,
nevertheless, an impossible standard for any State to manage,
developing or developed.\footnote{211}{“The *Tecmed* ‘standard’ is actually not a standard at all; it is rather a
description of perfect public regulation in a perfect world, to which all
states should aspire but very few (if any) will ever attain. But in the
aftermath of the tribunal’s correct finding of liability in *Tecmed*, the quoted
obiter dictum in that award, unsupported by any authority, is now
frequently cited by tribunals as the only and therefore definitive authority
for the requirements of fair and equitable treatment.” Zachary Douglas,

It effectively means that the BIT would act like a contractual stabilisation or economic
equilibrium clause, freezing legislation at the investor’s point
of entry and requiring all subsequent legislation to be equally,
or more, protective of the investment.\footnote{212}{See, Andrea Schemberg, ‘Stabilization Clauses and Human Rights’,
Research Project Conducted for the International Finance Corporation and the
United Nations Special Representative to the Secretary General on
Business and Human Rights, 11 March 2008.}

Any subsequent
regulation, including necessarily progressive human rights
measures, that reduced protection, would simply not apply to
that investment. This could potentially stall human rights
realisation at the time of entry of foreign investment.

In relation to the *Tecmed* dispute, it is important to note
that a State may be violating its obligation to safeguard public
health if it fails “to enforce relevant laws”,\footnote{213}{CESCR, 2002, supra note 189, para 43.} “regulate the
activities of individuals, groups or corporations so as to
prevent them from violating the right to health of others,” or
“to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.” Ergo, a human rights basis for challenging perceived breaches of the international investment regime manifestly exists.

### 3.3.5 - Positive Discrimination

State parties to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) are obliged to provide special measures of positive discrimination to groups disadvantaged by virtue of their race. Such obligations effect the realisation of all human rights, yet most immediately impact on socio-economic rights. Positive discrimination measures may easily conflict with investors’ rights to national treatment, minimum standards of treatment, and, as in the case of land reform mentioned above, expropriation. South Africa’s Black Economic Empowerment (BEE) policy of positive discrimination, aimed

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215 For a detailed discussion on how such a defence could play out see, Suda, 2005, supra note 115.
at redressing the historic inequity of wealth and resources between the country’s racial groups, has caused a significant amount of agitation among the business community both domestically and internationally.\textsuperscript{218} There is evidence to suggest that foreign investors controlling large sections of the mining sector have used threats of litigation under various BITs to cause government revision of the implementation of this policy, limiting the extent of redistributive legislation.\textsuperscript{219} Such threats are known to have been effective in several other national contexts, including Indonesia with regard to forestry legislation,\textsuperscript{220} Canada in relation to restrictions on cigarette manufacturing,\textsuperscript{221} Paraguay in regard to land reform,\textsuperscript{222} and New Zealand on the issue of cigarette packaging.\textsuperscript{223} Certain effects of BEE policy have been credited with causing the collapse of negotiations between the US and the South African Customs Union over a major trade pact.\textsuperscript{224}

Such conflict between positive discrimination requirements and investor protection has arisen in the case of \textit{Piero


\textsuperscript{220} See, Suda, 2005, supra note 115, p. 107.

\textsuperscript{221} See, Peterson and Gray, 2003, supra note 219, p. 24, footnote 72.


\textsuperscript{223} See, Luke Peterson, ‘First Hearing in Philip Morris v. Australia Arbitration is Pushed into 2014, as New Zealand Reveals it is Awaiting Outcome of Australian Cases’, \textit{6 IA Reporter Newsletter} 5, 28 February 2013. In its jurisdictional objections to the tribunal Australia has stated that the claim brought by Philip Morris has “produced and is producing a deep and profound regulatory chill across the globe”. Jarrod Hepburn, ‘Philip Morris V. Australia: New Ruling Explains why Jurisdictional Questions to be Reviewed First; Umbrella Clause is No Longer Being Used to Import WTO Law’, IA Reporter, 30 June 2014.

BEE policy has taken many forms. Among them is the Mineral and Petroleum Resources Development Act (MPRDA), 2002, mandating 26 percent black South African ownership of businesses in the industry. If, for example, a foreign company owned 100% of the mine it would be required to sell 26% of shares to black South Africans in order to maintain the right to operate the mine. In 2006, a group of Italian investors in a mining interest filed for arbitration alleging breach of national treatment, expropriation, and fair and equitable treatment provisions due to the effects of this legislation, claiming damages of over $350 million. Two amicus petitions were made to the tribunal, both raising the critical relevance of South Africa’s human rights obligations under international and constitutional law. The petitioners noted that these issues are of international concern due to the coherence and widespread nature of the BIT-regime, and the extent of ratification of human rights treaties, meaning that the decision and reasoning of the tribunal would have potentially global effects.

The ability of governments to pursue substantive equality (e.g. through “affirmative action” measures) without violating their international investment commitments are matters that affect all nations. The same is true of governments’ ability to promote economic and social rights, such as the right to a healthy environment, the right to development, and other human rights by imposing environmental, labour, and other regulations upon mining operations. The concomitant international responsibility of investors to contribute to

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225 Piero Foresti v. The Republic of South Africa, ICSID Case No. ARB (AF)/07/1.
226 Ibid, Award, 4 August 2010, paras 1, 54, 78.
227 Ibid, para 25.
228 Ibid, Petition for Limited Participation as Non-Disputing Parties in Terms of Articles 41(3), 27, 39, and 35 of the Additional Facility Rules, 17 July 2009, paras 4.4, 4.5, 4.6, 4.7, 4.8, 4.9
human rights fulfilment, environmental protection, and the social upliftment of affected workers and communities when exploiting a nation’s natural resources is also a question of international concern.229

Only one month after the tribunal accepted the petitions the claimant applied for a discontinuance of proceedings, effectively backing out of the litigation, and consequently no decision was reached on these crucial questions.230 The investors nevertheless gained substantial concessions from the government, and had renewed their mineral rights without requiring the sale of 26% of shares to black South Africans.231 Instead investors agreed only to locally process 21% of the stone mined in the country, and to provide a 5% employee ownership programme. The initiation of the claim could then be viewed as a highly valuable negotiating tactic.

The workings of the investment regime affect a number of other specific socio-economic rights, most notably perhaps the right to water,232 addressed in further detail in chapter 4. The foregoing discussion is only intended to be illustrative. However, it is the systemic impact of the investment regime that is by far the greatest concern, highlighted by the investor’s ‘win’ in the Piero Foresti case, obtained without having to press an initiated claim. As Luke Peterson points out,

229 Ibid, para 4.7.
231 Piero Foresti, 2010, supra note 226, para 79.
232 See, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22; Aguas del Tunari S.A. (Bechtel) v. Republic of Bolivia, ICSID Case No. ARB/02/3; Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrals de Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17; Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12.
[t]here is no obvious way to measure how often investment treaties are used in informal contexts by foreign investors in the context of negotiation or lobbying. However, in my experience as a journalist tracking this area, I would not be the least bit surprised if there were dozens upon dozens of such informal treaty-uses for every claim that actually gets arbitrated. Virtually every lawyer I know professes to use these treaties in negotiations on behalf of their clients with governments. As a reporter it’s frustrating to know that the primary use of these treaties is in such non-arbitration contexts, but to lack fuller details of such uses - including the legal, policy and financial impacts.

Exacerbating the particular systemic effect on socio-economic rights due to their progressive nature, is the fact of the often opposed and unequally progressive development of the scope of investors’ rights under the current regime. Through sometimes very broad and expansive interpretations tribunals have restricted the regulatory space of States often beyond the intent of the parties to the underlying treaties. The reliance on expansive interpretation is what gives currency to the threats of investors in the context of negotiations and ‘discussions’ over the informal settling of disputes. This regulatory space is necessary for the implementation of all manner of public policy initiatives, however due to the legal

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233 As quoted in Gallagher and Shrestha, 2011, supra note 175, p. 5 (original emphasis).
234 The pro-investor stance of the vast majority of tribunals is tempered in a minority of cases, for example in the reasoning of the Lemire tribunal; “Economic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, the object and purpose of the Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy.” Lemire v. Ukraine, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para 273. See further, Stephan Schill, ‘Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator’ Leiden Journal of International Law 23 (2010).
demands of progressive realisation, it is even more crucial to the State's obligations regarding socio-economic rights.

3.4 – The Auto-Enhanced Power of Tribunals

Some aspects of the quest to expand the ‘empire’ of investment law\(^{235}\) have already been mentioned above, specifically in relation to interpretations of minimum standards of treatment and creeping expropriation. Yet there are further examples often overlooked. Investors have sought to stretch the realm of protected investment to embrace sovereign debt and financial derivatives. In addition, tribunals have introduced highly questionable concepts such as ‘creeping unfair treatment’, placing another set of dubious legal requirements on host States. They have also stretched the use of provisional measures to directly circumscribe and prohibit government actions in a manner unforeseen by the States drafting the underlying treaties.

3.4.1 - Financial Derivatives, Sovereign Bonds and Mass Claims

In a recent claim by Deutsche Bank AG the majority found that covered investments under the German-Sri Lanka BIT and the ICSID Convention include hedging agreements and

other financial derivatives.\footnote{236} Despite spirited objections voiced in the third arbitrator’s dissent,\footnote{237} the tribunal found that such novel forms require no association with a tangible investment,\footnote{238} and that they need not make any “contribution to economic development” in order to avail of protection.\footnote{239} The extent of protected investments has been found to include not only sovereign bonds,\footnote{240} but also, in one step further removed, securitised entitlements to sovereign bonds.\footnote{241} In the \textit{Abaclat} case 60,000 holders of such securities are challenging Argentina’s partial default and sovereign debt restructuring of 2001-2, which was arguably the only way for the country to recover from a deep economic crisis that threatened massive social upheaval.\footnote{242} The reasoning of this tribunal broke new ground in controversially opening arbitration to mass claims.

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\footnote{237} \textit{Deutsche Bank}, 2012, supra note 236, Dissenting Opinion of Makhdoom Ali Khan, paras 9-12, 46.

\footnote{238} \textit{Deutsche Bank}, 2012, supra note 236, para 130.

\footnote{239} Peterson and Balcerzak, ‘On Jurisdiction..’, 2013, supra note 236.

\footnote{240} For a penetrating discussion see, Michael Waibel, ‘Opening Pandora’s Box: Sovereign Bonds in International Arbitration’ 101 \textit{American Journal of International Law} 4 (2007).


\footnote{242} \textit{Abaclat and Others v. The Argentine Republic}, ICSID Case No. ARB/07/5.
\end{footnotesize}
and provided the basis for two other cases stemming from Argentina’s default. Thus precedents have been set allowing strict foreign investment protection standards to be applied to vital sovereign restructuring efforts. The tribunal rejected any need for a link to “a specific economic enterprise or operation taking place in the Host State.” In all these cases the tribunals have been divided, with Argentina’s nominee always dissenting on jurisdiction over sovereign bond claims. Most famously, Professor Georges Abi-Saab, not only wrote a “blistering dissent” in *Abaclat* but also resigned from the tribunal thereafter in protest.

Abi-Saab heavily criticised the tribunal for overstepping its powers in determining, without the consent of all parties involved, new mass claims procedures not envisioned in the BIT. He concluded that the decision unfairly prejudiced the host State’s right to due process. He also decried the lack of a prerequisite nexus with “a specific project, enterprise or activity”, and a demonstrable contribution “to the expansion of the country’s productive capacity”, in obtaining protected

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245 *Abaclat*, supra note 242, Decision on Jurisdiction and Admissibility, 4 August 2011, para 375.
246 Luke Peterson, ‘Another Divided ICSID Tribunal Finds it has Jurisdiction to Arbitrate an Argentine Sovereign Debt Dispute; Failure to Pursue Local Remedies not Fatal to Case’, IA Reporter, 12 February 2013.
249 *Abaclat*, supra note 242, Dissenting Opinion of Professor Georges Abi-Saab, 28 October 2011, paras 150-151, 190.
250 For further discussion on the widely ignored dimension of development contribution as a necessary element in the definition of ‘investment’ see, Diane Desierto, ‘Deciding International Investment Agreement Applicability: The Development Argument in Investment’, in Freya Beatens
investment status.\textsuperscript{251} This would seem to unjustifiably extend ICSID jurisdiction to cover virtually all capital market transactions, ranging from standardized financial instruments, such as shares and bonds to structured and derivative products, such as hedges and credit default swaps. It would thus open the way to converting them from specialized tribunals, dealing with disputes arising out of a special type of investment, into commercial tribunals of general jurisdiction, covering all manner of financial transactions, including the most speculative varieties, which have nothing to do, in fact are light years away from the economic investment for the encouragement of which the ICSID Convention was concluded.\textsuperscript{252}

Lastly, he points out the highly inappropriate, inflexible, ad hoc, incoherent and biased nature of investment arbitration as a forum for settling complex sovereign debt disputes.\textsuperscript{253} In this role arbitration under BITs would systematically and unfairly prejudice the taxpaying citizen and reward the foreign creditor in such settlements.\textsuperscript{254} This is due, as noted above, to the tendency of certain ICSID tribunals to consider any limitation on their jurisdiction ... as an obstacle in the way of achieving the object and purpose of these treaties, which they interpret as being exclusively to afford maximum protection to investment, notwithstanding the legitimate interests of the host State.\textsuperscript{255}

\textsuperscript{251} Abaclat, supra note 249, para 95.
\textsuperscript{252} Ibid, para 268.
\textsuperscript{253} Ibid, paras 270, 273.
\textsuperscript{254} See, Waibel, 2007, supra note 240.
\textsuperscript{255} Abaclat, 2011, supra note 249, para 272.
Abi-Saab’s views have been endorsed by Santiago Torres Bernárdez in his dissenting opinion on jurisdiction regarding another mass claim bondholder case against Argentina.256 Torres disagreed with the approach taken by the majority upholding jurisdiction, as inappropriately based on the policy preferences of these arbitrators, rather than on the applicable law or on the appropriate rules for the interpretation of that law, which he saw as resulting from “an excessive zeal in the protection of the interests of alleged foreign investors.”257

UNCTAD has also noted that investment agreements can circumscribe States’ efforts to fight financial and economic crises in order to protect the wellbeing of their people.258 While the current Greek debt crisis was still brewing international law firms were urging foreign investors to guard their own profits and interests from potential sovereign debt restructuring by preparing for litigation under investment agreements.259 Advice was also given to utilise the threat of arbitration as a bargaining chip in negotiations over the terms of restructuring.260 The implications of the Abaclat decision for Greece are rather obvious, offering a powerful incentive for

foreign investors not to participate in debt restructuring but to pursue full compensation through investment arbitration.\textsuperscript{261} Already one such claim has been lodged against Greece at ICSID.\textsuperscript{262} It is also reported that another claim, primarily regarding discrimination in access to bail-out funds, may also involve the issue of losses on Greek sovereign debt.\textsuperscript{263} These sovereign bond cases could potentially render the process of internationally agreed debt restructuring pointless where private foreign investors are involved.\textsuperscript{264}

3.4.2 - Creeping Unfair Treatment

On a different note, the doctrine of ‘legitimate expectations,’\textsuperscript{265} which tribunals have developed as a part of the standard of

\textsuperscript{261} Tomaso Ferrando, ‘The Abaclat Legacy: Investment Arbitration as an Obstacle to Greek Recovery’, Critical Legal Thinking, 27 February 2012.
\textsuperscript{265} Expansively defined within the NAFTA context as follows: “the concept of ‘legitimate expectations’ relates … to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA party to honour those expectations could cause the investor (or investment) to suffer damages.” International Thunderbird
fair and equitable treatment, has been particularly open to very wide interpretation by tribunals. The initiation of the doctrine in the *Tecmed* decision has been noted above. However a paradoxical case again involving Argentina, while limiting the doctrine of legitimate expectations has introduced the even more dubious doctrine of ‘creeping unfair treatment’. The tribunal declined to adopt previous broad readings of the fair and equitable treatment standard, and found that no individual action by the government of Argentina had amounted to a breach of the investor’s legitimate expectations, or therefore of this standard. This seemed to have definitively resolved the issue, but the tribunal then went on to consider the combined results of the corpus of government measures, concluding that their “cumulative effect ... was a total alteration of the entire legal setup for foreign investments,” and that “Argentina went too far by completely dismantling the very legal framework constructed to attract investors.” And so, another conveniently vague set of new criteria for State liability is born.

The Tribunal considers that, in the same way as one can speak of *creeping expropriation*, there can also be creeping violations of the FET standard. ... [which] could thus be described as a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.  

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268 Ibid, para 518.
The State was ultimately ordered to pay $43 million in damages.\textsuperscript{269} It is essential to note that even before such radical expansion, the fair and equitable treatment standard \textit{per se} has been described by a leading authority as a standard that has “no consolidated or conventional meaning”, the normative content of which “is contested, hardly substantiated by State practice, and impossible to narrow down by traditional means of interpretive syllogism.”\textsuperscript{270}

The consequences of a State attempting to reverse or revise a domestic legal framework designed according to the interests of foreign investors are hereby graphically illustrated, highlighting the ‘locked-in’ nature of such reforms under the current investment regime. This decision also creates a brand new grey area of State liability under BITs that will have the same chilling consequences on government regulation as the doctrine of ‘creeping expropriation’ from which it was borrowed, and will create another new playground for investors’ claims and arbitral interpretation.\textsuperscript{271} It also begs the question of whether all concrete provisions and standards in BITs might ultimately be subject to such ‘creeping’ interpretation.

\textsuperscript{269} Ibid, para 752.
\textsuperscript{270} Schill, 2009, supra note 52, p. 263.
3.4.3 - Provisional Measures

Tribunals may also be exceeding the powers intended for them by the State parties to the underlying treaties, through an inappropriate issuance of provisional measures and non-monetary remedies.\textsuperscript{272} Some tribunals are moving from a panel of review of government acts after the fact to a far more determinative position, directly prescribing or circumscribing specific State actions before the fact. International commercial arbitration (typically involving only private parties) allows for declaratory relief and awards issuing orders of specific performance instead of monetary damages.\textsuperscript{273} Yet the propriety of these remedies and injunctions granted by ad hoc tribunals on behalf of foreign investors is questionable as against sovereign States, especially where crucial issues of public interest, welfare and human rights may be at stake.\textsuperscript{274} Problems arise, for example, if tribunals can pre-empt the exercise of the right of sovereign States to expropriate, or discriminate against a foreign investor, in order to realise immediate human objectives even in the knowledge of the risk that they may have to pay compensation. This encourages investors to proactively seek injunctive relief from a tribunal even before any damage to its interest has occurred, which is

\textsuperscript{272} Jose Rueda-García, ‘Provisional Measures in Investment Arbitration: Recent Experiences in Oil Arbitrations against the Republic of Ecuador’ \textit{Transnational Dispute Management} 4 (2009).

\textsuperscript{273} See, Patrick Dunaud and Maria Kostytska, ‘Declaratory Relief in International Arbitration’ 29 \textit{Journal of International Arbitration} 1 (2012); Christoph Schreuer, ‘Non-Pecuniary Remedies in ICSID Arbitration’ 20 \textit{Arbitration International} 4 (2004).

a situation contrary to that arguably intended by the States that created the investment regime.\textsuperscript{275} A number of commentators have noted that State sovereignty led the drafters of the ICSID Convention to grant tribunals the power only to “recommend” provisional measures, rather than “order” them, with the result that they are non-binding.\textsuperscript{276}

Nevertheless tribunals have not interpreted their powers as limited in this manner.\textsuperscript{277} In *Enron v. Argentina* the investor claimed that taxes assessed by the government were tantamount to expropriation and that the tribunal should annul them, declare them unlawful and enjoin “their collection permanently”.\textsuperscript{278} Despite Argentina arguing that the

\textsuperscript{275} For example, Vodafone is requesting an arbitral tribunal to apply an interim measure, in the context of an ongoing arbitration against India, to block the State from collecting $2 billion in taxes from the corporation. Luke Peterson, ‘As Vodafone Sues India – and Nokia Threatens the Same – Company will Seek Interim Arbitral Order Blocking India from Pursuing Billions in Taxes’, IA Reporter, 13 May 2014.

\textsuperscript{276} The Article in full states; “Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.” For examples of commentators taking a straightforward view in light of the plain text of the article see, Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, Cambridge, 2001), p. 758; Alan Redfern and Martin Hunter (eds.) *Law and Practice of International Commercial Arbitration*, Fourth Edition, (Sweet and Maxwell, London, 2004), paras 7-12; L. Yves Fortier, 2008, supra note 274, p. 6. According to Sarooshi however, “ICSID Tribunals should not consider themselves bound in any way by decisions of other courts or tribunals, including decisions of the ICJ.” Dan Sarooshi, ‘Provisional Measures and Investment Treaty Arbitration’ 29 *Arbitration International* 3 (2013).

\textsuperscript{277} See, *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Request for Provisional Measures, 28 October 1999, para 9; “The Tribunal’s authority to rule on provisional measures is not less binding than that of a final award. Accordingly, for the purposes of this order, the tribunal deems the word ‘recommend’ to be of equivalent value as the word ‘order’.” This declaration, justified by circular reasoning, would seem to constitute a disregard of the tribunal’s obligation to interpret the treaty “in accordance with the ordinary meaning given to the terms” therein, the words ‘recommend’ and ‘order’ having totally different definitions. Vienna Convention on the Law of Treaties, 8 ILM 679, Article 31(1).

\textsuperscript{278} *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para 77.
tribunal should restrict itself to finding expropriation only after the fact, and then order compensation if and as appropriate, the tribunal disagreed, concluding that it had the power to prescribe the actions of the State and grant the investor’s request. In a series of claims against Ecuador also centring on tax collection tribunals have come to the same conclusion. In three instances the foreign investor has prevailed and the tribunals have issued provisional measures prohibiting the State from enforcing its own law and collecting the much needed revenue. Also involving Ecuador, another tribunal has issued a series of orders and awards regarding provisional measures on behalf of oil giant Chevron, seeking to restrict the State and its national courts from enforcing a domestic judgement against the company, both nationally and internationally.

3.5 - Backlash

These considerations underscore the expanding frame of protection, which constitutes the primary cause for the growing backlash that a number of States are enacting

279 Ibid, para 81.
against the current investment regime. As Abi Saab noted in his dissent in *Abaclat*,

This misguided tendency, purporting to serve progress by expanding the rule of law and the role of adjudication in international society ... is undermining the credibility not only of the ICSID system, but of the very idea of objective international adjudication, by eroding the confidence of States, whose consent remains the basis of jurisdiction, in the objectivity and good judgement of those to whom they may entrust the ascertainment of their rights. The risk of a backlash is already pointing its head.\footnote{283}

Such warnings of the oncoming, or already present, legitimacy crisis\footnote{284} and backlash\footnote{285} against the current regime are numerous, and the consequences of an over-expanded neoliberal agenda promulgated through capricious interpretation is more than evident in the recent reactions of States.\footnote{286}

Latin America and the Caribbean make up only 14% of the ICSID member States but are the subjects of 46.7% of pending

\footnote{283 *Abaclat*, 2011, supra note 249, para 274.}
\footnote{285 See generally, Waibel (et al eds.), 2010, supra note 92; Sornarajah, 2008, supra note 46.}
\footnote{286 Sornarajah, 2008, supra note 122, p. 223.}
ICSID cases as of March 2013, and 51% of extractive industry cases.\textsuperscript{287} As a result, the backlash by States against the current regime is undoubtedly led from this region. Bolivia became the first country to notify the ICSID Secretariat of its withdrawal from the ICSID Convention.\textsuperscript{288} In 2009 Ecuador followed suit,\textsuperscript{289} as did Venezuela in 2012.\textsuperscript{290} Regionally, in 2013 twelve States formed a new alliance called the Ministerial Conference of Latin American States Affected by Transnational Interests,\textsuperscript{291} which involves a proposal from Ecuador for an International Centre for Conciliation, Mediation and Arbitration under the auspices of the Union of

\begin{flushright}
\textsuperscript{289} Previously Ecuador had unilaterally terminated nine of its twenty-five BITs in 2008; those with Cuba, The Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay. UNCTAD, ‘Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims’, IIA Issues Note No.2, December 2010, p. 1, footnote 3. Reportedly, Indonesia is also moving in this direction. In March 2014, the government gave notice that it will terminate its BIT with the Netherlands, and has indicated that it will soon terminate all other BITs to which it is signatory. Martin Khor, ‘Investor Treaties in Trouble’ 52 Southnews (10 April 2014); Martin Khor, ‘International Arbitration: The End of the Line for Indonesia’s Bilateral Investment Treaties?’, Berwin-Leighton-Paisner, April 2014.
\textsuperscript{290} The Venezuelan Foreign Ministry stated that the country’s previous submission to ICSID jurisdiction was “a decision of a provisional and weak government, devoid of popular legitimacy, and under the pressure of transnational economic sectors involved in the dismantling of Venezuela’s national sovereignty.” Ripinsky, 2012, supra note 204.
\textsuperscript{291} Third World Network, ‘Latin American States Form Alliance to Tackle Investment Treaties’, SUNS No. 7576, 30 April 2013.
\end{flushright}
South American Nations (UNASUR), as a regional replacement for ICSID.\footnote{Silvia Fiezzoni, ‘The Challenge of UNASUR Member Countries to Replace ICSID Arbitration’ \textit{2 Beijing Law Review} 3 (2011), p. 140.} Elsewhere, South Africa has cancelled BITs with Germany, Luxembourg, Belgium and Spain,\footnote{Carol Paton, ‘SA Annuls Bilateral Investment Treaty with Germany’, Business Day (South Africa), 28 October 2013.} and it would seem that all of South Africa’s ‘old generation’ BITs are set for termination.\footnote{Leandi Kolver, ‘SA Proceeds with Termination of Bilateral Investment Treaties’, Engineering News, 21 October 2013.} Of the Northern States, Norway has unilaterally attempted the most far reaching reforms to date in a new model BIT tabled for public discussion in 2008.\footnote{For commentary see, Luke Peterson, ‘Norway Proposes Significant Reforms to its Investment Treaty Practices’, Investment Treaty News, 27 March 2008; and South Centre, ‘Comments on Norway’s Draft Model Bilateral Investment Treaty (BIT): Potentially Diminishing the Development Policy Space of Developing Country Partners’, Geneva, 15 April 2008.} A government commentary to the model sets out the reasons for this broadening by stating the need “to lead the development from one-sided agreements that safeguard the interests of the investor to comprehensive agreements that safeguard the regulative needs of both developed and developing countries.”\footnote{Peterson, 2008, supra note 295.} However, following heavy criticism from both business lobbies and social justice movements the Norwegian model was returned to the drawing board.\footnote{Damon Vis-Dunbar, ‘Norway Shelves its Proposed Model Bilateral Investment Treaty’, Investment Treaty News, 8 June 2009.}

Within Europe, the Lisbon Treaty has transferred competence for the conclusion of international investment agreements from individual member States to the European Union (EU) collectively. Sensitive to some of the widespread criticisms of BITs the European Parliament has called on the Commission to ensure that the EU Investment Policy includes obligations not only on host States but also on investors, noting that,
for investment agreements to further benefit [developing] countries, they should also be based on investor obligations in terms of compliance with human rights and anti-corruption standards as part of a broader partnership between the EU and developing countries for the purpose of reducing poverty.  

Similarly, the Parliament expressed dissatisfaction with an earlier communication from the Commission stressing that “while [it focussed] extensively on investor protection, it should better address the right to protect the public capacity to regulate and meet the EU’s obligation to exercise policy coherence for development.” The Parliament also stated that,

the EU should also be aware of the concerns of its developing partners and should not call for more liberalisation if the latter deem it necessary for their development to protect certain sectors, particularly public services.

However, it would seem that the Commission is not adequately addressing the Parliament’s concern for the lack of a development dimension in EU investment policy, but is instead focused only on “legal certainty and maximum protection for EU investors.” The EU is the major trader and

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300 Ibid, para 26.
301 Seattle to Brussels Network, ‘European Member States Refuse Necessary Reform, Ignore the Will of the European Parliament and Insist that Future EU Investment Agreements Copy Their Bad Practice’, September 2011.
302 Commission of the European Union, Outcome of Proceedings of the Trade Policy Committee (Full Members) Meeting, EU doc. 5667/10 WTO 25, 22 January 2010. This is reflected in the position of the Council, which clearly subordinates the space for EU Member States “to adopt and enforce measures necessary to pursue public policy objectives”, to “the main focus” of an EU investment policy, namely “effective and ambitious
donor for developing countries taken as a whole, and the current consolidation of investment competence summing the resources of its 28 member States will drastically enhance its ability to shape international investment policy, giving it tremendous negotiating leverage in relation to any developing country.\textsuperscript{303} Its goal of improved market access and ‘competitiveness’ for its investors may not bode well for the development prospects of these countries absent significant attention to the calls of the European Parliament. Currently the debate between the elected Parliament and the appointed Commission is of major significance.\textsuperscript{304}

A number of the core problems with the investment regime may be illustrated through UNCTAD’s response to the present backlash. UNCTAD has introduced a detailed Investment Policy Framework for Sustainable Development (Policy


Within current negotiations between the US and the EU on the Transatlantic Trade and Investment Partnership, the German government has informed the European Commission that the ISDS procedure must be excluded from any future agreement with the US. Shawn Donnan and Stefan Wagstyl, ‘Transatlantic Trade Talks Hit German Snag’, Financial Times, 14 March 2014; Khor, ‘Investor Treaties in Trouble’, 2014, supra note 289. The French trade minister has taken the same stance, and reports on ISDS commissioned by the UK government have made the same recommendations. The EU Commission subsequently removed the ISDS clause from negotiations in January 2014 and opened a public consultation which attracted 150,000 submissions, one of the highest response rates of any Commission consultation. See, Finbarr Bermingham, ‘TTIP: 150,000 Register Concerns over Controversial ISDS Clause of Free Trade Agreement’, International Business Times, 24 July 2014. For further reflections on the future of EU investment policy see, August Reinisch, ‘The EU on the Investment Path - Quo Vadis Europe? The Future of EU BITs and other Investment Agreements’ 12 \textit{Santa Clara Journal of International Law} (2013).
Framework).\textsuperscript{305} It provides guidance to States at both national and international levels. Nationally, the move towards greater regulation is encouraged as a core part of the need to integrate investment policy within an overarching sustainable development strategy. Internationally, the Policy Framework seeks to strengthen the “development dimension” of investment agreements to “manage” the systemic complexity of the current investment regime.\textsuperscript{306} In its somewhat ad hoc managerial orientation it does not provide a coherent strategy for reform or reconceptualization, and can therefore drift out of focus and into contradictions.

The professed aim is to provide a “common language” for discourse and cooperation on international investment policies.\textsuperscript{307} However, this language marginalises the lexicon and terminology of human rights. References to the human rights obligations of home and host States and the responsibilities of investors to respect human rights, are sparse and are given no elaboration or prominence.\textsuperscript{308} Their inclusion in future investment treaties is presented as one of a plethora of options, on par with suggested attention to tax measures and general transparency. This fails entirely to account for their prior status as extensively defined international legal obligations.

The Policy Framework is based on a number of Core Principles. In a note on the origins of these principles within international law there is no mention of any of the international human rights conventions that place binding

\begin{itemize}
  \item \textsuperscript{305} UNCTAD, 2012, supra note 85, pp. 97-164.
  \item \textsuperscript{306} Ibid, p. 97.
  \item \textsuperscript{307} Ibid, p. 97.
  \item \textsuperscript{308} For some exceptions, relating to carve-out clauses for human rights policies, and exclusion of disputes from the ISDS procedure involving human rights measures see, Ibid, pp. 114, 151, 152.
\end{itemize}
obligations on States. Only the Universal Declaration of Human Rights is noted in a secondary list of “[s]everal other international instruments [that] relate to individual Core Principles.” Despite much of the Universal Declaration having attained the status of custom, it is awkwardly grouped on par with a number of investment instruments with no equivalent claim to universality; to wit, the Convention on the Establishment of the Multilateral Investment Guarantee Agency, the World Bank Guidelines on the Treatment of Foreign Direct Investment, and several WTO agreements, including GATS and TRIMs. UNCTAD’s failure to give a prominent place to the corpus of international human rights law is lamentable, and belies a professed aim to prioritise the protection of people.

The result of UNCTAD’s effort to please everybody is that its policy advice is at best confusing and at times clearly self-contradictory. For instance, while one core principle advocates the provision of “predictable, efficient and transparent procedures for investors”, and another States that “investment policy should establish open, stable and predictable entry conditions for investment”, yet a third advises that investment

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311 The important issue of integrating human rights norms into UNCTAD’s processes, and reinvigorating its role as a forum built on the founding principle of representing and furthering the interests of developing countries, is returned to in chapter 6, section 6.4. Accordingly, UNCTAD may play a “unique and extraordinarily valuable role”. Speech by Mr. Robert Davies, Minister of Trade and Industry of South Africa at the session on UNCTAD’s Investment Policy Framework for Sustainable Development (IPFSD), Geneva, 24 September 2012, printed in ‘South African Minister: New Approach Needed on Investment Treaties’ 69 *South African Bulletin* (21 November 2012), p. 8:
policy should be ever in flux, “regularly reviewed ... and adapted to changing development dynamics.” Stability and change are opposing impulses. Also, while one principle advises that investors be accorded non-discriminatory treatment, and another highlights the need to avoid “investment protectionism”, yet a third advises the alignment of investment policy with the overarching goal of sustainable development “designed to minimise the risk of harmful competition.” As noted above, achieving sustainable development may often necessitate discrimination in favour of domestic interests and may require a degree of protectionism. There is also an obvious tension between principle 7 requiring openness to investment and principle 6 establishing the right of the host State to regulate, whereby “[e]ach country has the sovereign right to establish entry and operational conditions for foreign investment ... in the interest of the public good and to minimize potential negative effects.” The Framework does not provide a clear conceptual metric for striking a balance.

The deep tensions evident simply reflect the widely divergent interests in the debate, and the desire to promote sustainable development while recognising at the same time that investors, to whom the development process is beholden, must be satisfied. UNCTAD’s Policy Framework is therefore open to the criticism that, in trying to cater to all interests and erring on the side of the powerful, it offers no truly coherent

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314 Ibid.
315 “Investment policies need to serve two potentially conflicting purposes. On the one hand, they have to create attractive conditions for foreign investors. ... On the other hand, the overall regulatory framework of the host country has to ensure that any negative social or environmental effects are minimized ... this core principle suggests that the investment climate and policies of a country should be “balanced” as regards the overall treatment of foreign investors. Where and how to strike this balance is basically an issue for the domestic law of host countries.” Ibid, pp. 108-109.
advice, and in the end does not present a principled approach to resolving those opposing interests.\textsuperscript{316} This is the case despite placing sustainable development as the telos of investment policy, and thereby as the supposed principle that provides resolution.

Formulation of investment policy reaches a practical limit here in the form of a development paradigm based on FDI dependence. If investment is the necessary precondition of development itself, sustainable or otherwise, then investment policy, regardless of its quality or its contribution to a sustainable type of development, must satisfy the interests of investors in order initially to attract them. One aim must prevail, or at least predominate, over the other. The degree of a State’s FDI dependency will dictate the degree to which it can compromise investor interest for sustainability. It is the reflection of this reality that renders the Policy Framework contradictory.

FDI dependence for development is the elephant in the room that UNCTAD is ignoring. The Policy Framework then becomes a mixed bag of options, rather than a coherent whole, from which a government can pick and choose according to the degree to which it is independent from FDI as a source of development finance. LDCs will not be able to choose many, if any, options that lead to sustainability. Even peripheral European States that are highly dependent on FDI, such as Ireland, will be likewise unable to choose many of the sustainable policy options. These considerations highlight the need to squarely face the issue of FDI dependency.\textsuperscript{317}


\textsuperscript{317} See in particular, Principle 11, UNCTAD, 2012, supra note 85, p. 110.
Caliari notes that while there are many good options in the Framework from a developing point of view, the “realpolitik” fact remains that they are absent from existing North-South investment treaties given that the powerful nations approach negotiations with their own template and a take-it-or-leave-it attitude.

Moreover, in the trade-off between interests of investors and the sustainable development concerns of the host countries, the evolution of IIAs has a clear trend to being further skewed towards the former.318

While UNCTAD points hopefully to the recent developments in US and Canadian model BITs as indicative forward movement in this regard, the failure of these models to account for the interests of developing countries is well known.319 This means that despite a turn away from pure investment protection and promotion we are left with a gaping divide between the interests and attitudes of developed and developing States.

Ultimately, while there has been a certain amount of convergence between North and South, and while the potential for greater convergence is a deep current running through a cooperative approach, it is nevertheless important not to overlook the continuing existence of a substantial

318 Caliari, 2013, supra note 316.
319 “These changes do not alter the fundamental character of these investment treaties as quintessential liberalist instruments, which only protect and ‘empower’ investors without sufficient consideration of the rights of host states and the duties of the investors.” Wenhua Shan, ‘Calvo Doctrine, State Sovereignty and the Changing Landscape of International Investment Law’, in Shan (et al eds.), 2008, supra note 122, pp. 303-304.
The actual changes to the investment regime to date have been shallow, scattered, partial, and of little benefit to developing countries. Moves by some States to extricate themselves from the regime fail to substantively change it, and while there are notable alternative plans, these are all currently at the drawing-board stage. Yet perhaps the deep division, evident throughout the history of the investment regime, can be bridged by a process in which the self-interest of Northern developed States is reconceptualised, and its narrow, short-term framing is overcome, a theme explored further in the conclusion. We now turn to a deeper analysis of human rights within the investment regime.

[I]n order to oblige people to stay in line, economics discourse needs to produce a set of threats, or better still, a set of potential losses should there be any non-compliance with the directing line.\footnote{Manuel Branco, \textit{Economics Versus Human Rights} (Routledge, London, 2009), p. 2.}

potential conflict between the two bodies of law in arbitral practice. Human rights references are very seldom seen in investment agreements and the “tendency of elites in many states geared to neo-liberalism has been to attract foreign investment even at the cost of human rights.”\textsuperscript{4} In order not to defeat this fundamental aim of attracting foreign investment, much of the commentary is devoted to suggesting solutions to the conflict based on opening the arbitral process to human rights values and concerns in varying ways that do not disturb the overall purpose and architecture of the investment regime.

It is argued that this set of theoretical solutions proposing the ‘addition’ or ‘insertion’ of human rights into the investment regime, without fundamental reform addressing its basic purpose, will result in the realisation only of an ‘investor-friendly’ set of human rights.\textsuperscript{5} A thoroughgoing human rights critique must therefore strive for fundamental reform and renegotiation from the ground up. Anything less risks the probability that at least some human rights will be interpreted or compromised out of existence.

An appraisal of the reality of human rights in investment arbitration to date leads ineluctably to this conclusion, and the case of \textit{Suez v. Argentina} is a paradigm example. This case also illustrates a central theme of this study; that the investment regime cannot be meaningfully separated from the development paradigm that it enforces and which gives it meaning. The implication is simple; that a solution to the ills


\textsuperscript{5} This is intended as a situation specific aspect of Baxi’s ‘trade-related, market-friendly paradigm of human rights’, as discussed in section 1.1.1.
of the regime cannot be successful in isolation from a solution for the ills of the paradigm. There must be a principled and simultaneous approach to both.

4.1 – Theory

This section addresses a representative selection of the voluminous writing on the investment regime along a spectrum according to its position on the question of reform. The spectrum ranges from a perception of ripples on a pond to imminent storm warnings; from arguments for the general maintenance of the status quo, to those supporting a fundamental renegotiation that attempts to redress the purpose of investment protection and its proper place in the broader context of international law and socio-economic justice.

It must be noted beforehand that human rights, public interest and sustainable development critiques of the investment regime are often highly integrated and difficult to un-mesh. For the purposes of the following analysis no systematic separation of these critiques is attempted or necessary. There is, nevertheless, an important caveat explained at the end of section 4.1.2 noting the unique nature of human rights. Relative to the demands of the public interest and sustainable development, which may be more amenable to a middle-ground approach of systemic integration with the investment regime,\(^6\) the unique nature of human

\(^6\) On the concept of systemic integration see, Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(c) of the Vienna Convention’ 54 International & Comparative Law Quarterly 2 (2005);
rights suggests a greater need for fundamental renegotiation to ensure their realisation.

4.1.1 - Ripples...

Though few would deny the evident tension between the two regimes, some commentators believe that existing problems are superficial. They are seen as the mere growing-pains of a newly instituted normative regime, which is basically “sound and only needs marginal (or no) improvements at all.”

Tim Nelson, for example, contends from a historical perspective that the regime is durable and a match for changing economic and political realities. Commentators in this category will emphasise the fundamental value of the current system to the most powerful and best rewarded stakeholders, and stress the superficial similarities between the human rights and investment protections.


To the charge of inconsistency in arbitrations and structural bias against developing countries,\(^\text{10}\) commentators of the ‘ripples school’ claim that this criticism is overwrought and ignores substantive factual differences between cases and textual differences between individual BITs applied.\(^\text{11}\) However the seriousness of these inconsistencies is demonstrated by the fact that they have had to be clarified directly by States in changes to their model or by interpretational guides to tribunals specific to particular treaties, as in the case of NAFTA.\(^\text{12}\) In some cases identical circumstances have produced oppositional rulings as to whether or not the host

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\(^{12}\) In 2001 cabinet ministers from each of the state parties, the US, Canada and Mexico, constituting the NAFTA Free Trade Commission, issued what are intended to be binding interpretations of the fair and equitable treatment, and full protection and security standards under the investment section of the treaty. NAFTA Free Trade Commission, ‘Notes of Interpretation of Certain Chapter 11 Provisions’, 31 July 2001.
State has breached the protections in the relevant treaties.13 On the charge of systemic bias Susan Franck has presented empirical evidence purporting to show its absence, supporting arguments for the maintenance of the status quo.14 However these findings have been questioned on numerous grounds including lack of methodological rigour.15 Furthermore, in most advanced legal systems the standard in this regard is the absence of any perception of bias, not just a questionable aggregated empirical elimination.16

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13 The two instances most often noted here are the contradictions between CME v Czech Republic and Lauder v Czech Republic, as one example, and between LG&E v. Argentina and a number of other cases arising from the same facts such as Enron v. Argentina, CMS v. Argentina and Sempra v. Argentina, as another. See, CME Czech Republic B.V. v. Czech Republic, Under the UNCITRAL Rules, Partial Award, 13 September 2001; Ronald S. Lauder v. Czech Republic, Under the UNCITRAL Rules, Final Award, 3 September, 2001; LG&E Energy Corp., and Others v. The Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006; Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007; CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005; Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007. See further, David Schneiderman, ‘Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes’ 30 Northwestern Journal of International Law and Business 2 (2010).


Stephan Schill argues that although there may be a need for the rebalancing of arbitral predilection and reasoning towards a more ‘public law approach’, this is eminently feasible simply through ‘system-internal reform’ and changes in arbitrators thinking.17 There is consequently no need for the ‘re-crafting’ of the investment regime, and neither is there a need to put “the institutional structures of investor-State arbitration into question.”18 Yet the fact is that the institutional structure is already in question, and no abstract proposal for changing the thinking of arbitrators alone is likely to change that fact.

In reply to our core concern of conflict between investment rules and human rights law James Fry is of the opinion that the problems have been exaggerated.19 He holds that such critiques generally rely on hypothetical situations and that the investment regime is not only compatible with but positively supportive of human rights law. This ignores a number of pointed critiques relying exclusively on the evidence of arbitral awards and decisions, most notably authored by Luke


18 Schill, 2011, supra note 17, p. 102.

Peterson. More broadly, sections 4.2 and 4.3 may be taken as a rebuttal of Fry’s opinion. In addition, Moshe Hirsch, who analyses almost the exact same set of disputes as Fry, reaches quite a different conclusion, stating that

An analysis of the investment awards ... reveals a quite consistent approach undertaken by international investment tribunals with regard to the non-significance of international human rights law in investment disputes. ... investment tribunals have declined to examine the specific provisions of international human rights instruments invoked by the parties.

Brigitte Stern, often employed as an arbitrator herself, uses interesting imagery to sum up the viewpoint of the ‘ripples school’. In referring to the crisis of the international investment law and policy system, she advances the opinion that this is “only a crise de croissance—a teenager’s crisis.” She suggests the modest remedy of better NGO participation

22 Brigitte Stern, ‘The Future of International Investment Law: A Balance Between the Protection of Investors and the States’ Capacity to Regulate’, in José Alvarez (et al eds.), 2011, supra note 7. However, according to Goldhaber, Stern has also noted elsewhere that resolving the problems of the current system could be far more challenging: “One arbitrator sitting on several of these Argentine tribunals has warned that the system—such as it is—has a potentially fatal flaw: “You have the potential,” Professor Brigitte Stern warns, “for 20 arbitrations, one problem, and 20 solutions.” Michael Goldhaber, ‘Wanted: A World Investment Court’ 3 Transnational Dispute Management (2004).
in the system and more coherent arbitral decisions, but
decries the need for any fundamental change. Stern has the
belief that, over time and in the main, ‘good’ arbitral decisions
will prevail over ‘bad’, the difference being decided by the
small college of arbitrators and elite commentators of which
she is one.

Yet, from the point of view of States’ international legal
obligation to realise human rights, this defence of ‘growing-
pains’ is not acceptable. It is unacceptable that the uncertain
‘development’ of an international regime into morally
functional maturity be allowed to violate previously
established and universal precepts of higher moral import. If
indeed we are witnessing a crise de croissance then good
parenting would demand the application of discipline, in
everyone’s interests, and in line with States’ pre-existing
commitments under international human rights law. Referring
specifically to Stern, Alvarez and Khamsi state that,

we are not convinced by those who suggest that neither
structural nor interpretative reforms may be needed. ... The
implication is that arbitrators in investor-state cases will be
able to interpret agreements such as the US–Argentina BIT
to strike a better balance between the needs of the market
and the needs of sovereigns to protect the rights of their
peoples. ... The Argentine Gas Sector Cases suggest, on the
one hand, that Stern’s optimism is unwarranted.23

They note that Stern’s faith in preambular references to
outcomes such as worker’s rights and economic development

23 José Alvarez and Kathryn Khamsi, ‘The Argentine Crisis and Foreign
Investors: A Glimpse into the Heart of the Investment Regime’, in Karl
Sauvant (ed.) Yearbook on International Investment Law and Policy 2008-
ignores the fact that these hoped for consequential outcomes are set at the level of possibility, and are clearly secondary to the object and purpose of BITs, that is, the protection of foreign investment. “What this means is that it may not be so easy to outgrow the *U.S.–Argentina BIT*’s ‘adolescent’ preoccupation with protecting investors’ rights. Protecting such rights is the *sine qua non* of that treaty.”

Elaborating on earlier work by Campbell McLachlan and others, Bruno Simma and Theodore Kill offer a detailed example of the theory by which human rights and investor protections may be harmonised, or systemically integrated, purely through the application of interpretational techniques drawn from Article 31 (3)(c) of the Vienna Convention on the Law of Treaties. Tribunals are thereby encouraged to interpret the provisions of BITs taking into account any “relevant rules of international law applicable in the relations between the parties”, including, where appropriate, human rights law. This solution is offered against a backdrop of

concern regarding the ‘disintegrative inclination’ prevailing in the area of international investment law ... [whereby the] tendency towards considering international investment law

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in a vacuum is perhaps most disturbing with regard to human rights law.\(^{28}\)

This interpretational method is widely advocated.\(^{29}\) The authors point out that the International Court of Justice has used such techniques of interpretation either to utilise an ‘external’ rule to determine the scope of a particular right or obligation in the treaty at hand, or to base an interpretation on a presumption that a treaty is intended to conform to pre-existing rules of international law to which the State parties are bound.\(^{30}\) In the context of investment arbitration, human rights norms, as seen above, may be relevant in a number of instances, specifically in regard to the determination of fair and equitable treatment and the existence or extent of regulatory expropriation.\(^{31}\)

However, despite the promise of such an approach and its prominence in the literature, Simma and Kill are modest in their expectations. They stress that the utilisation of these interpretational techniques, without structural change, in fact only opens the door to a new set of problems. The *meaningful* effect of human rights depends entirely on the manner in which tribunals answer a range of questions relating to their exact interaction with investors’ rights in given contexts, and the relative weight they attribute to one or the other. For example;

\(^{29}\) Ibid, p. 581.
\(^{30}\) Ibid, p. 688.
\(^{31}\) Ibid, pp. 705-706. For an in depth discussion of the ways in which state obligations to provide socio-economic rights could normatively inform the interpretation of investment treaties, see Bruno Simma, ’Foreign Investment Arbitration: A Place for Human Rights?’ 60 *International and Comparative Law Quarterly* 3 (2011), pp. 586-591.
If ‘equitable treatment’ properly understood embraces a multi-party balancing of obligations including human rights, are a State’s obligations to its own citizens to be weighed against investor rights under BITs? Or are the obligations owed to citizens and investors on independent parallel tracks? In what ways could international human rights law and international investment law be said to be in conflict? If a tribunal finds a conflict between the two regimes, how should this be resolved?\(^{32}\)

The ad hoc nature of investment disputes, the disparities between investment agreements, and the lack of precedent and coherence all mitigate heavily against the emergence of any principled or predictable answers to these questions. Their sheer complexity and the seriously disruptive and radical consequences of recognising the moral superiority of human rights law are cogent reasons for the complete avoidance of human rights law by tribunals to date.

For Simma at least, these considerations have resulted in a severely reduced faith in the likelihood of interpretational techniques. In a later article he opines that, while the interpretational approach

possesses considerable merits and has attracted a certain attention (albeit still more in the academic world than in that of arbitration practice), it remains an approach ex post, possibly leaving excessive discretion to arbitrators.\(^{33}\)

He even speculates that a predisposition to ignore human rights may be “in the investment arbitrators’ genes” due to their


\(^{33}\) Simma, 2011, supra note 31, p. 573.
usually commercial or private law background.\textsuperscript{34} Whether or not it is true that “[l]awyers specialising in international investment law today probably have more in common with domestic corporate lawyers than with international human rights lawyers”,\textsuperscript{35} arbitrators are certainly wont to view human rights and other aspects of public international law as politically controversial, and contrary to the allegedly depoliticising ideology of the neo-liberal set of rules that they administer.\textsuperscript{36}

4.1.2 - Troubled Waters...

A number of other commentators voice a more serious concern with the external effects, internal legitimacy, and prospects of the investment regime. The critiques here and the accompanying suggestions for change are greatly differentiated and difficult to categorise into a single set. Nevertheless, it is submitted that the dominant theme takes a position that while a certain amount of treaty renegotiation is desirable, a \textit{fundamental} renegotiation is not necessary. The ‘troubled waters’ school could therefore be viewed as reformers rather than revolutionaries, and they provide the theoretical

\textsuperscript{34} Ibid, p. 576.
underpinnings of the ‘new-generation’ of investment agreements described above.\textsuperscript{37}

The majority of proposals for reform fall into one or more of four sub-categories regarding the ultimate goal; 1) to make it a proper public international law regime; 2) to focus the regime on sustainable development; 3) to reform the content of BITs; and 4) to reform the process of arbitration.\textsuperscript{38}

\subsection*{4.1.2.1 - A Public International Law Regime}

Gus Van Harten spearheads the call for the creation of a public international investment law regime.\textsuperscript{39} His plan is not so much to change the substance of treaties but to change the institution of arbitration into one adopting more of the characteristics and values of public, rather than private/commercial, international law. The assumption is that arbitrators make ‘bad’ awards, in Stern’s terminology, because of the absence of these public law strictures, such as accountability of arbitrators, and general demands of systemic

\begin{itemize}
\item \textsuperscript{38} Howard Mann, ‘Civil Society Perspectives: What Do Key Stakeholders Expect from the International Investment Regime’, in José Alvarez (et al eds.), 2011, supra note 7, p. 22.
\end{itemize}
transparency and coherence with the larger body of public international law.

Much of the human rights critique of the current regime can be placed in this category. Usually the modest application of principles and norms of public international law, rather than institutional restructuring sets the tone. The theme of this critique is that the majority of tensions between investment law and human rights law can be ‘balanced’ through a greater degree of consideration given to the human rights obligations of host States within the process of arbitrating disputes, as a part of a broader process of developing a ‘truly public’ international investment regime. There exists a plethora of variations on this approach. This theme encompasses the majority of contributions to a seminal edited collection on the relationship between the investment regime and human rights. For example, Dupuy and many others argue that arbitrators can ultimately ‘reconcile’ the ‘interpretations’ of human rights courts with possibly different approaches taken by arbitration tribunals. This may or may not be so. Most human rights advocates however (not to mention the beneficiaries of said rights), would be very uncomfortable at the thought of commercially oriented ad hoc

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40 Schill, for example, observes the same problems as Van Harten but emphasises that the solution does not require the ‘overturning’ of the current regime. Stephan Schill, ‘Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator’ 23 Leiden Journal of International Law 2 (2010).


42 Dupuy (et al eds.), 2009, supra note 9.

arbitrators chosen by the parties to the dispute, reinterpreting of ‘reconciling’ the considered pronouncements of specialised human rights bodies long subject to the full range of public international law principles. Some even contend that the roles be reversed such that investment disputes are instead resolved by human rights bodies.\textsuperscript{44}

In a similar vein, Anne van Aaken argues that investment law must evolve and be interpreted in consistency with other aspects of public international law, including human rights law.\textsuperscript{45} While rejecting the need for any amendment to BITs as such she advocates a ‘good faith’ application of the substantive provisions of these treaties in line with the human rights obligations of host States.\textsuperscript{46} Echoing these views, Yannick Radi is of the opinion that investment law already contains sufficient ‘tools’ for the appropriate balancing of human rights and investor interests without any need to look further to other rules of ‘general’ international law.\textsuperscript{47}


\textsuperscript{46} In a similar vein, Valentina Vadi advocates the application of a human rights infused theory of property, paying appropriate attention to the broader social purpose of property that can justifiably limit the private interests of the property owner, within investment arbitration. Valentina Vadi, ‘Through the Looking-Glass: International Investment Law through the Lens of a Property Theory’ 8 \textit{Manchester Journal of International Economic Law} 3 (2011), p. 22.

Supposedly, through proper application of two guiding principles of interpretation in investment law (those of ‘legitimate expectations’ and ‘distinct-investment-backed expectations’) “public and general State interests and the interests of the investor” can be balanced by arbitrators, in such a way that “state measures pursuing a human rights objective rarely infringe on the provisions” of investment agreements. On this hypothetical basis Radi goes as far so to state that,

> [f]or a regime which has been widely accused of being indifferent (if not detrimental) to human rights, the tolerance and flexibility it demonstrates in favour of human rights is a considerable one.

Such hypothetical tolerance and flexibility are far from realised in practice, rendering the choice of the word ‘demonstrates’ unfortunate. On the contrary, the only thing that current arbitral practice demonstrates is a considerable disfavour towards human rights. This is a point that Radi himself concedes:

> [T]here is a tendency to give a limited role to human rights norms. Whether it is because arbitrators are not familiar with human rights law or because they believe that sticking to their competency in investment law will increase the legitimacy of their arbitral decisions, international human

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48 Radi, 2011, supra note 47, pp. 1116-1117.

49 Ibid, p. 1117.

rights norms to date are generally absent from investment arbitration.\(^{51}\)

Yet his solution is completely dependent on the practice of tribunals. Michael Waibel has demonstrated that the current record of tribunals with regard to the application of the interpretational rules of custom formalised in the Vienna Convention is “cavalier” and “superficial.”\(^{52}\) In short, the fact that any eventual resolution must be arrived at by the same institution and actors who have created the problem would seem to indicate, even in theory, that the process holds little promise.

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4.1.2.2 - Sustainable Development

The work of the International Institute for Sustainable Development (IISD) is a prime example of the move toward a focus on the quality of FDI rather than on simple unregulated quantity.\(^{53}\) This position would naturally include a deeper

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\(^{51}\) Radi, 2011, supra note 47, p. 1116. And elsewhere; “[M]ost arbitration tribunals have limited themselves to pay lip service to human rights arguments”. Gazzini and Radi, 2012, supra note 47, p. 4. Van Aaken makes the same admission: “As it stands now, owing to the institutional set-up, the danger arises that only non-investment issues conducive to investors’ interests are de facto taken into account by tribunals”. Anne van Aaken, ‘Fragmentation of International Law: The Case of International Investment Protection’, University of St. Gallen Law School, Law and Economics Research Paper Series, Working Paper No. 2008-1, p. 35.


concern for human rights issues as part of the social component required for sustainable development, but would not put them front and centre. For instance, the IISD’s Model International Agreement on Investment for Sustainable Development contains references to human rights provision, but these are scattered and subsumed within the supposedly ‘broader’ aim of sustainable development. This position is one of a number associated with the desire to widen the angle of investment law to accord duties to investors, and parallel rights as well as duties to home and host States.54

From a human rights standpoint, this turn to sustainable development is a provisionally welcome one. However, it will often be insufficient to ensure respect for specific human rights in particular contexts. This will be all the more true if development, of whatever brand, remains dependent on foreign investment. If the fundamental equation, development=foreign investment, is not overcome then whatever adjective that seeks to qualify development (sustainable, human-friendly, ecological, climate-friendly, equitable, human-rights based) will ultimately dissolve into an illusion as it reaches this overriding and limiting value. The purpose and the effect of the regime will be set by the unstated equation, and will always boil down to benefiting


investors. As such, Alschner and Tuerk, following UNCTAD’s line of promoting sustainable development in investment agreements, applaud the recent inclusion of some provisions which *supplement* ‘hard’ investment *obligations* with ‘softer’ sustainability *standards*.\(^{55}\) The purpose and effect could not be clearer. Nothing changes.

The transition from the *nominal* purpose of BITs as development to the *real* purpose of BITs as protection of investment is dramatically illustrated in certain passages from the *Suez* case. The tribunal in *Suez* reasoned that,

[\textbf{w}hen one examines the stated purposes of the three BITs, one sees that they all have broader goals than merely granting specific levels of protection to individual investors. ... [for example,] to further economic cooperation. ... The Tribunal considers that the goal of “economic cooperation,” stated in the Argentina-France and the Argentina-Spain BITs, reaffirms and indeed strengthens, rather than diminishes, the importance of “fair and equitable treatment” ... \[I\]n the notion of “economic cooperation between States” is the commitment to give fair and equitable treatment to important economic actors, such as investors ... \textit{Thus, this Tribunal considers that fair and equitable treatment of investors is the \\textit{sine qua non of the economic cooperation envisaged by France, Spain, and Argentina.}}^{56}\]


The inescapable fact that investors’ interests are the ultimate value could not be more clearly demonstrated than by the ‘logic’ of this argument. ‘Economic cooperation’ is synonymous with the promotion and protection of foreign investment, because the purpose of cooperation, development, is based on, and strictly requires this investment. Therefore, all economic cooperation boils down to the needs of an FDI dependent development paradigm. It is difficult to see how the concept of ‘sustainable development’ would fare any better than that of ‘economic cooperation’ here. It is submitted that the tendency will remain to boil that purpose down to the core value of promoting and protecting foreign investment. The concern is that the concept of sustainable development is ill-defined and sufficiently malleable to be captured by the foundational demands of an FDI dependent development paradigm. That, in the final analysis, the ‘sustainable’ aspects of the concept (social and environmental) will be subordinated to the interests of the investors on whom the ‘development’ aspect is reliant.

Before moving on it is necessary to clearly separate human rights-based critiques from those promoting the public interest and sustainable development. Human rights have a unique nature and far greater specificity and weight of legal requirement under international law than the more malleable demands of public interest or sustainable development. The nature of human rights as inherent in the human person, inalienable, and the universally agreed minimum requirements for a life of human dignity, bring a presumption that they are susceptible to compromise only in relation and in ultimate reference to each other, at least initially. It is common knowledge that human rights cannot and do not
operate as trumps in all cases. They must ultimately be open to compromise in a real world. However, their nature accords them a certain level of priority that cannot be easily dismissed or compromised. A tacit acknowledgement of the special nature of human rights, in comparison to public interest or sustainable development concerns, may underlie the refusal of arbitral tribunals to address them in any substantive way.

The unique nature of human rights also means that taking them seriously in relation to the current investment regime makes qualitatively different, and quantitatively greater, demands on that regime; specifically on the arbitral process and the interpretation and ‘balancing’ of fundamentally different human and investor rights. Human rights inhere in each individual’s human dignity and their realisation is fundamental to the simple expression of each person’s humanity. On the other hand, rights are granted to investors in order to achieve certain policy objectives. Investor’s rights are not inherent, nor essential, and are at best tangentially related to fundamental human dignity.57

Concepts of public interest and sustainable development are philosophically underpinned by more utilitarian and functional notions of current and inter-generational equity, closely connected to, but not so fundamentally based on human dignity. They too could be viewed as primarily instrumental, and while they perhaps lend themselves more to compromise and therefore to systemic integration within an investment regime that remains fundamentally unchanged, human rights do not.

4.1.2.3 - Content Reform

Public international law and sustainable development critiques usually demand actual reforms to the content and the process of the investment regime. With respect to content, there is no doubt that future clauses carving out human rights and other developmental measures from the ambit of investor protection are a necessary minimum.\textsuperscript{58} The only question is whether they will be sufficient. Even an express carve-out will require arbitrators to decide what is or is not a human rights measure. It is highly unlikely that a self-declaration by a State will be a sufficient defence.

The work of Luke Peterson, Kevin Gray, Howard Mann, and Samal Zia-Zarifi, comes under this category (as well as that on process reform below). They argue that changes explicitly recognising human rights concerns are required to the substantive and procedural rules of existing and future investment treaties.\textsuperscript{59} The IISD Model Investment Agreement forms the paradigm here.\textsuperscript{60} Article 14 establishes that investors must uphold human rights and may not act in any way that causes a breach, or results in complicity in a breach, of human rights.\textsuperscript{61} Minimum standards of human rights


\textsuperscript{60} Mann (et al), 2005, supra note 53.

\textsuperscript{61} Ibid, p. 10.
protection, and domestic compliance with law policy and action, are set for the State parties in Article 21.62

It is important to note, however, that the relationship between the investment agreement and other international agreements, set in Article 34, defers to the former.63 While the parties “re-affirm their obligations under international environmental and human rights agreements to which they are a Party”,64 they are under an obligation to ensure consistency only with other trade agreements. With respect to the contents of human rights treaties, the parties are weakly encouraged to “seek to interpret such agreements in a mutually supportive manner”, and furthermore, in the event of disputes between conflicting obligations under international law, a resolution must first be sought under the “mechanisms” of the investment agreement rather than those of any human rights treaties.65 In these cases there is a serious risk of distorting and diluting the provisions of human rights law. Certain articles in the IISD Model Agreement, for instance, corral disputes within the resolution mechanisms foreseen under the investment regime without any concomitant prioritisation of human rights norms, heightening this risk.

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63 Ibid, p. 18.
64 Ibid, Article 34 (c)
65 Ibid, Article 34 (a) and (b).
4.1.2.4 - Process Reform

Some advocating substantive reform of BITs would argue for the removal of clauses establishing recourse to the ISDS procedure in their entirety, maintaining the power of interpretation in domestic courts.\textsuperscript{66} While from the viewpoint of this study this would be a welcome development, it would still not guarantee a pro-human rights interpretation by domestic judges in a country that remained subject to the FDI dependent development paradigm. One step away from this position is that whereby the arbitral system is in need of a complete ‘overhaul’, as verbalised stridently by an insider who regularly represents States in international arbitrations;

what is needed, and what seems further away now than ever, is a complete overhaul of investor-state arbitration, top to bottom, beginning to end. ... [I]n the long run neither states nor the international arbitration community benefits from sweeping these issues under the rug.\textsuperscript{67}

For the rest, less dramatic changes are needed to the process, bringing democratic judicial standards of independence, transparency, due process and accountability, all linked to the argument from the angle of a public international law system, yet implemented in a concrete fashion through the re-design of treaties. Burke-White for

\textsuperscript{66} See for example, Muthucumaraswamy Sornarajah, ‘Starting Anew in International Investment Law’, in Sauvant and Reimer (eds.), 2012, supra note 17.

instance argues that the Argentinean cases in particular\(^6\) prove that “some of the basic premises of investor State arbitration must be reconsidered.”\(^7\) As Mann puts it, the system ultimately “fails as a judicial model through its own recognition that decisions that are wrong as a matter of law are not reversible because there is no appeals process from an error of law per se.”\(^8\) Commentators here call for the exhaustion of local remedies, a dependable appellate process, rules on conflict of interest, as well as complete public transparency.\(^9\) These calls could be said to culminate in proposals for a World Investment Court, fully integrated into the public international law discipline, put forth by writers such as Gus van Harten\(^10\) and Michael Goldhaber\(^11\).

Yet, in response to the more modest changes within the framework of investor-State arbitration, both procedural and substantive, there exist a number of problems. Most notably, as is repeatedly stressed here, their success depends greatly on the good graces and fair interpretation of arbitrators. In

\(^6\) See the report of one annulment committee in a particularly controversial case; CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007.

\(^7\) William Burke-White, The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System’, University of Pennsylvania Law School, Faculty Paper No. 193, 2008, p. 3. The author also, controversially, suggests that the Annulment Committee “may well have intended to prompt a legitimacy crisis in the ICSID system and a more fundamental rethinking of state liability under BITs.” Ibid.

\(^8\) Mann, 2011, supra note 38, p. 29.

\(^9\) See, Leon Trakman, ‘The ICSID Under Siege’, University of New South Wales Faculty of Law Research Series, Working Paper No. 6, February 2012. Though his tentative and ‘realistic’ conclusive suggestions for greater transparency are a little at odds with his statement that, “For some developing countries, concluding bilateral investment treaties is a means of economic survival, not a dispensable luxury.” Ibid, p. 20. This would seem to necessitate far more radical answers.


addition, despite the often reinforcing nature of procedural measures in combination with substantive carve-outs and add-ons for human rights and the public interest, etc., it remains the case that such concerns are implicitly sidelined, or, in other words, are special instances, requiring a deliberate focus by the State to ensure vindication. The system will otherwise assume that they are not at issue. In the case of human rights the State cannot be relied on to raise these issues, and neither does the peripheral nature of third party involvement in dispute settlement augur well for their visibility. In the absence of a multilateral set of rules or alternative financing for development there will remain intense competition among developing countries individually to have the least offensive changes to their treaties, which remains a powerful force for maintaining the strong bottom line of investor protection. As a result, many of the actual changes to treaties, as well as the proposed ones such as the IISD Model, contain heavily limiting language.

Furthermore, the unpredictability of arbitral outcomes in such a situation is probably heightened rather than lowered, and as such the problem of regulatory chill is left unaddressed and possibly exacerbated. Clauses on human rights for example would be no less vague than those already protecting investors, and there is no guarantee that tribunals would follow the detailed interpretations of human rights norms by treaty bodies and regional and national courts.\footnote{Spears, 2010, supra note 37, pp. 1071-1072.} Finally, this raises the spectre of ad hoc arbitral tribunals developing into global administrators, applying domestic constitutional and/or administrative law principles to decide on and set \textit{de facto} legal boundaries for a vast range of local and national
public policies and actions in relation to foreign investment.\textsuperscript{75} A relatively conservative collection of essays edited by Baetens contains a common thread that sums up the thrust of the ‘trouble brewing’ school and hints at its inadequate attention to system-wide solutions.

International law-makers and adjudicatory bodies can no longer ignore the various interactions between international investment law and other fields of public international law ... However, a more systematic approach towards creating a new generation of international agreements is required.\textsuperscript{76}

\textbf{4.1.3 - A Storm Brewing...}

At the more deeply critical end of the spectrum some commentators recognise a need for a fundamental renegotiation of the current regime, addressing more radical issues. The perception is that if the investment regime fails to come to grips with these deeper contextual issues present tensions will inevitably escalate into a storm.\textsuperscript{77} Some even argue that such conditions are already material and the ‘destroy and re-build’ strategy gaining momentum in Latin America represents the storm’s arrival.\textsuperscript{78}

\textsuperscript{78} Karsten Nowrot, ‘International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism’, Transnational Economic Law Research Center (TELC), School of Law, Martin Luther University Halle-Wittenberg, 2010.
A key factor driving this degree of criticism is “the absence of any cogent evidence that international investment agreements actually make a positive contribution to development, let alone sustainable development.”\(^7\)\(^9\) Aside from the crucial issue of quality, there is no solid evidence that the current regime even delivers on the more basic promise of increasing the quantity of FDI.\(^8\)\(^0\) Some argue that the only tangible result of the current regime is the dramatic escalation in investor-State arbitration.\(^8\)\(^1\) The deeper criticisms of the investment regime generally emanate from this heightened appreciation of the seriously detrimental “governance impact” of the regime as a whole.\(^8\)\(^2\)

As Mann states, in light of this impact it is not at all unreasonable to suggest that the best thing to do is to terminate the regime as it exists and to not seek to replace it until and unless new directions are found. Supporters of this view argue that no political will exists today to make such fundamental changes, and that the economic forces and actors surrounding globalization’s capital movements will not allow such changes to happen.\(^8\)\(^3\)

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\(^7\)\(^9\) Mann, 2011, supra note 38, p. 23. See further, Olivier De Schutter, Johan Swinnen and Jan Wouters (eds.), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge, New York, 2013).
\(^8\)\(^3\) Mann, 2011, supra note 38, p. 25.
However, for the moment, the realism or otherwise of expectations that the powerful will heed reason and change course does not affect the veracity of the critique. A core argument of the ‘storm brewing’ school is that such intransigence in fact only breeds further and deeper antagonism speeding the approach of the storm. It effectively highlights what Kennedy terms the ‘politics of the private’ in the ascendant,\(^{84}\) where private interests and values dominate and displace broader concerns of public wellbeing and basic human rights. This contributes dramatically to the already gross imbalance in the distribution of wealth within and between nations; a massively inequitable tendency in our day that most agree can only lead to violent conflict and the ultimate removal of inequitable institutions by force.\(^{85}\)

This is obviously where Gill and Schneiderman fit in, yet scholars taking the Third World Approach to International Law (TWAIL) also view the current investment regime very similarly, as an integral part of a larger imposition of international law generally by Northern States for the purpose of controlling the destinies of developing countries.\(^{86}\) It could

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be characterised then as an important aspect of neo-colonialism. James Thuo Gathii, for example, argues that,

[i]n era after era of reformism from the Calvo era, to the NIEO and to the era in opposition to neo-liberal economic governance, capital-importing States have continued to resist and sometimes adapt to the coercive realities of the rules of international economic governance.87

Sornarajah explores the links between the investment regime and the neoliberal agenda emanating from the Northern States, arguing that this agenda is broadly opposed to the interests of the South, and calling for concerted action from developing countries as a whole to “put forth a collective stand and be united in their opposition to investment treaties which would otherwise engender them to surrender their control over their natural resources.”88

Closely linked to this perspective, Sundhya Pahuja illuminates a hidden mechanism in the operation of international law whereby the particular interests of the

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88 Sornarajah, 2011, supra note 86, p. 203. See also the proposal of “An Agenda on Investment for Developing Countries”, in Luisa Bernal (et al), 2004, supra note 86, pp. 22-24.
developed States are successfully positioned as ‘universal’ values, underpinning and grounding the law, giving it foundational meaning and determining its structure and teleology.\(^89\) These universal values are held in place by the basic concept of the good, common to all nations and all human beings; economic development. Development is the transcendent value, the self-evident good that gives meaning to international law without being seen to do so.\(^90\) The key is that the developed States retain a definitional and juridical monopoly over this concept, having after all invented it following the Second World War.\(^91\) Pahuja applies this perspective to the conflict in the 70s between North and South over the shape of foreign investment regulation. She demonstrates how Southern demands for Permanent Sovereignty over Natural Resources, a New International Economic Order, and domestic political control over their economies, were “transformed by, and subsumed within, a nascent regulatory framework dealing with foreign investment.”\(^92\) The energy in the South’s political claim for national sovereignty, through its basic goal (economic development), was channelled by the Northern definition of

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\(^90\) Ibid, p. 7. Or, as Rajagopal terms it, development can be thought of as a hegemonic concept, structuring, ordering and valuing a host of (if not virtually all) other concepts. Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, Cambridge, 2003).


\(^92\) Pahuja, 2011, supra note 89, p. 96.
the goal itself into a formulation of an investment regime that would attract foreign investment and deliver development by protecting foreign investment.

To Pahuja’s analysis it is only necessary to add that the central part of this universalising dynamic is the positioning of foreign investment as the driving force of development, equating this source of capital with development itself. The transcendent and self-evident necessity of foreign investment then washes through and colours the international regimes with which it has immediate interaction, those of financing for development and investment ‘regulation’. And this dependence, though only of particular benefit to investors, is hidden by its obviousness as a universal organising principle. Even if it is recognised at the fringes that foreign investment is not always beneficial, nevertheless, it is never questioned that it remains necessary for development. This debate then turns on how to ensure its benefits rather than how to avoid or question its necessity in the first place. We would have to recognise then, that there is no actual necessity beyond the deliberate creation of a regime or system that makes it so. These questions mean that we would have to recognise the distribution of resources through the regime of financing for development as a choice made by the wealthy and the powerful.

Complementing Pahuja, the role of investment arbitrators in controlling and determining the policies of developing

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93 Yet, it is possible to argue that to some extent FDI dependence permeates all international regimes. After the two addressed here, the environmental regime would perhaps be the next most affected, as is witnessed by the heavy reliance on the private sector and market-based mechanisms in international debates and policy responses relating to climate change.
countries is analysed through the TWAIL framework by Van Harten in reference to one particular dispute involving India.\textsuperscript{94} He describes how arbitrators loyally reproduce the received definition of development and re-inscribe the paradigm of FDI dependence in their decision-making. He also finds evidence of institutional bias in the investment regime, which is an important element of the ‘universalising’ mechanism described by Pahuja.\textsuperscript{95} This institutional bias is also supported empirically by McArthur and Ormachea, noting that investors from the richest countries are the most likely to obtain ICSID jurisdiction for the resolution of their claims. … Compared to investors of all other nationalities, U.S. investors have been 40\% less likely to fail in having claims heard at ICSID. Since claims brought by U.S. investors account for fully one-third of all ICSID cases, this is a remarkable finding.\textsuperscript{96}

According to Hachez and Wouters evidence of bias will mount and heavy criticism of the regime will only intensify in the near future. The internal contradictions of the regime will become increasingly evident and minor adjustments will not allay intensifying concerns.\textsuperscript{97} In fact, incremental reform only seems to bring into greater relief the necessity of “a sea change” and “a pressing need for (r)evolution”.\textsuperscript{98}

\textsuperscript{94} Van Harten, 2011, supra note 86.


\textsuperscript{97} Nichloas Hachez and Jan Wouters, ‘International Investment Law in the Twenty-First Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitration Model?’ in Beatens (ed.), 2013, supra note 55.

\textsuperscript{98} Baetens, 2013, supra note 76.
In its depth and scope the ‘storm brewing’ school readily recognises that much that is wrong with the current regime stems from the mode in which it has been concluded; vastly unequal bilateral negotiation. An important part of the call for a fundamental renegotiation is that it should take place in a multilateral setting where such power discrepancies are automatically lessened even in the absence of specific procedural rules on negotiations mandating cooperative practices.99 A true development dimension cannot be included in any regime without collectively addressing the determinants of the competitive struggle that precludes it. As Zhan, Weber and Karl put it,

[t]he key issue for the future development of the [international investment] organism will be whether this new phase of globalization will take place in a spirit of cooperation or confrontation.100

This is not just a ‘pure’ political choice. Human rights law places an obligation on States to cooperate in exactly these situations. The human rights critique of the investment regime has been mostly limited to the ‘troubled waters’ school, and has had very little to say on the issue of a need for fundamental renegotiation. This is no doubt a reflection of the fact that recent developments on the extraterritorial obligations on States to cooperate in the realisation of human rights have not yet reached a substantial section of the

100 James Zhan (et al), 2011, supra note 99, p. 204.
human rights community, and are even more sparsely acknowledged among those writing on investment issues. However, this in no way lessens the reality of those obligations.\footnote{Sigrun Skogly, Beyond National Borders: States’ Human Rights Obligations in International Cooperation (Intersentia, Antwerp, 2006), pp. 4 and 13.} This set of cooperative obligations provides the basis of a human rights critique of the current regime that fits squarely in the ‘storm brewing’ school and has a very substantive amount to say about the need as well as the process of a fundamental renegotiation.

With regards to the accommodation of human rights or other ‘external’ issues, the storm-brewing school tends to see the current investment arbitration model, in line with the system as a whole, as deeply and inherently compromised and in need of total re-imagining. The complete failure of tribunals to engage meaningfully with human rights arguments raised by third-party interveners and developing countries themselves in their defence, is often pointed to as an important element of these deeper critiques calling for a fundamental renegotiation. In contrast to the oft-noted theoretical possibility of harmonisation and integration it is this stark reality of disregard and isolation to which we now turn.
4.2 – Reality Part I – Various Cases

Simma and Hirsch are among the majority expressing the opinion that when faced with possibly incompatible human rights or other non-investment norms, tribunals are obligated “to examine the source of the relevant non-investment obligation ... [to] determine whether such an inconsistency exists”, and to give effect to a fair balance between differing norms.\footnote{Hirsch, 2006, supra note 52, p. 26.} Failure to do so would mean that “its reasoning with regard to that matter would be insufficient—with all the consequences attached to this default.”\footnote{Simma, 2011, supra note 31, p. 591. See also, Sornarajah, 2010, supra note 4, pp. 228-229.} Arbitrators have taken disparate and unprincipled approaches in such situations,\footnote{“[C]ontemporary international investment law does not offer a systematic set of rules to be applied to such questions. International investment tribunals that encountered such questions have tended to address these questions in a sporadic manner.” Hirsch, 2006, supra note 52, p. 12.} yet they are nonetheless united in an effort to dismiss human rights issues through procedural or definitional sleight of hand, avoiding completely any substantive engagement with the relevant norms and arguments, or otherwise rationalising them out of relevance.\footnote{Clara Reiner and Christoph Schreuer, 'Human Rights and International Investment Arbitration', in Dupuy (et al eds.), 2009, supra note 9, pp. 89-90; Simma and Desierto note that “there has not yet been an arbitral decision that fully and squarely adjudicates the issue of a State’s fulfilment of human rights obligations alongside investment treaty obligations.” Bruno Simma and Diane Desierto, ‘Bridging the Public Interest Divide: Committee Assistance for Investor-Host State Compliance with the ICESCR’ 10 Transnational Dispute Management 1 (2013), p. 1.}
Tribunals in a number of Argentinean cases have consistently demonstrated myopia in regard to the social context of the investors’ claims. In *Azurix* the State provided an expert witness who verified that a conflict, or incompatibility, between the BIT protections and human rights must be resolved in favour of the latter “because the consumers’ public interest must prevail over the private interest of [the] service provider (sic).”\(^\text{106}\) The detail of this argument as made by Argentina is unknown, however, in a 164 page award the tribunal dismissed its relevance in a single sentence.\(^\text{107}\) In the *Siemens* case Argentina argued that it was obligated to honour a number of international human rights treaties, which have constitutional status under the State’s domestic law. Again, this human rights argumentation was summarily dismissed.\(^\text{108}\) In the *Sempra* award, arguments by the State based on the Inter-American Convention on Human Rights were also disregarded.\(^\text{109}\)

Elsewhere, in *Biwater Gauff v. Tanzania*, the tribunal did take into account certain non-investment concerns, but did not adopt any of the human rights reasoning presented by *amicus curiae* in the case,\(^\text{110}\) and in this regard remained wed

\(^{106}\) *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para 254.

\(^{107}\) The tribunal stated that “[t]he matter has not been fully argued and the Tribunal fails to understand the incompatibility in the specifics of the instant case.” *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para 261.

\(^{108}\) “This argument has not been developed by Argentina. The Tribunal considers that, without the benefit of further elaboration and substantiation by the parties, it is not an argument that, *prima facie*, bears any relationship to the merits of this case.” *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para 79.

\(^{109}\) *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, paras 331, 332.

to “an exclusively investment law inspired point of view.”

Similarly, Quechan Indian claims of indigenous rights as imposing relevant duties on the US were ignored in a decision by a NAFTA tribunal in *Glamis Gold v. United States of America.*

Human Rights arguments raised by *amici* in *Methanex v. US* were also sidestepped. And finally, in *von Pezold and Border Timbers v. Zimbabwe,* an amicus curiae application from an NGO and four local indigenous communities was rejected on highly controversial grounds, effectively barring the tribunal’s consideration of the human rights issues raised. More pointedly however, the tribunal

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stated that the human rights norms referred to by the petitioners were “unrelated to the matters before” the arbitrators. The only support for this assertion was that neither the State nor the investor directly referred to human rights.\footnote{von Pezold and Border Timbers v. Zimbabwe, Procedural Order No. 2, 26 June 2012, para 57.} Despite the indigenous claim to the lands at issue, and the relevance of the UN Declaration on the Rights of Indigenous Peoples, the tribunal nevertheless could not see any evidence or support for [the] assertion that international investment law and international human rights law are interdependent such that any decision of these Arbitral Tribunals which did not consider the content of international human rights norms would be legally incomplete.\footnote{Ibid, para 58.}

For those placing their faith in interpretational techniques elaborating on the Vienna Convention, one study covering 98 decisions has found that “[t]he way in which ICSID tribunals use interpretive arguments in practice is often quite far removed from the structures set out in Articles 31 – 32 of the VCLT.”\footnote{Ole Fauchald, ‘The Legal Reasoning of ICSID Tribunals: An Empirical Analysis’ 19 European Journal of International Law 2 (2008), pp. 358-359.} Tribunal’s treatment of these rules was in general very brief and they were used only as general arguments in support of the tribunals’ approaches in almost all decisions. Only in exceptional decisions did tribunals
integrate the VCLT into their reasoning beyond general references.  

In addition, only four decisions referred to general principles of international law. These considerations, in the context set out above, paint a picture of a regime in far deeper crisis than that of teenage adjustment as in Stern’s imagery, and expose the lack of veracity in Fry’s assertions of an exaggerated and purely hypothetical conflict with human rights norms masking an underlying compatibility. They tend to place the institutional structure of the regime into serious question despite Schill’s assertion of its adequacy, and they lend a great amount of weight to Simma’s conclusion that making the protection of human rights subject to appropriate interpretation by arbitrators is not a strategy to be relied upon, even if those arbitrators are replaced. There is a big gap between taking human rights into account and taking them seriously. Without fundamental alteration, Kriebaum is refreshingly forthright in making it clear that,

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120 Ibid, p. 314. This point is echoed by Waibel, noting that, “many investment awards demonstrate a cavalier attitude” towards the application of the interpretive articles of the Vienna Convention. Michael Waibel, 2011, supra note 35, p. 29.
121 Fauchald, 2008, supra note 119, p. 357.
122 See text to footnote 22 above.
123 See text to footnote 19 above.
124 See text to footnotes 8, 9, 17 and 18 above.
125 See text to footnotes 30-33 above. See also, Vid Prislan, ‘Non-Investment Obligations in Investment Treaty Arbitration: Towards a Greater Role for States?’, in Beattes (ed.), 2013, supra note 55. Gus Van Harten, in a recent interview, states plainly; “The point is the people making the decision are the wrong people … and whatever decision they make, it will lack integrity as a result.” Jeremy Hunka, ‘Calgary-Based Mining Company Suing Costa Rica for More than $1 Billion’, Global News, 4 October 2013.
127 For a suggestion on the inclusion of evidence and argument from the Committee on Economic, Social and Cultural Rights to aid tribunals in the process of deciding on “complex public interest arbitrations involving fundamental economic and social rights”, see, Simma and Desierto, 2013, supra note 105, pp. 4-5.
“human rights will never take centre stage but will be relegated to a supporting role” at most.\textsuperscript{128} Others argue convincingly that human rights and investment protections operate on different planes and are not amenable to balancing at all.\textsuperscript{129} The position taken here is that the evidence from arbitral tribunals to date destroys any faith in the ability of the current regime to be anything but a barrier to the vindication of human rights without fundamental and radical renegotiation.

4.3 – Reality Part II - Revisiting Argentina as Exemplar

The recent history of Argentina provides a terrain on which to demonstrate the exemplary interplay between the dictates of the dominant development paradigm, their enforcement by the investment regime, and the conflict between these processes and human rights law, within an accordingly neo-


liberalised, disciplined and re-structured State. Despite an optimistic but ultimately misleading refrain on the formal equality and possible harmonisation between investment and human rights regimes, the case at hand depicts an outright conflict, which is resolved through a de facto elevation of the investor’s interest over human rights law.¹³⁰

4.3.1 – An Exemplary Neoliberal Pupil

In the 1990s Argentina dramatically liberalised trade restrictions and capital movements, and carried out extensive privatisation and deregulation.¹³¹ In particular, the country became deeply dependent on foreign investment for development capital and entirely restructured its orientation towards foreign investors accordingly, both internally and externally. During the last decade of the twentieth century it attracted one of the greatest shares of FDI in the developing world. The nation is therefore a prime case study for examining the operation of FDI dependent development.

After a decade of extreme neo-liberalism Argentina found itself sunk in severe depression and crisis at the end of the

¹³⁰ ‘Conflict’ here is referred to in its broader sense, as extant when “one norm constitutes, has led to, or may lead to, a breach of the other”, where the word ‘breach’ is meant to be interchangeable “with ‘violation’, ‘incompatibility’ or ‘inconsistency’.” Joost Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law (Cambridge University Press, Cambridge, 2003), pp. 175-176, footnote 45. With respect specifically to conflicts involving human rights norms see, Marko Milanovic, ‘Norm Conflict in International Law: Whither Human Rights?’ 20 Duke Journal of Comparative and International Law (2009).

twentieth century. The situation was so severe “that over 50% of the population was living below the official poverty line, and almost one quarter of all Argentineans were in a state of indigence.”

Dependence on foreign investment brought with it a distinct class bias that resulted in a dramatic increase in inequality and a decline in the living standards of the majority of the populace. This amounted to a marked regression in socio-economic rights. Argentina is indicative of a broader pattern wherein neo-liberalism has failed to bring “any appreciable improvement in growth, cross-national equality, employment, or national debt loads.” Furthermore, Argentina is a clear example of the deep connection between authoritarian government and rapid and deep neo-liberal restructuring against the interests and the well-being of the majority of the population.

In the 1970s Perón’s populist government could not get consistent support from the IMF. However, the Fund’s attitude changed when the military took over the country in 1976. Only a week later, once it was clear that neo-liberal policies would be implemented by the regime, the military

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134 For an extensive treatment of this opposition see, O’Connell, 2007, supra note 129.
government received an IMF loan of $100 million, followed five months later by another, the largest ever endorsed at that time to a Latin American country at $260 million. In the early 80s the democratically elected Alfonsín government sought to change direction again by adopting a heterodox development path aimed at a more equal distribution of income. Going against the advice of the IMF, this led to a collision of wills in the context of the debt crisis, which the government was destined to lose due to its ultimate reliance on IMF support and foreign investment.

This became a pattern during Alfonsín’s tenure, characterised by a consistent series of crises created by the tension between an internationally imposed development paradigm and the heterodox demands of the domestic economy. Throughout this period the national debt continued to balloon causing Alfonsín to suspend interest payments, eliciting a severe response from the IMF, forcing Argentina “back on the neo-liberal track.” The doomed attempt to meld a pro-working class heterodox macroeconomic approach developed domestically, within the dominant neo-liberal demands of conditionality precipitated another inflationary crisis. The Fund exerted influence on Alfonsín to resign before his term was complete. This was successful and cleared the stage for a ‘strong’ government with IMF backing that was seen to be able to take control and assuage the fears of a disconcerted and damaged electorate.

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137 Cooney, 2007, supra note 132, pp. 11-12.
140 Cooney, 2007, supra note 132, p. 17.
The overall state of policy confusion\textsuperscript{141} gave the pretext for the introduction of ‘shock-therapy’ measures.\textsuperscript{142} Any heterodox vestiges in policy were expelled,\textsuperscript{143} “dismantling the coalition of business and labour interests who were tied to the postwar model of State-led industrialisation in a semi-closed economy,”\textsuperscript{144} and opening the country completely to foreign investment.\textsuperscript{145} The new era was introduced in 1989 by President Carlos Menem, freshly installed with the backing of the IFIs. The World Bank, IMF and the US Administration were heavily involved in the design, coordination and implementation of the reforms. The approval and direction of the IMF was particularly dominant.\textsuperscript{146} By all accounts the responsibility for the adoption of these extensive structural adjustment measures must be shared.\textsuperscript{147}

\textsuperscript{144} Ibid., p 55.
\textsuperscript{145} Baer (et al), 2002, supra note 141, p 64.
\textsuperscript{146} For example, in 1989 it issued a standby loan to Argentina despite the exchequer being $5.3 billion in arrears to the financial institution in unpaid interest. Smith, 1991, supra note 143, p 55.
\textsuperscript{147} Jose Antonio Ocampo, ‘Preface’, in Jan Teunissen and Age Akkerman (eds.), The Crisis That Was Not Prevented: Lessons for Argentina, the IMF,
Argentina was highly praised as a perfect example of the globally integrated developing country. Only two years before the onset of severe crisis the IMF’s Managing Director effused that Argentina’s economic policy was “the best in the world.”\footnote{Jose Antonio Ocampo, The Mistaken Assumptions of the IMF, in Teunissen and Akkerman (eds.), 2003, Ibid, p 26.} The culpability of the IMF in Argentina’s eventual downfall is admitted by Michael Mussa, who was the Director of the Department of Research at the IMF for the relevant decade.\footnote{Michael Mussa, Argentina and the Fund: From Triumph to Tragedy (Institute for International Economics, Washington DC, 2002).} Stiglitz also notes the importance of IMF involvement in the making of the Argentinean catastrophe.\footnote{Joseph Stiglitz, ‘Argentina, Shortchanged - Why the Nation That Followed the Rules Fell to Pieces’, Washington Post, 12 May 2002.}

Central to the ultimate crisis was Menem’s introduction of the Convertibility Law, pegging the local currency to the US dollar at a one to one ratio.\footnote{Law No. 23.928, 27 March 1991, [LXI-B] A.D.L.A. 1752, amended by Law No. 25.445, 21 June 2001, [LXI-D] A.D.L.A. 4043. From Paolo Di Rosa, ‘The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues’ 36 University of Miami Inter-American Law Review 44 (2004-2005), p. 44, footnote 10.} This was aimed at controlling inflation but also prevented Argentina from devaluing its currency in order to ameliorate difficulties in the balance of payments and finance budget deficits through its central bank. The law therefore, greatly reduced the State’s control over its own macro-economic destiny and development strategy, and crucially reduced its financial policy flexibility, making the nation especially susceptible to the negative

effects of external economic shocks and crises.\textsuperscript{152} In addition, it has been shown that the convertibility plan had decidedly negative effects on employment, income distribution, poverty levels and wage rates.\textsuperscript{153}

Another key aspect was a widespread privatisation “of a massive number of State entities”, particularly in the area of public services.\textsuperscript{154} This was enabled by the 1989 State Reform Law, which enabled the government to initiate a programme of “full-scale privatisation”\textsuperscript{155} resulting “in one of the most ambitious and accelerated structural reform programmes ever implemented.”\textsuperscript{156} Believing in the merits of FDI over the fostering of local capacity,\textsuperscript{157} the State took a raft of measures enticing foreign investors to purchase long-term concessions and licences instituting a thoroughly ‘investor-friendly’ framework\textsuperscript{158} that was advertised “far and wide with the assistance of leading US investment banking firms.”\textsuperscript{159} Key elements of this framework included the repeal of any restrictions on the entry of foreign investment and the introduction of a number of new domestic legal guarantees to investors.\textsuperscript{160} Concession contracts were also designed on

\textsuperscript{152} Baer (et al), 2002, supra note 141, p 64. “Pegging the currency to the dollar ... was a system doomed to failure. Fixed exchange rates have never worked.” Stiglitz, 2002, supra note 150.

\textsuperscript{153} Baer (et al), 2002, supra note 141, pp. 67-71. See also, Ocampo, 2003, supra note 148, p 23.


\textsuperscript{155} “Privatization included airlines, assembly operations, electricity, gas, telecommunications, highways steel, railways, shipping, water utility, petrochemical plants, insurance and the state petroleum company (YPF).” Baer (et al), 2002, supra note 141, p 64, footnote 1.

\textsuperscript{156} Petrecolla (et al), 1993, supra note 154, p 68.


\textsuperscript{158} Smith, 1991, supra note 143, p 64.

\textsuperscript{159} Di Rosa, 2004-2005, supra note 151, p. 45.

\textsuperscript{160} Cooney, 2007, supra note 132, p. 18.
extremely favourable terms, severely reducing leeway for the State to control foreign investors in sensitive sectors.

The international cornerstone of these structural reforms was an extensive programme of BIT negotiations resulting in the rapid and deep integration of the State into the nascent international investment regime.\textsuperscript{161} Over 50 such BITs were signed by Argentina in the last decade of the twentieth century.\textsuperscript{162} The government’s aim of attracting FDI was highly successful in terms of volume,\textsuperscript{163} though it has been noted that two thirds of total FDI was in the form of mergers and acquisitions rather than ‘greenfield’ investments.\textsuperscript{164} A very large percentage of these acquisitions were of previously State-run utilities. The privatisation process accounted for 75\% of the inflow of FDI between 1990 and 1995,\textsuperscript{165} and by the middle of the decade nearly all State-owned utilities and enterprises had been sold off.\textsuperscript{166} As Collinson notes,

\begin{itemize}
\item \textsuperscript{161} Alvarez showed particular prescience in 1992; “For Latin American countries dissatisfied with the import substitution model of development, the BIT represents a return to the earlier days of reliance on FDI - before they learned to fear becoming dependent.” José Alvarez, ‘The Development and Expansion of Bilateral Investment Treaties: Remarks’ 86 \textit{American Society of International Law Proceedings} (1992), pp. 552-553.
\item \textsuperscript{162} Di Rosa, 2004-2005, supra note 151, p. 45. 28 were entered into with States of the western hemisphere and the European Union, covering all of the major capital exporters. Bouzas and Chudnovsky, 2004, supra note 131, p. 8.
\item \textsuperscript{163} “As a result of the FDI boom through take-overs, acquisitions and privatizations, foreign firms increased their share in sales of the 1,000 largest firms from 39\% in 1992 to 67\% in 2000. During that period the number of foreign firms among the 1,000 largest also increased from 199 to 472.” Bouzas and Chudnovsky, 2004, supra note 131, p. 8.
\item \textsuperscript{166} Baer (et al), 2002, supra note 141, p 66.
\end{itemize}
There is little doubt that the BITs signed between Argentina and their major sources of capital in North America and Europe were designed to make this happen. The vast majority of BITs signed between Argentina and capital exporters were signed in 1990 and 1991; the epicentre of the first wave of privatisations. In this sense Argentina’s BITs were highly successful.\textsuperscript{167}

The abandonment of industrial policy space in exchange for an increased volume of FDI has led to a distinct setback in Argentina’s development. Until recently the nation was in a process of deindustrialisation, or reverse development, most concentrated in the 1990s, whereby the contribution of industry to the GDP declined from 36 percent in 1990 to 28 percent in 2000.\textsuperscript{168} This phase of deindustrialisation coincides with Argentina’s insertion into the current investment regime, which served to lock the country into this process and permanently stifle its development prospects. Very short-term gains were traded for long-term underdevelopment.

While it is true that Argentina experienced spurts of strong superficial GDP growth in the 1990s, the \textit{specific} developmental consequences of Argentina’s neo-liberal structural reforms are widely noted and consistently negative. The cost of public utility privatisation was borne extensively by the consumers and the general labour force.\textsuperscript{169} Demonstrating the extremities demanded by the neo-liberal paradigm, the Menem government attempted to gain the

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\textsuperscript{167} Collinson, 2008, supra note 165, p. 13.
\textsuperscript{169} Baer (et al), 2002, supra note 141, p 67.
\end{flushleft}
union’s collusion by asking for a moratorium on strikes for two years in order to “ensure the success of its economic reforms.” Privatisation resulted in a substantial increase in unemployment due to retrenchments and downsizing. Exacerbating this situation, prices of utilities increased at a rapid rate affecting a straightforward transfer of resources from domestic consumers to foreign investors. This was enabled and aggravated by the overly generous nature of the concession contracts awarded in the context of a virtual absence of regulation. There were three very important additional benefits to these concession contracts; tariffs on privatised public utilities were to be calculated directly in US dollars; they were to be adjusted regularly in line with the US inflation rate; and licences could not be rescinded or modified without the consent of the investor.

Investors in monopolised sectors, such as water provision and telecommunications, enjoyed immense opportunities for profit-making as they were regulated neither by the official authorities nor by the unofficial mechanism of a competitive market assumed by neo-liberal theory. The international

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170 Smith, 1991, supra note 143, p 56.
171 “Privatisations of state enterprises had a rather significant impact on unemployment in Argentina, especially in the provinces. A total of over 110,000 workers were laid off between 1990-1993. This increase in unemployment had the greatest impact in the poorer provinces.” Cooney, 2007, supra note 132, p. 19.
173 Baer (et al), 2002, supra note 141, pp. 73-74. See also Ibid, p. 71.
investment regime saw to it that there could be no capital controls to regulate the transfer of profits and resources out of the country. Furthermore, the speed and haste with which the privatisation process unwound also led to a severe undervaluing of the State’s assets, and as such the price paid by foreign investors for public utilities was well below real cost.\textsuperscript{176} Not only did the IMF provide “a significant external push by strongly advocating these policies”, it also played a direct role in “supporting TNCs in subsequent negotiations” over the terms of concessions.\textsuperscript{177}

The influx of FDI brought no significant knowledge or technological spill-overs.\textsuperscript{178} Instead, as pointed out above, it had the opposite effect of catalysing a period of deindustrialisation. In addition, and in line with Woodward’s analysis above (section 2.3), there were very significant negative effects on the nation’s external debt and balance of payments, as well as the net transfer of resources out of the country, meaning that the flood of unregulated FDI subject to no capital controls played a very significant part in causing the eventual crisis.\textsuperscript{179}

Argentina’s experience with FDI highlights again the necessity of policy space for development, in order to regulate

\textsuperscript{176} Petrecolla (et al), 1993, supra note 154, pp. 78-79. See also, Solanes, 2006, supra note 175, p 154, footnote 2.


\textsuperscript{178} Bouzas and Chudnovsky, 2004, supra note 131, p. 57.

\textsuperscript{179} Ibid, p. 55. “[T]he data available suggest that, except in years of remarkably high inward FDI flows -as was the case in 1999, the global contribution of subsidiaries to the balance of payments was probably nil and, what is more important, may have been even negative depending on the size of new inflows.”
and control FDI such that actual benefits arise.\textsuperscript{180} The scope for employing the appropriate industrial policies for national development and for extracting any potential benefit from inflows of FDI was largely removed by the ‘investment-friendly’ policy and regulatory context deemed necessary to attract it in the first place. The legal certainty provided by the international investment regime is the key regulatory aspect. Therein lies the bind, perfectly demonstrated in the Argentinean ‘textbook’ case. The neo-liberal FDI dependent paradigm simultaneously makes a promise of development and removes the possibility of its realisation.\textsuperscript{181}

4.3.2 – Economic Crisis and the Avoidance of a Complete Meltdown

The restructuring of the State in accord with the neo-liberal development paradigm had a direct effect on the onset and severity of the subsequent crisis. Almost at the peak of the crisis in 1999 the Committee on Economic, Social and Cultural Rights (CESCR) examined Argentina’s second periodic report, stating in clear terms that “the implementation of the structural adjustment programme has hampered the enjoyment of economic, social and cultural rights, in particular by the disadvantaged groups in

\textsuperscript{180} Ibid, pp. 51 and 57.

society.”\textsuperscript{182} It recommended that the government, “when negotiating with international financial institutions, take into account its Covenant obligations to respect, protect and fulfil all of the rights enshrined in the Covenant.”\textsuperscript{183}

The irony is palpable. Although from a narrow perspective and a limited definition of ‘choice’, the Argentinean government could be said to have adopted such a thoroughgoing restructuring, it did so according to a specific set of principles and an ideology that external forces made it consistently more and more costly to avoid.\textsuperscript{184} These forces precluded a coherent implementation of the alternative heterodox policies of Alfonsin and Perón that were aimed at directly addressing the same concerns of the CESCPR. Yet the same forces provided almost limitless financial support for the neo-liberal turn of the dictatorship and the Menem administration. However, that turn was destined to bring calamity.\textsuperscript{185}

During the wave of neo-liberal reform that swept Latin America only three countries temporarily recorded a better economic performance than was previously experienced under inward-looking heterodox policies, even if they were


\textsuperscript{184} Onis, 2006, supra note 157, p. 243.

incoherently implemented and externally sabotaged. In 2003 Rodrik surveyed their prospects:

Chile remains a success, in part because it has taken a cooler attitude towards capital inflows than the others. Uruguay looks shaky and is hardly an inspiring example in any case because its growth rate has been anaemic. And Argentina now lies in ruins.186

Despite surges in GDP growth, these neo-liberal policies had an obviously negative affect on the economy and Argentinean society as a whole, leading to an undeniable regression in socio-economic rights.187 The privatisation programme garnered an initial, one-off, return from the ‘fire-sale’ of public utilities that helped for a while to balance the external debt, but resulted in the loss of future revenue streams, an increase in unemployment, and a net exodus of capital.188 Informal work in Buenos Aires rose to 38% of all employment in the city, with wages roughly half those of the formal sector. At the height of the crisis unemployment was over 20% and when combined with underemployment over 40%.189 Average annual income per capita fell from $8,500 in the late 90s to $2,800 in 2002.190 Poverty rose from 12.5% in 1986 to 42% in 2002, and the indigent, those who could not even afford food,

188 Due to the privatisation of social security, for example, the public lost $52 billion to the private sector over the six years prior to 2000. Cooney, 2007, supra note 132, p. 18-20.
rose from 3% to 25% of the population during the same period.\textsuperscript{191}

The extremity of financial deregulation and openness, and deep integration into the global market meant that the domestic economy was easily held hostage to external influence and the confidence of international investors.\textsuperscript{192} As Argentina was rocked by crises in Mexico, Asia and Brazil, as its external debt ballooned, and as it could not devalue its currency because of the convertibility scheme, this confidence was lost.\textsuperscript{193} Resulting divestment from the Argentine economy and a run on domestic withdrawals began a self-fulfilling prophecy whereby investors’ belief in economic collapse ensured its inevitability. As Stiglitz notes, this was all largely out of Argentina’s control.

\textit{[A]t the centre of Argentina’s budget deficits, however one assesses them, was not profligacy but an economic downturn, which led to falling tax revenues. Soaring [international] interest rates resulted not so much from what Argentina did but from the mismanaged global financial crisis of 1997-98.}\textsuperscript{194}

The only possible way out was to terminate the convertibility scheme, devalue the peso and default on the debt. These moves were resisted and advised against by the IMF, up to the

\textsuperscript{191} Solanes, 2006, supra note 175, p. 151.
\textsuperscript{192} Cooney, 2007, supra note 132, p. 18. See also, Onis, 2006, supra note 157, p. 239; “A central conclusion is that ‘new’ or unconsolidated democracies find themselves particularly vulnerable when they are suddenly and prematurely exposed to financial and capital account liberalisation.”
\textsuperscript{193} The Argentinean crisis would not have occurred but for the country’s dramatic openness to the global economy, to FDI and to the international financial markets. Stiglitz, 2002, supra note 150.
\textsuperscript{194} Ibid. See also, Ocampo, 2003, supra note 148, pp 23-24.
point where it was obvious that if they were not carried out only extreme civil unrest, violence and possible revolution could be expected.

At the same time as the onset of the full crisis was evident in 1999-2000, the IMF was still advocating budget cuts instead of stimulus in order to service the debt, which was only a recipe for more disaster. These austere demands forced the government to announce a cut of an entire 18% of its total budget in December 2001, annulling social welfare programmes, reducing pensions and cutting public sector salaries by 20%. $3 billion was lent as the full onset of the crisis began in 1998 and further loans of $13.7 billion (plus arranged funding of another $26 billion from other sources) in 2000 and $8 billion in 2001 had no effect on the deepening crisis because of the detrimental conditions attached, resulting only in increasing debt and decreasing investor confidence.

The unsupportable debt was the central factor in the unfolding crisis. From $10 billion in 1976 it grew to $146 billion in 2000, with the most dramatic increase over the period 1993-2000, where it doubled. In an alleged effort to help right the balance and maintain interest payments the

195 “Yet the IMF said make cuts, and Argentina complied... Not surprisingly, the cuts exacerbated the downturn; had they been as ruthless as the IMF had wanted, the economic collapse would have been even faster.” Stiglitz, 2002, supra note 150. See also, Onis, 2006, supra note 157, p. 248-9.
197 Ibid.
198 Cooney, 2007, supra note 132, p. 27. For an insightful discussion of the legality or otherwise of a failure to repay its debt see, Sabine Michalowski, ‘Repayment of Sovereign Debts from a Legal Perspective: The Example of Argentina’, in Janet Dine and Andrew Fagan (eds.), Human Rights and Capitalism (Edward Elgar, Cheltenham, 2006).
199 Cooney, 2007, supra note 132, p. 27.
IMF continued to loan, and Argentina was forced into
dependence. This led to a situation where Argentina paid over
$60 billion solely in interest over the period of the 90s while
the total stock of debt increased dramatically.\textsuperscript{200} This stock
ultimately became unsupportable. As one author notes,

\begin{quote}
[t]he last straw was when the IMF reneged on a payment to
Argentina of $1.3 billion at the beginning of December
2001. This state of affairs led to the spontaneous street
protests of the \textit{cacerolazos} (the banging of pots and pans)
and an increase in the highway blockades of the \textit{piquetero}
movement in Buenos Aires and across the country.\textsuperscript{201}
\end{quote}

Civil unrest quickly escalated and by the end of the month
(following a general strike, rioting, a popular insurrection in
central Buenos Aires and a declared state of emergency) the
government had fallen. There followed intense social and
political turmoil that resulted in 32 deaths.\textsuperscript{202} Within a two
week period, five successive presidents were ousted from
office. Finally Argentina defaulted on a foreign debt load of
$155 billion, at that time the largest sovereign default in
history.\textsuperscript{203} The convertibility regime was scrapped, resulting in
a devaluation of the peso to a quarter of its previous value.
This was all accomplished pursuant to the Emergency Law
passed in January 2002.\textsuperscript{204}

\begin{flushleft}
\textsuperscript{200} Ibid, p. 28.
\textsuperscript{201} Ibid, p. 26.
\textsuperscript{203} MacEwan, 2002, supra note 196.
\textsuperscript{204} Public Emergency and Foreign Exchange System Reform Law, Law No.
25.561, enacted January 6, 2002. Importantly, this law terminated certain
benefits enjoyed by foreign holders of public utility concessions.
Specifically, the calculation of tariffs in US dollars and their adjustment to
US inflation was ended. Tariffs were transferred on a one to one basis into
the drastically devalued peso. The Law also indefinitely froze tariffs, ruling
out adjustment according to any indices, and required renegotiation of all
prior agreements in light of the existing dire circumstances.
\end{flushleft}
The implementation of the FDI dependent development paradigm was clearly a failure, yet as MacEwan points out, forging another alternative economic destiny is a daunting task for countries such as Argentina.\textsuperscript{205} As the preceding discussion illustrates, it is impossible to separate core policies demanded by an FDI dependent development paradigm from the actual causes of the crisis.\textsuperscript{206} Yet even if such a severe crisis had not struck there is convincing evidence that this development path would not have brought the results promised.\textsuperscript{207} Argentina is therefore a prime example of FDI dependent underdevelopment.

Local firms should have been fostered. Larger and more powerful foreign investors should have been selectively discriminated against to limit their exploitation of locally financed and produced technology, and foreign intrusion in certain sectors of the domestic economy should have been circumscribed, in order to promote development. Such actions

\textsuperscript{205} “In early February [2002], the finance ministers of the G-7 (the world’s seven wealthiest industrial nations) rejected Argentina’s request for a $20 billion loan, saying that the IMF must be on board in order to bring about a “sustainable” plan.” MacEwan, 2002, supra note 196.


would have conformed to the development trajectories of the successful Northern States (see section 2.5), yet they go directly against the grain of the dominant development paradigm. Instead, the international investment regime enforces compensatory payment for these measures. They amount to entry restrictions, post-entry performance requirements, or otherwise regulatory transgressions amounting to unfair and inequitable treatment, that are all prohibited by the current regime. So, in order to have a chance to develop, the host-State, already mired in debt, would have to pay to exit the system and restructure its FDI policy.

4.3.3 – Paying Twice for the Crisis

In fact, throughout the 90’s minor efforts were made by the government to take similar measures, in response to social pressures for employment, higher wages, lower charges on public utilities and more equitable distribution. Small adjustments to the regulatory regime to reign in the excessive escalation of tariffs are one example. Some of these measures were already the subject of early challenges by investors in the late 1990s. Yet the disciplinary effects of the investment regime inevitably kicked in on a grand scale.

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Argentina found that in its response to the crisis and in its attempts to pull itself out of a depression afterwards, it had lost control of the terms on which it settled accounts with the diverging interests of foreign investors under such pressing circumstances. These terms were ultimately decided by ad hoc arbitrators in ensuing investment disputes. In submitting to the investment regime Argentina effectively delegated the ability to decide where to draw the line between the benefits and costs of FDI to arbitrators operating under a regime instantiated for the sole purpose of protecting foreign investors. How then, could an unbalanced outcome be surprising?

There have been a total of 49 cases filed against Argentina to date,\(^\text{209}\) the vast majority of which were initiated by investors claiming damages from actions taken by the Argentinean government in order to avoid a complete economic collapse. The consequences of the Emergency Law would then form the basis of most claims. This avalanche of cases has made Argentina the most sued nation under the current investment regime. The macroeconomic effects of these decisions are substantial. It has been estimated that overall compensation from these claims could total as much as $8 billion, more than “the entire financial reserves of the Argentine government in 2002”, and could even reach 10 times that amount if all potential claims are included.\(^\text{210}\) At

\(^\text{209}\) [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=ViewAllCases](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=ViewAllCases), (26 Feb 2013).

\(^\text{210}\) Burke-White, 2008, supra note 69, p. 5. Elsewhere it is estimated that “over US $20 billion in damages are claimed in approximately 44 originally pending cases, amounting to approximately an annual budget of Argentina.” Anne van Aaken, “The International Investment Protection Regime through the Lens of Economic Theory”, in Michael Waibel (et al eds.), 2010, supra note 2, p. 539, footnote 6. These figures do not take into account legal and other costs.
the time of writing a number of claims are still ongoing, and some have only just begun. One case, begun after these financial estimates were made may force them to be substantially revised upward. In the pending case of Abaclat (see discussion in section 3.4.1 above) 60,000 Italian holders of Argentinean sovereign bonds have made an estimated claim of $2 billion.

In effect, the Argentinean people are being called upon to pay twice for the full package of neo-liberal policies adopted during the ‘90s. Not only did these policies lead to a social, political and economic crisis, a heavy price in itself, but the people are also expected to pay for the negative effects of that crisis on the foreign investors that the country was told to rely on for development. The widespread failure of these policies has been acknowledged by their own peddlers, and yet they are still pushed. As two commentators put it,

[a]t the end of the day we have a group of countries saddled with defective privatizations and regulations, plus

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\begin{itemize}
  \item See for example, Impregilo S.p.A v. Argentine Republic, ICSID Case No. ARB/07/17. In this case an Italian investor was awarded $21.2 million in damages when they had only paid $1.26 million in 1999 for a 30 year water treatment and service concession in Buenos Aires. This case is currently being assessed by an ICSID annulment committee. See, Jarrod Hepburn and Luke Peterson, ‘ICSID Round-up: Argentina Bondholders Tribunal Reconstituted, Hungary Tribunal Picked, and Two New Annulment Panels Chosen’, IA Reporter, 31 January 2012.
  \item Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5.
  \item See for example, Ioannis Kessides, Reforming Infrastructure: Privatization, Regulation, and Competition (World Bank, Washington DC, 2004).
\end{itemize}
inadequate economic assessments, and recognition of inappropriate advice. Yet, while negligence or lack of expertise may be shared among governments, advisors, banks, and companies, it is the governments that are being sued to fulfil contracts that were wrongly designed, assessed, and instrumented. And if the governments lose, their people will, in the end, be the payers.216

This situation can be pictured in terms of risk. According to mainstream theory, the managers of multinational corporations should naturally have to incur some risk when investing in a foreign country. Under current rules the risk factor is almost entirely removed. Uncertainty for investors is structurally minimised by the international investment regime, which “could eventually amount to an insurance policy against business risk” that frees investors while leaving all potential benefits and profit-making potential intact.217 However, who pays the premiums? The risk is not removed from the host-State, but shifted squarely onto its own shoulders alone. It pays heavily for risking the imposition of a development paradigm for which there is no real evidence of success, and it pays again when failure backfires against the supposed drivers of that paradigm. In other words the current investment regime enforces the transference of risk in the process of FDI dependent development from the investor to the host State.

In the majority of cases brought against it Argentina has paid dearly for this transference.218 These cases have contributed significantly to the legitimacy crisis in the investment regime. As Alvarez and Khamsi point out, they raise a core issue relating to the ‘grand bargain’ struck; sovereignty for development.219 The full depth of the legitimacy crisis is in the fact that this promise is not being fulfilled. As such, unless this promise can be shown to be real the fundamental legitimacy of the whole system collapses with the refutation of the bargain’s logic, and the exposition of the promise’s emptiness. While tribunals have made much of the legitimate expectations of the investors under this regime, there is rarely mention of the far more consequential and far more legitimate expectations of the host-State and the developing world as a whole, expectations of actual development and the increased dignity and well-being of billions of poor people; the terms of submission and forfeited sovereignty. Arbitrators are drawing the line between the benefits and costs of FDI for host State development. However this is happening within narrow and constricted margins set by the substantive rules of the regime. These rules set the margins far from the field of actual development.

Alvarez and Khamsi note that the most penetrating critiques of the investment regime are those that

direct attention to whether the requirements of some investment agreements ... hinder developing countries from adopting policies that other states enjoyed at comparable stages of their development.220

The failure of the underlying theory of development based on attracting FDI, and the role played by the economic and regulatory climate dictated by that theory, in actually precluding such development, is the core issue. More specifically, the above discussion has demonstrated the failure to provide technological advances and the failure to spur the competitiveness of local businesses. Instead, it is a prime illustration of the negative effects on the balance of payments, and a paragon of a process of deindustrialisation, increasing unemployment, higher prices and lower quality of utilities, and the list goes on. Alvarez and Khamsi counsel that for “the long-term viability of the regime”, there is a need for its supporters to prove, “that investment treaties deliver ... on their promises and that those real benefits exceed their costs”.221 The foregoing highlights that closer attention to the empirical evidence proves the opposite; that the bargain has no merit, that while the costs are real and heavy, the benefits are illusory, and that therefore the regime has no long-term viability.

Argentina raised partial human rights based defences in some previous arbitrations, however these arguments became more focussed in the Suez case. This was especially aided by an important amicus brief. These factors forced the tribunal in this case to the deepest engagement of any tribunal with

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221 Ibid, p. 473.
human rights law to date. In the *Suez* case, therefore, the Argentinean crisis also provides us with the clearest indication of how these regimes are set to interact.

4.3.4 – *Suez* - People and Profit
Come Head to Head

In the case of *Suez*, the facts relate to the purchase of a large 30 year water utility concession in Buenos Aires by a conglomerate of some of the world’s largest water corporations.\(^{222}\) As noted above the speed and bad management of the privatisation programme negatively affected the equitable distribution of the contractual outcome.\(^{223}\) The World Bank designed and recommended the particularly generous tariff structure, which was a key feature of the contracts, and an internal report reveals that the Bank hired external consultants that held high positions in the privatised corporate service providers, who then drafted the regulatory framework and prepared the privatisation documents.\(^ {224}\)

The relationship between the investors and the local authorities soon turned abrasive as numerous issues arose concerning the quality and supply of water to local inhabitants and the terms of the contract.\(^ {225}\) In 1994 the investors took a loan from the International Finance

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\(^{222}\) *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19.

\(^{223}\) Solanes, 2006, supra note 175, p 151.

\(^{224}\) Solanes and Jouravlev, 2007, supra note 216, p. 29.

\(^{225}\) Solanes, 2006, supra note 175, p 154.
Corporation, the conditions for repayment of which were actually price increases and reductions in investment, which were duly implemented, of course having a disproportionate effect on the poor. The original contract allowed the company to connect houses to the water supply that could not afford it, and then to bill the household for this connection even if no water was used. Disputes deepened as Argentina fell further into economic difficulty. The investors argued that the terms of the contract allowed them to raise prices for water supplied as the value of the peso dropped, in order to balance their books and maintain internationally competitive profit margins. They alleged a breach of contract as the State froze the price of water to maintain affordability and supply to the poorest of its inhabitants during the crisis. Acrimony increased, with the State making counter-claims of breaches by the company of contractual obligations regarding the quality and available supply of water. In 2006, Argentina unilaterally ended the concession, effectively nationalising the water supply to Buenos Aires in order, in its view, to ensure the affordable supply of clean

226 Ibid, p 158. “As of 2001 only 39% of the households of the Conurbano had water and sewerage. Only 66% had water. Just 40% had sewerage and 33% had neither. Thus, 56% of households in the poorest decile had neither water nor sewerage, and 83% had no sewerage. There were no direct subsidies to the poor until 2001”. Ibid, p 161.
227 Ibid, p 159.
228 This amounted to a threefold increase to 7.7 million people in regard to water provision and 5.8 million in regard to sanitation services during the crisis. See, Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Amicus Curiae Submission, Centro de Estudios Legales y Sociales (CELS), Asociación Civil por la Igualdad y la Justicia (ACIJ), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, Unión de Usuarios y Consumidores, Center for International Environmental Law (CIEL), p. 3, at http://www.ciel.org/Publications/SUEZ_Amicus_English_4Apr07.pdf (8-8-2014).
water to its people. The investors duly brought a claim to ICSID, where Argentina based a substantial part of its defence on the right to water. An *amicus* submission from a coalition of five NGOs was also accepted, which was advanced in support of the government’s stance on its international human rights obligations.

The human right to water is given its clearest formulation in General Comment 15 of the Committee on Economic, Social and Cultural Rights, devoted to the ramification of this right.\(^{230}\) The right to water is implicit in Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights,\(^{231}\) and explicit in Article 14(2) of the Convention on the Elimination of Discrimination against Women\(^{232}\) and Article 24(2) of the Convention on the Rights of the Child.\(^{233}\) Argentina has ratified all of these treaties. The CESC\(\text{R}\) has elaborated specific demands that the right places on States. They are obligated to ensure functioning regulatory systems to realise *de facto* public participation in all circumstances surrounding the provision of the right to water; they must ensure that water is affordable and equitably distributed with special provision for the poor and marginalised; and that third parties responsible for provision must ensure “equal, affordable and physical access to sufficient, safe and


acceptable water.”234 Under the obligation to respect the socio-economic rights of their people governments must ensure that their laws, administrative procedures and policies concerning the corporate sector conform to these rights, and that companies exercise due diligence to be certain they do not impede or negatively affect their realisation, particularly in times of crisis.235

Violations of this right may include; “arbitrary or unjustified disconnection or exclusion from water services or facilities”; “discriminatory or unaffordable increases in the price of water”; “pollution and diminution of water resources affecting human health”; “failure to enact or enforce laws to prevent the contamination and inequitable extraction of water”; and “failure of a state to take into account its international legal obligations regarding the right to water when entering into agreements with other states or with international organizations.”236 The requirement of affordability and economic access to water is of special relevance in this case. The CESC has elaborated that any “payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups.”237 Furthermore, the “direct and indirect costs and charges associated with securing water

236 CESC General Comment 15, supra note 230, para 44.
237 Ibid, para 27.
must be affordable, and must not compromise or threaten the realization of other Covenant rights.” The duties on States are, as such, relatively clear and demanding, justly reflecting the essential nature of water to human life and health. Therefore, the normative framework includes the right to water as an essential component of the rights to life and the highest attainable standard of health.

In applying this legal framework the *amici* in this case pointed out that many Argentines “wouldn’t be able to afford a sudden three-fold increase in water and sanitation tariffs amidst a deep economic and social crisis”, which would have been the effect of catering to the investors’ demands. They also point out the inevitability of increased rioting, destruction and human suffering attendant on a massive social upheaval that could only be expected if the investors’ expectations were granted. Given that the State is a party to all the human rights treaties mentioned above, the

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238 Ibid, para 12 (c)(ii).

239 The *amici* note that the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights both “protect the right to water in order to ensure the right to life. The ICCPR provides that every individual has an inherent right to life and explicitly prohibits the deprivation of means of subsistence ... The Inter-American Court of Human Rights has interpreted the right to life as including the right to access to conditions that guarantee a dignified life.” *Amicus Curiae* Submission, supra note 228, pp. 7-8. International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A, UN GAOR , 21st Sess., Supp. No. 16 at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976, Articles 1(2) and 6(1); American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978, Article 4(1); the case is *Villagrán Morales et al. vs. Guatemala, The ‘Street Children’ Case*, Inter-American Court of Human Rights (Ser. C) No. 63 (1999), Judgment on the Merits, 19 November 1999, para 144.


241 *Amicus Curiae* Submission, supra note 228, pp. 17-18.
freezing of the tariffs for water and other measures taken by Argentina, being essential in ensuring the provision of water to its people, were required of the government under international law. The European Commission of Human Rights has consistently upheld the view that

if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty.\textsuperscript{242}

Should Argentina have acted differently it would have failed to ensure affordable, equitably distributed water with special provision for the marginalised, to regulate third-parties to ensure the same result, and to prevent unaffordable increases in price and unjustified exclusion. “Therefore, the complaint filed by the corporations is a direct interference with Argentina’s reasonable measures to fulfil the [socio-economic rights] of its citizens.”\textsuperscript{243} Framed in this way, as a more or less simple conflict of norms, the \textit{amici} argue for the prioritisation of the State’s human rights obligations, on the basis that investors’ rights are instrumental whereas human rights are inherent and inalienable.\textsuperscript{244} There are strong arguments for the normative superiority of human rights in international

\textsuperscript{244} The UN Special Rapporteur on the Right to Food, for example, has stated a widely held opinion that inconsistencies between human rights and investment obligations must be reconciled such that human rights norms prevail. Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, UN Doc. A/HRC/19/59/Add.5, 19 December 2011, para 1.3.
Therefore, “the difference in juridical nature between human rights and investor/investment protections means that they operate on different planes and are thus not amenable to balancing.”

In the absence of the employment of a simple prioritisation such as this the amici also argue that the human right to water and other elements of human rights law are essential to the resolution of the dispute on the terms of the relevant BIT, specifically with respect to provisions on fair and equitable treatment and expropriation. In short, these provisions should not be read in isolation but in light of the government’s human rights obligations during a severe economic crisis.

In particular the investor’s legitimate expectations under the treatment provision cannot extend to an abrogation by the

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246 Amicus Curiae Submission, supra note 228, p. 15. See also, Report of the High Commissioner for Human Rights, Human Rights, Trade, and Investment, UN Doc. E/CN.4/Sub.2/2003/9, 2 July 2003, para 24. In an opinion given in another case against Argentina arising from the crisis, this position is echoed by Sornarajah: “Argentina had the duty to restore order so that human life could go on in peace. This is an obligation that the State in Argentina owed to its people but also to the international community through human rights obligations ... Here, in times of the crisis, the international law obligations the State of Argentina owed to its own people have primacy ... [and] the lesser international law obligations could be cast aside.” El Paso Energy International Company v. The Republic of Argentina, ICSID Case No. ARB/03/15, Legal Opinion of Mthuthumalaswamy Sornarajah, paras 123-124.

State of its human rights obligations. Noting that in *Maffezini v Spain* the tribunal concluded that the investor could not expect to be compensated for costs incurred due to the State’s compliance with pre-existing EU environmental regulations,\textsuperscript{248} the *amici* go on to argue by analogy that the same applies to Argentina’s obligations under human rights law. In particular, “an investor cannot legitimately expect tariffs to increase in such a way as to become an insurmountable obstacle to effective access to water and sanitation to millions of people.”\textsuperscript{249} Taking a broader perspective, the *amici* also note that this “contextual interpretation leads to normative dialogue, accommodation, and mutual supportiveness among human rights and investment law.”\textsuperscript{250}

In discussing the applicable law the tribunal notes that all the relevant BITs being applied to the case refer to the use of “relevant principles of international law”,\textsuperscript{251} “general principles of international law”,\textsuperscript{252} and “the applicable principles of international law.”\textsuperscript{253} It is stated that the rules of the BITs “shall primarily govern the investor’s claim”, but that “international law may apply to every extent relevant.”\textsuperscript{254} Thus, the tribunal made the usual initial, and ultimately empty, nod to the interpretational rules of the Vienna Convention, as set out by Waibel, Hirsch and others. Following this broad statement there was no concrete application of human rights law to the particulars of the case.

\textsuperscript{248} *Emilio Augustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000.
\textsuperscript{249} *Amicus Curiae* Submission, supra note 228, pp. 18-19.
\textsuperscript{250} Ibid, p. 15.
\textsuperscript{251} Article 8.4 of the Argentina-France BIT.
\textsuperscript{252} Article X(5) of the Argentina-Spain BIT.
\textsuperscript{253} Article 8(4) of the Argentina-United Kingdom BIT.
The tribunal made no mention of Argentina’s human rights obligations under international law in its deliberations on any of the investors’ three substantive claims of treaty breach, specifically with regard to expropriation, full protection and security, or fair and equitable treatment. Neither did Judge Nikken make mention of human rights in his separate opinion.

The tribunal did, however, give a very cursory nod to human rights arguments made by Argentina in the context of its main defensive argument of necessity, mentioning them in passing though declining to apply them in any way.\textsuperscript{255} Argentina had referred to a previous case, \textit{LG&E},\textsuperscript{256} where another tribunal held (partially) in favour of its defence of necessity in the same circumstances.\textsuperscript{257} For their part the investors argued that under customary law, for a defence of necessity to succeed, the possibility of invoking the defence must not be precluded in the treaty that is being applied, the State must not have contributed to the situation forcing necessity, and the actions taken must have been the only way for the State to safeguard its essential interests.\textsuperscript{258} They believed that the BITs were intended to provide equal levels of protection even in crisis situations, that, contrary to the ruling of the \textit{LG&E} tribunal, Argentina contributed to the crisis, and that there were other means by which the State could have safeguarded its interests. Finally, the investors stated clearly that “what is at issue in these cases is whether

\textsuperscript{255} Ibid, para 252.
\textsuperscript{256} \textit{LG&E Energy Corp. v. Argentine Republic}, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006.
\textsuperscript{257} Suez, supra note 254, para 251.
Argentina breached its legal commitments under the BITs and that human rights law is irrelevant to that determination.”

The tribunal displayed the same attitude. In a single paragraph it noted and summarised the amicus curiae submission. It noted the severity of the crisis, referring to the LG&E tribunal’s assessment of its socio-economic consequences as “devastating.” Yet it emphasises the exceptional nature and the strict conditions attached to a defence of necessity under customary law. It went on to agree with the arguments of the investors, holding that these conditions were not met by Argentina in the present case. In making this decision the tribunal leaned heavily on a finding that Argentina had contributed to the crisis. A short discussion of this necessity defence is instructive for its application to the broader context outlined in the sections above.

Generally, the application or otherwise of this defence in relation to the Argentinean cases has been a source of contention among arbitrators. The controversy extends to the academic commentary. Peterson notes this broad rift between arbitrators who have been called on to pronounce on Argentina’s defence of necessity. Kurtz points out that the

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259 Suez, supra note 254, para 255.
260 Ibid, para 256.
261 Ibid, para 257. LG&E, para 237.
262 Ibid, para 257. LG&E, para 265.
predominant approach of tribunals to date has been a decidedly restrictive one from the viewpoint of the State’s right to regulate. At the core of this approach is “the problematic suggestion that a single value of [investment] protection should exclusively form our understanding of the purpose of investment treaties.”

Recent deliberations in *El Paso* further reflect the depth of the controversy.

In this case the tribunal split between a majority that decided the necessity defence did not apply because they believed Argentina had contributed towards its own crisis, and arbitrator Brigitte Stern, who disagreed with this “far-reaching conclusion ... which is not based, in her view, on an in depth understanding of the intricacies of economic development.” Stern took the broader view, as set out above, of Argentina’s extensive liberalisation and deep integration into the global financial and trade system during the ‘90s, performed in line with neo-liberal policy proscribed by the IFIs, the international community and donor States who made it conditional on financial support. She concludes that, “considering the facts of this case, the substantial contribution of the Argentine authorities to the crisis has not been sufficiently proven by strong and uncontroversial evidence presented by the Claimant.”

It should not lightly be assumed that a State is responsible for an economic collapse in a liberal market economy, where the invisible hand of the market is more powerful

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267 Ibid, para 667.
268 Ibid, para 666.
than the hand of the State. ... Economics is a complicated science or, better, a complicated art; the mere reading of the analyses of the [economic] experts of both Parties show that there is little certainty. ... [Yet] the situation of the Argentine economy was extremely serious and out of control by any definition.269

A serious clue to the gravity of the crisis was the decrease of Argentina’s annual contribution to the United Nations in 2002. For the first time in history the General Assembly had decided to reduce a State’s contribution, and it did so unanimously.270 In this context, Stern viewed the measures taken by the government as “suitable means” to avoid anarchy, social disintegration and chaos.271 Sterns analysis illustrates the importance of the discussion in chapter 2. An appreciation of the operation of an imposed neo-liberal development paradigm, and a forced dependency on FDI for development broadens the perspective, whereby it is easier to see how an apparent choice is no real choice at all. The major part of Argentina’s ‘contribution’ to the crisis272 was simply the adoption of the neo-liberal development paradigm as demanded by external actors.

In the Suez case the tribunal held that the terms of the concession contract, particularly relating to the tariff

269 Ibid, para 667.
270 Ibid, para 668.
271 Ibid, para 669
272 “Having fully considered the Parties’ arguments and the evidence before it, a majority of the Tribunal has reached the conclusion that Argentina’s failure to control several internal factors, in particular the fiscal deficit debt accumulation and labour market rigidity, substantially contributed to the crisis.” Ibid, para 656. It should also be noted that these two greatest ‘contributions’ to the crisis that Argentina is regularly accused of are both measures taken to ameliorate the worst socio-economic effects of neo-liberalisation, borne by the lower strata of Argentinean society. They are therefore measures to realise socio-economic rights, or otherwise to mitigate their regression.
structure, comprised a legal framework that informed the investor’s legitimate expectations, and that Argentina’s refusal to revise the tariffs in accordance with that framework frustrated those expectations.\textsuperscript{273} The State was deemed to have acted “outside the scope of its legitimate right to regulate”, and was therefore guilty of an abuse of regulatory discretion in violation of its commitment in the relevant BITs to provide fair and equitable treatment.\textsuperscript{274} Furthermore, the Suez tribunal took the majority’s viewpoint in \textit{El Paso} and declined to accept the defence of necessity. In addition, the applicability of human rights law in regards to Argentina’s necessity defence is left substantively unaddressed by the Suez tribunal. It dealt with the complexities of the human rights arguments made by the government of Argentina and the \textit{amici} very briefly in the following terms.

Argentina and the \textit{amicus curiae} submissions received by the Tribunal suggest that Argentina’s human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, \textit{i.e.} human rights \textit{and} treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina’s human rights obligations and its investment

\textsuperscript{273} A very important part of the background to this discussion is the fact that previously renegotiated increases to the tariffs charged had been extraordinarily generous to the investors, leading to a conclusion that such expectations could easily have become very unreasonable. “The average bill paid by residential customers increased between May 1993 and January 2002 by 88%, which is far above the retail price inflation rate of 7.3% for the same period.” Solanes and Jouravlev, 2007, supra note 216, p. 29.

\textsuperscript{274} \textit{Suez}, supra note 254, paras 237-238.
treaty obligations are not inconsistent, contradictory, or mutually exclusive. ... Argentina could have respected both types of obligations.275

Only the overarching position of the hierarchy of norms was addressed, and even this aspect was treated in the most abstract, stylised and dismissive manner. The tribunal engaged in no further analysis of Argentina’s supposedly ‘equal’ obligations, and nevertheless found Argentina in violation of the investor’s rights to fair and equitable treatment, thereby belying any actual equality and revealing its pure nominality. There was no substantial investigation by the tribunal of how exactly Argentina could have both sets of obligations simultaneously. Besides a blunt statement that it sees no basis for prioritising the human rights of the Argentinean population over the property rights of foreign investors, there is no elaboration or supporting argument given. As Peterson has modestly pointed out,

[j]t might be presumed that the tribunal thinks that the human right to water is of sufficient generality that it obliges no specific state measures or actions which need conflict with investment treaty obligations. However, the lack of any explicit examination and discussion of the specific human rights obligations leaves some ambiguity as to the basis on which the tribunal reaches its conclusion that such obligations are not in conflict with Argentina’s investment treaty obligations.276

275 Ibid, para 262.
The conclusion of equality and harmony between the competing rights is presented as a simple and self-evident fact. This is not the case, as set out in the *amicus curiae* submission. There, a number of arguments for the converse of the tribunal’s blunt statement are given, and elaborated to the extent possible.\(^{277}\) As noted above, the obligations on the State to provide and protect the right to water are particular, specific, and extensive. Moreover, the tribunal’s terminological division between human rights and BIT based treaty obligations is confusing, as Argentina’s human rights obligations are also treaty based. The effort seems to insinuate privilege for investor’s rights as treaty based over human rights as based on some lesser source. This insinuation is simply false.

The allusion to ‘equal’ and ‘consistent’ regimes of international law, and the consequently glib conclusion that Argentina’s obligations are in no way in conflict and are open to be equally and simultaneously respected, without further supporting analysis, amounts to a simple avoidance strategy.\(^{278}\) The pronouncement of the *Suez* tribunal is exemplary of a clear pattern in such cases, where, as Karamanian describes, tribunals “tend to stridently dispose of the merits of the human rights issue in an effort to define away the conflict in the first instance.”\(^{279}\) International decisions having such extensive and serious repercussions

\(^{277}\) The amici were specifically limited to a submission “no longer than 30 double-spaced pages in 12 point font”, and so had to severely restrict the depth of argumentation. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organisations for Permission to make an Amicus Curiae Submission, 12 February 2007, para 27(b).

\(^{278}\) Schadendorf, 2013, supra note 111, pp. 18-19.

\(^{279}\) Karamanian, 2012, supra note 9, p. 266.
should be based on transparent reason and a full engagement with the available evidence, the applicable law, and the extent of the legal argument put to them. “A judge on an international bench cannot resolve conflicts by fiat. The resolution must be reasoned.”280

Although entirely unaccountable to the Argentinean people, the tribunal adjudged itself competent to decide the appropriateness of their State’s response to their crisis and briefly suggested some ways that, in its opinion, the government could have satisfied investors and simultaneously met its human rights obligations. In addition to its brevity and superficiality, this analysis is flawed from the standpoint that human rights are inherent in human dignity and should not be presumed subject to a utilitarian trade-off, as the amici argued. If a trade-off is necessary it should be made with respect to other human rights or to broader goals of national security or the broader well-being of the society in which human rights are at least implied, not to foreign investors’ ‘rights’ to maintain profits or their even more dubious ‘expectations’ of legal certainty.281 In short, comparable interests and entitlements must be the basis of a fair and legitimate trade. Through application of proportionality analysis in this respect, human rights courts adopt a wide

281 In a separate opinion Pedro Nikken expressed the opinion that to read in a concept of legitimate expectations that effectively gives the standard of fair and equitable treatment the character of a legal stability, or equilibrium clause (as the tribunal’s majority did), is contrary to the rules of treaty interpretation in customary law and in Article 31(1) of the Vienna Convention. Suez, Sociedad General de Aguas de Barcelona S.A., and Inter Aguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010, para 3. For further discussion see, Christopher Campbell, ‘House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law’ 30 Journal of International Arbitration 4 (2013).
margin of appreciation for States in implementing their human rights obligations, even wider in the case of national emergencies.²⁸² Yet, it would seem that investment tribunals are not likely to bind themselves to such a deferential point of view, and are instead far more disciplinary in their approach when the rights of investors are at stake.²⁸³

This directs attention to the gulf between the enforcement of human rights and the enforcement of investors’ rights. States are accorded substantial leeway by international human rights bodies,²⁸⁴ but evidently far less space by investment tribunals.²⁸⁵ In this way the disciplinary effect of the investment regime on States is in fact far greater than that of human rights law, despite the pretence of formal equality between them. Hence the use of characterising the substance of the investment regime, the protection of the property rights of foreign investors, as embodying a de facto global constitutional norm, which threatens to determine the

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²⁸³ Schill, 2011, supra note 82, p. 881.
²⁸⁴ In regard to the defence of necessity, “the European Court of Human Rights has stated that the executive of the state is entitled to considerable deference. It is “a pre-eminently political judgment” which courts or supervisory bodies will not second-guess.” El Paso Energy International Company v. The Republic of Argentina (ICSID Case No. ARB/03/15, Legal Opinion of M. Sornarajah, para 118.
²⁸⁵ “The CMS Award was clearly partial in seeking to ignore the State’s own assessment of the crisis. It adopted a stance entirely at variance from that of other tribunals such as the European Court of Human Rights”. El Paso Energy International Company v. The Republic of Argentina (ICSID Case No. ARB/03/15, Legal Opinion of M. Sornarajah, para 120.
applicability, scope, and content of human rights norms.\textsuperscript{286} This situation, as exemplified in the \textit{Suez} decision, legitimises the violation of socio-economic rights as \textit{de facto} inferior norms, when they run counter to the promotion and protection of foreign investment.\textsuperscript{287} As John Reynolds rightly notes,

\begin{quote}
[i]n a case such as Argentina, disregard of state obligations in the socio-economic sphere or derogations from individual civil rights under the self-declared emergency may be accepted as necessary by an international or regional human rights body, while at the same time a mechanism of international investment law may hold that the same circumstances do not constitute an exceptional justification to negate the interests of foreign investors. The result is a distorted three-tiered hierarchy that privileges the corporation over the state, and the state over the human.\textsuperscript{288}
\end{quote}

In sum, the \textit{Suez} decision is entirely emblematic of what some view as a head on conflict between the two regimes of investment and human rights law. It demonstrates in stark terms the rhetorical allusion made to a putative equivalence and illusory harmony between the regimes, the \textit{de facto} elevation of property rights over human rights, and the enforcement of this elevation without justification or reasoning, moral, factual or legal. The conflict of norms, so evident to the State and the \textit{amici}, is defined away, made to

\textsuperscript{288} Reynolds, 2012, supra note 142, p. 122.
disappear, though in reality it is just ignored and the resolution presented is based on “convenience rather than analysis.”\footnote{289} Interestingly, in doing so the tribunal also belied its own forecast of its deliberative duty, that in deciding the case it would have to resolve “complex public and international law questions, including human rights considerations.”\footnote{290} Finally, the \textit{Suez} award will put a dollar value on the cost to under-developed countries should they attempt to rollback investor protections once granted, or adjust a course of ‘development’ that has gone wrong. To date damages have not been decided in this case, however it is reported that the investors are claiming $1.2 billion.\footnote{291}

It is widely agreed that the Argentinean cases such as \textit{Suez} raise strong questions of the legitimacy of the arbitration process and of the current investment regime as a whole. This chapter demonstrates that the cases, and a clear appreciation of their context, do much more. They vividly bring to light broader questions of the legitimacy and efficacy of an FDI dependent development strategy in which the current investment regime is set, of which it is a key feature, and the ideology of which it seeks to legally entrench and permanently enforce. In a nutshell, this is the problem. We now turn to the solution.

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\footnote{289} Jorg Kammerhofer, 'The Theory of Norm Conflict Solutions in International Investment Law', in Cordonier-Segger (et al eds.), 2011, supra note 53, p. 84. Avoidance is noted as a common general strategy when international courts and tribunals are presented with actual and apparent norm conflicts. See, Milanovic, 2009, supra note 130, p. 128. \footnote{290} \textit{Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic}, ICSID Case No. ARB/03/19, Order in Response to a Petition of Five Non-Governmental Organisations for Permission to make an Amicus Curiae Submission, 12 February 2007, p. 9. \footnote{291} Peterson, 2010, supra note 229.
THE NEED FOR A HOLISTIC SOLUTION TO THE PROBLEM

Understanding the problem in its full form and its dual aspect, underscores the need for a holistic solution. The dissatisfaction with most of the proposed solutions to the ills of the investment regime stems from its isolated treatment. The major exception is that in which sustainable development forms the resolving principle. This principle forms a systematic basis for addressing both aspects of the problem. Yet, for reasons already explained it may not provide sufficient purchase to adequately challenge international forces aimed at entrenching reliance on foreign investment for development, which is at the heart of the problem. An alternative principle is needed.

The international legal obligation to cooperate in the realisation of human rights provides the building blocks of a durable solution that can address the full scale of the problem. The obligation directly addresses each of its fundamental determinants, and offers a holistic and principled basis for the resolution of both its aspects. It is both an alternative and a complement to the principle of sustainable development (among others), arguably encompassing and strengthening the latter. The most immediate advantage is that it frames a resolution in legally binding terms, thereby adding gravity and weight to the longstanding and widely accepted rhetorical status of cooperation for international social and distributive
justice as economic, moral or otherwise utilitarian best practice. Given that a fundamental purpose of international law is to institutionalise and enforce the values of human society, it is past time that these acknowledged cooperative values of an interdependent international community be reflected at the normative level, in an appropriate understanding and application of the content and requirements of international law. The argument here is not

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for new law, but for the consistent application of extant law on international cooperation.

The international obligation to cooperate for the purpose of realising universal human rights also furnishes a principled set of applicable limits to the historic oscillations and vagaries of economic fashion.\textsuperscript{5} The devastating consequences of extreme economic paradigms governing global society and human development can conceivably be contained in this way, by a set of legal boundaries shaped according to the basic requirements of a dignified human life.\textsuperscript{6} Part II turns firstly to a consideration of what the concept of international cooperation is, exploring its scope as an obligation under international law, before applying this legal concept to the two aspects of our problem, the current investment regime and the process of financing for development.


\textsuperscript{6} This would give concrete and effective legal form to what Lutz refers to as the effort of a long tradition in social economics to ensure that “the standard criterion of economic efficiency is subordinated to the social values calling for material sufficiency and respect for human dignity of all members of the economy.” Lutz, 1999, supra note 1, p. xi.
5 - THE OBLIGATION TO COOPERATE IN INTERNATIONAL LAW

5.1 - From Coexistence to Cooperation

The last century has seen a fundamental conceptual shift in international law from an international legal system founded on the principles of State’s independence and coexistence, to one increasingly based on the principles of interdependence and cooperation. Writing in 1758, Emer de Vattel presaged this positive shift by setting forth a primary general norm of cooperation between nations: “The first general law, to which the society of nations should be aiming, is that every nation must contribute to the wellbeing and perfection of all other nations, to the degree within its power.”7 In positing the primary nature of such a norm Vattel was decidedly ahead of his time. However, two hundred years later Wolfgang Friedmann was in a position to definitively detail the advent, following the Second World War, of an international ‘law of cooperation’ progressively supplanting a traditional ‘law of coexistence.’8

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The new law reflects the hard-learned lessons of two World Wars in forty years, codifying the clear understanding that in the contemporary world the national interests of States are best served by cooperation rather than competition and conflict.\(^9\) Furthermore,

The problems of development cannot be resolved on the basis of the principles of peaceful co-existence among States with different political and economic systems. Coexistence as a minimum standard for preserving world peace, should be further developed and it should be the duty of all States to cooperate for development, on the basis of preferential and non-reciprocal treatment of developing countries.\(^{10}\)

The new law of cooperation is, nevertheless, still evolving. Its evolution proceeds often in tension with an anachronistic and increasingly unworkable resort to power politics justified by regressive interpretations of international law and blinkered conceptions of national interest.\(^{11}\) Quincy Wright has built on

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\(^{11}\) “State sovereignty and national interest has already become out of date; the new international law should start from the candid recognition of the interest of the organized international community and the ‘Bien Commun Universel’.” Yasuhiko Saito, ‘International Law as a Law of the World Community: World Law as Reality and Methodology’, in Atle Grahl-Madsen
Friedmann’s work to establish that the law of cooperation is rooted in well accepted sources, and is the international legal expression of a drive “to make possible the fulfilment of human needs in a rapidly changing world in spite of the obstacles that obsolete conceptions place in its path.”¹² In other words, international law is now building norms around the observable fact that the national interest is no longer separable from the common interest of a community of States.¹³

An ‘international community’ of States was said to evolve as new situations and problems arose that could only be dealt

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with effectively in coordination rather than isolation.\textsuperscript{14} According to Judge Bedjaoui in the \textit{Nuclear Weapons Case},

It scarcely needs to be said that the face of contemporary international society is markedly altered.... [I]ntegration and “globalization” of international society is undeniable. Witness the proliferation of international organizations, the gradual substitution of an international law of co-operation for the traditional international law of co-existence, the emergence of the concept of “international community”... The resolutely positivist, voluntarist approach of international law still current at the beginning of the [twentieth] century ... has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community.\textsuperscript{15}

Reflecting this fact, the League of Nations was established after the First World War. Although not ultimately effective, the Covenant of the League is nevertheless a milestone in the shift away from the law of coexistence. The Covenant established in its first phrase that its fundamental purpose was “to promote international cooperation and to achieve international peace and security.”\textsuperscript{16} A number of States resisted this shift resulting in the breakdown of the League and the enactment of the Second World War. Ultimately the horror of the War served to

\textsuperscript{16} Covenant of the League of Nations, 28 April 1919, Preamble. One commentator at the time noted that a “shifting of emphasis from rights of states to responsibilities of states is the fundamental change which the Covenant will make in international law.” Quincy Wright, ‘Effects of the League of Nations Covenant’ 13 \textit{American Political Science Review} 4 (1919), pp. 556-558.
strengthen the perceived importance of firmly grounding and infusing international law with the principle and dictates of cooperation. Lessons were learned from the failure of the League and a more detailed conception was gained of how cooperation should be organised and institutionalised. Of particular importance, the conceptual purpose of international cooperation was conceived, in the form of the embryonic establishment of a regime of fundamental human rights. The United Nations and its founding Charter were the result, ensuring that “[i]t is no longer sovereignty, but interdependence, that shapes international law”,\textsuperscript{17} because “where the defining features of the international system are connection rather than separation, interaction rather than isolation, and institutions rather than free space, sovereignty as autonomy makes no sense.”\textsuperscript{18}


5.2 – The UN Charter

The UN Charter is a document of unparalleled significance in international law.\(^{19}\) It has been likened to a constitution that frames the international legal domain,\(^{20}\) providing a lasting foundation in the evolution of international law from coexistence to cooperation.\(^{21}\)

Cooperation as an international law term-of-art emerges only after World War II when it is asserted, first, as an international law-based duty of States to cooperate with one another in accordance with the United Nations Charter, and also, in larger, generic terms, as a special body of international law in its own right.\(^{22}\)

The Charter sets cooperation at the heart of the United Nations organisation itself, and thus at the heart of international law.\(^{23}\)

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\(^{19}\) Article 103 of the Charter states that, “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 October 1945.


\(^{21}\) It is clearly the case that many areas of international law are not sufficiently influenced by the principle of cooperation and remain operational on the logic of coexistence. Nevertheless, the point advanced here is that the *foundational* shift has been made, and been made explicitly. See, Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century, Part II: The Founding Principles of the International Legal Order’, Collected Courses of the Hague Academy of International Law 281, Martinus Nijhoff, 1999, p. 262.


\(^{23}\) Indeed, in arguing for a general duty of international cooperation, Shreuer notes that “cooperation is not so much an obligation under international law as a factual precondition for international relations and international law. ... International law without cooperation is inconceivable.” Christoph Shreuer, ‘State Sovereignty and the Duty of
In Udombana’s words, “[t]he ‘international law of cooperation’ has come to stay.”24 There is much in the world of international relations that does not occur within the radius and auspice of the UN however it is clearly the locus of international legitimacy. With 192 member States legally bound by the articles and purpose of the Charter, virtually all nations are subject to its core principle of cooperation. In fact, cooperative obligations in international law can now be described as the norm, in the legal as well as the colloquial sense. Delbruck observes that

a look into State practice with regard to obligations to cooperate shows these are obviously acceptable and are not seen as an undue burden on State’s sovereignty.25

The question of cooperative obligations is not existential. It is a far harder one, as is familiar in the human rights field, of actual implementation.26

The preamble of the Charter speaks of unity and coordinated positive action, and central within its statement of principles and purposes is the intention

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25 Jost Delbruck, ‘The International Obligation to Cooperate: An Empty Shell or a Hard Law Principle of International Law? – A Critical Look at a Much Debated Paradigm of International Law’, in Hestermeyer (et al eds.), 2012, supra note 8, pp. 4-5. Though he does not specify them precisely, Delbruck further states that “in the process of developing international obligations to cooperate a number of specific duties to cooperate have reached the status of hard law”. Ibid, p. 16.
26 “Given the fact that the obligation to cooperate for the protection of human rights today possesses a firm legal basis in international law, the question remains how this obligation is implemented in State practice.” Ibid, p. 7.
to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all.\textsuperscript{27}

The organisation itself was tasked with facilitating, moulding and creating this cooperation, embodying “a centre for harmonizing the actions of nations in the attainment of these common ends.”\textsuperscript{28} Again, positive requirements are set by Article 2(5), whereby “all Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter.” These requirements of cooperation are echoed within the substantive obligations of the Charter, particularly throughout Chapter IX on International Economic and Social Cooperation. Therein all States are obliged to

- take joint and separate action in co-operation with the Organization for the achievement of;
  - a) higher standards of living, full employment, and conditions of economic and social progress and development;
  - b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
  - c) universal respect for, and observance of, human rights and fundamental freedoms for all.\textsuperscript{29}

One of the major achievements of the UN Charter is that it sets out clearly what international cooperation is intended to accomplish. The overarching goal is peace and security, yet the Charter recognises that the immediate threats of violence and

\textsuperscript{27} UN Charter, supra note 19, Art 1(3).
\textsuperscript{28} Ibid, Art 1(4). On the developing enforcement of such harmonious actions in the interests of the international community see, Bruno Simma, ‘Human Rights Before the International Court of Justice: Community Interest Coming to Life?’, in Hestermeyer (et al eds.), 2012, supra note 8.
\textsuperscript{29} UN Charter, supra note 19, Art 55.
war are underlain by the far more pervasive and often structural economic and social insecurity of large sections of the world’s population.\textsuperscript{30} As such, Chapter IX of the Charter must be seen as the relevant section setting out the fundamental method of implementing the purposes of the Charter embodied in Article 1, as it is the essential prerequisite to the prevention of international insecurity. Indeed this was the precise intent of the drafters of the Charter.\textsuperscript{31} Chapter VII, specifying the framework of action to address aggression and threats to, and breaches of, the peace, is instead curative, to be employed once an immediate threat to international peace and security is either manifest or immanent. So, while the organisation was foreseen to play a highly important, but in a sense sporadic role in regulating outright conflict, the continuous purpose of day to day


international cooperation is the reduction of the economic and social insecurity of individuals and peoples.\textsuperscript{32}

In the aftermath of formal colonisation the turn of international law towards cooperation centred on socio-economic wellbeing takes on special significance and heightened import for the vast majority of humanity.

A community in which the majority of the members are poor needs a law that expresses the responsibility of the whole for the part. ... International law has, to some extent, accorded recognition to these changing needs by keeping the social and economic development of the world community as its legitimate concern.\textsuperscript{33}

While the principles of cooperative State obligations are already to be found in the UN Charter and other normative texts, they have long been avoided by the powerful. Concordance will only be approached as States own their obligations and bend their influence to the centrally socio-economic task of cooperation. This implies a deep commitment to the full set of international human rights and their integration into the process of global development, for it is from this core socio-economic purpose of the law of cooperation that the structure of international human rights law springs.\textsuperscript{34} Viewed in this way, human rights law is the logical and detailed legal expression of the core motivation of

\textsuperscript{32} Tomuschat, 1999, supra note 21, p. 61.
\textsuperscript{34} Explicitly by virtue of the operation of Article 55(c) of the UN Charter, the institution of the UN Economic and Social Council (UN Charter, supra note 19, Chapter X), and the subsequent establishment of the International Bill of Rights through that Council.
an international law of cooperation.\textsuperscript{35} It provides a programme of action and a foundation of accountability for the economic, civil, political, and social security of all individuals and peoples,\textsuperscript{36} the acknowledged prerequisite of international peace and security.\textsuperscript{37}

Some may opine that the UN Charter does not recognise any specific rights at all but rather refers simply to general aspirations of an international community of States.\textsuperscript{38} However, as Langford, Coomans and Isa point out, many scholars have convincingly rebutted this assertion.\textsuperscript{39} Perhaps most notably Hersch Lauterpacht, who after careful attention

\textsuperscript{35} As noted by Salomon; “The principle of international cooperation repeatedly invoked in the UN Charter framed the institutional and normative evolution in the area of human rights in which the endorsement of universal values has been elevated to become a superior interest of the collective of states.” Salomon, 2007, supra note 17, p. 24.


A secondary question is whether obligations of international cooperation to realise human rights can in principle be deemed specific enough to impose clear duties on States. Answering this question in the affirmative, Dinah Shelton indicates the reasoning of the International Tribunal on the Law of the Sea (ITLOS) in the \textit{Mox Plant Case}.\footnote{Dinah Shelton, ‘Remedies and Reparation’, in Langford (et al eds.), 2013, supra note 39, p. 370.} The Tribunal found that an identifiable duty to cooperate indeed existed as “a fundamental principle in ... general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve.”\footnote{\textit{Mox Plant Case (Ireland v, United Kingdom)}, International Tribunal on the Law of the Sea, Provisional Measures, Order of 3 December 2001, para 82.} Acts and omissions of a State can therefore clearly violate the general international obligation to cooperate and thereby attract State responsibility. The ILC’s Draft Articles on State Responsibility, for example, set out a straightforward and unqualified duty on all States to cooperate in ending any
serious breaches of peremptory, or *jus cogens* norms of international law.\(^{44}\)

Finally, it has been pointed out that further elaboration of the specificities of a principle of cooperation is evidenced in a number of subsequent General Assembly resolutions.\(^{45}\) Foremost are the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States,\(^{46}\) the Declaration and Programme of Action on the Establishment of a New International Economic Order,\(^{47}\) the Charter of Economic Rights and Duties of States,\(^{48}\) and the Declaration on the Right to Development.\(^{49}\) The clearest formulation, however, is to be found in the Charter of Rights and Duties of States. Among a number of specific delineations of cooperative obligations, the Charter states that,

> International co-operation for development is the shared goal and common duty of all States. Every State should cooperate with the efforts of developing countries to accelerate their economic and social development by providing favourable external conditions and by extending active assistance to them, consistent with their development needs and objectives, with strict respect for the sovereign equality of States and free of any conditions derogating from their sovereignty.\(^{50}\)

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\(^{46}\) UN General Assembly Resolution 2625 (XXV), 24 October 1970.

\(^{47}\) UN General Assembly Resolution 3202 (S-VI), 1 May 1974.

\(^{48}\) UN General Assembly Resolution 3281 (XXIX), 12 December 1974.

\(^{49}\) UN General Assembly Resolution 41/128, 4 December 1986.

\(^{50}\) UN General Assembly Resolution 3281 (XXIX), 12 December 1974, Article 17. The Charter of Rights and Duties provides a wealth of legal clarity in this regard, and is an untapped reservoir from which to nourish the legal content of international cooperation.
Of great significance in the present context, the Charter of Rights and Duties also sets out a range of specific sovereign rights of States with regard to foreign investment, which are worth quoting extensively. Accordingly,

[each State has the right:

a. To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. *No State shall be compelled to grant preferential treatment to foreign investment*;

b. To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. *Every State should*, with full regard for its sovereign rights, *cooperate with other States in the exercise of the right set forth in this sub paragraph*;

c. 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*. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of *free choice of means*.\(^{51}\)

\(^{51}\) UN General Assembly Resolution 3281 (XXIX), 12 December 1974, Article 2 (2) (emphasis added).
On initiating the drafting of the Charter of Rights and Duties of States in 1972, the Mexican President, Luis Echeverría, expressly stated that the purpose of the Charter was to ground international economic relations in a necessary and solid framework of international law, without which cross-border economic arrangements would inevitably be derived solely from power relations. If left based on these shifting sands, they would inevitably lack legitimacy, durability and justice.

We must strengthen the precarious legal foundations of the international economy. A just order and a stable world will not be possible until we create obligations and rights which protect the weaker States. Let us take economic co-operation out of the realm of goodwill and put it into the realm of law. Let us transfer the concrete principles of solidarity among men to the area of relations among countries.\(^{52}\)

5.3 – The Covenant on Economic, Social and Cultural Rights

As mentioned previously, international cooperation appears as a legal requirement in a range of international instruments. Of particular concern here is the importance of its place within human rights law. It appears specifically in a number of human rights treaties, charters and declarations, particularly

\(^{52}\) Statement of the President of Mexico, Mr Luis Echeverría, at the third session of the United Nations Conference on Trade and Development, April 1972, as quoted in the Provisional Verbatim Record of the 2315\(^{th}\) Meeting, UN GAOR, 29th Session, 12 December 1974, UN Doc. A/PV.2315 and Corr.1, para 150.
standards are threatened by agricultural trade policies; rights to health and work are affected by international sanctions; rights to privacy are endangered by the sale of software and surveillance technology; and the full range of socio-economic rights are at risk when nations are forced to repay unsustainable sovereign debt.

The requirements of cooperation are most developed in the context of Article 2(1) of the Covenant on Economic, Social and Cultural Rights (ICESCR).\[^{57}\] This instance of the obligation to cooperate takes the focus here because it is perhaps the strongest provision, due to its broader scope, and the legally binding nature of the Covenant on 152 States parties.\[^{58}\] In addition, the obligation has been interpreted to its most detailed extent to date, and with the highest authority, within the context of the Covenant by the Committee on Economic, Social and Cultural Rights. It is believed that the Covenant provides the sharpest entry point for the application of concrete obligations to cooperate.

This context forms the focus for simple reasons of space. Yet it should not be forgotten that the arguments for the existence of legally binding obligations of international cooperation presented here are buttressed substantially by the relevant


provisions in numerous other international human rights instruments, as well as by the elaboration of the associated treaty bodies, courts and commissions.\(^{59}\) Notable also is the work done to further define and apply cooperative obligations by the UN Special Procedures, including the Special Rapporteur on Extreme Poverty and Human Rights,\(^{60}\) the Independent Expert on Human Rights and International Solidarity,\(^{61}\) and the Independent Expert on the Promotion of a Democratic and Equitable International Order,\(^{62}\) among others.\(^{63}\) Taken together with the academic commentary, NGO application and an ever increasing popular demand for achievable international justice, there is now a sizeable body of work on cooperative obligations gaining momentum, weight and coherence, that is currently snowballing into inevitability.

\(^{59}\) For example, as Khalfan notes, the Committee on the Elimination of Racial Discrimination (e.g., CERD, Concluding Observations: United States of America, UN Doc. CERD/C/USA/CO/6, 8 May 2008, para 30), the Committee on the Elimination of Discrimination Against Women (e.g., CEDAW, General Recommendation No. 28, UN Doc. CEDAW/C/GC/28, 16 December 2010, para 12), and the ICJ in applying CERD (Application of the Convention on the Elimination of all Forms of Racial Discrimination, Georgia v. Russian Federation, International Court of Justice, Provisional Measures, Order of 15 October 2008, para 109), have all determined that the respective treaties apply when a State’s acts have effects outside its territory. See, Ashfaq Khalfan, ‘Accountability Mechanisms’, in Langford (et al eds.), 2013, supra note 39, p. 394.


Under substantial and growing pressure from all these quarters, States must soon put their principles and promises into practice.

Article 2(1) of the ICESCR is the general implementation article of the Covenant and requires that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The drafters of the Covenant intended the primary obligation for the realisation of these rights to rest with each State party individually, reflecting the uppermost duty of each government toward its own people. Nevertheless, the phrase “and through international assistance and cooperation” was also included by necessity, in clear recognition of the simple fact that developing countries would be unable to fulfil this primary obligation individually within an international environment created by others. This is reflected in a number of other references to international cooperation throughout the Covenant, but is stressed particularly in relation to the right to an adequate standard of living protected in article 11, where it is mentioned twice and characterised as of “essential importance” to the realisation of the right.64

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64 To take but one simple example as illustration: “According to the World Health Organisation (WHO), universal health coverage ... costs at least $60 per person per year in low income countries ... Burundi with an average annual Gross Domestic Product (GDP) of $164 – simply cannot afford those expenses.” Gorik Ooms and Rachel Hammonds, ‘Global Governance
It is essential because the substantive rights with which the Covenant is concerned are held to be universal, inherent in each and every human being and based on their irreducible human dignity, not on the national income of their country of birth. Without international cooperation there cannot be any pretence towards the universality of these rights. A Covenant on socio-economic rights drafted without a clear cooperative obligation, would make a mockery of the very idea of global socio-economic justice, as well as the notion of the equality, indivisibility and universality of all rights as founded in the Universal Declaration of Human Rights. Certain rights would not then be based on the inherent human dignity of all people, but on personal or national wealth. As a matter of principle, irrespective of the clear injustice of reality, such rights would then ultimately arise from pure fate, from a lottery of birth. Such a principle was emphatically rejected by the drafters of the Covenant. Perhaps Craven puts this point best.

Those ... who see the ESC [economic, social and cultural] rights project as mundane [because they live in the wealthy world], do so largely by refusing to engage with the possibility that their lives may be somehow connected to those living in poverty elsewhere in the world (that the accrual of wealth and resources in the North is unconnected

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67 See the discussion in the next section.
to their lack in the South). And it is, thus, in respect of the existence or otherwise of international (or extraterritorial) obligations in respect of ESC rights that much appears to depend. ... [A] territorial conception of economic, social and cultural rights not only, and rather obviously, provides a convenient analytical space for the deployment of coercive economic measures internationally, but also, and more invidiously, puts into question the very rationale of ESC rights. ... [T]he cost of resistance to the idea of extra-territorial responsibility, is not simply an incidental one (one that may be articulated for example, in terms of ‘collateral damage’, or ‘necessary suffering’) but rather a cost which may seriously prejudice any continued commitment to such rights.68

In this light, the recent literature should be careful not to foster any narrative presenting cooperative or extraterritorial obligations as only a recent reaction to the nature of the latest phase of globalisation, seeking to change the ‘design’ of international human rights law. To give one example:

[T]he legal community began to focus some attention on the spatial reach of human rights only since the 1990s. This new development ... was felt to make the international human rights regime relevant to contemporary forms of transboundary human rights violations ... [and] to mitigate the impacts of globalisation ... [marking] a radical challenge – or a ‘revolution’, so to speak – to the norms of general international law ... [S]uch a radical development represents a ‘quantum leap’ in the norms of human rights law.69

In contrast, the exclusive attention on the domestic State in the predominant Northern conception of human rights, previous to the late 1990s, was not intrinsic to any original design but only to the way it was *perceived* and implemented in fact. The conception of solely territorial human rights duties is a distinctly Northern ideology, which was never shared by the vast majority of the world, the developing countries or by the past Soviet bloc, who long argued for international human rights obligations. Increased attention in the 1990s is restricted to the Northern, and particularly European legal community. Keba M’Baye, as only one prominent representative of the South, and a relatively recent example at that, focussed a great deal of attention on them in the 1970s.\(^{70}\)

Attempts to make the human rights regime relevant to trans-boundary violations began at the inception of modern human rights law itself by nations still colonised and newly decolonised.\(^{71}\) The ‘revolution’ and the ‘quantum leap’ instituting international State obligations occurred then, when these documents were proclaimed. The rest is failed implementation due to the ‘normal’ operation of the human rights regime, as instantiated and enforced by the powerful.\(^{72}\)

This occurs regularly, where human rights law is portrayed as having to ‘catch up with the times’, and the ‘development’ of extraterritorial obligations or obligations of international


\(^{71}\) With greater flows of FDI such negative human rights influence has indeed increased, yet the need to protect populations and local economies from foreign investment has actually been one of the longest standing battle-grounds on which developing countries have claimed international cooperative obligations, as is made clear in the Charter of Rights and Duties of States as quoted above.

cooperation, over the last decade or so, is seen as central to that response. Historically it is more accurate to observe an increasing Northern awareness and attention to obligations that have been long ignored, but no less long standing. It is dangerous to portray the current, and well overdue, delineation and strengthening of these long standing obligations as a reactive ‘creation’ of new norms. Such a perspective elides the long struggle of the decolonised and developing world for recognition of exactly these obligations, still visible in the current Doha round at the WTO. It also makes these obligations seem precarious and fragile, ‘in their infancy’, when in fact they are deeply rooted, long neglected and abused, yet strongly recurrent and resilient.

There is nothing new here. The struggle for the recognition of such obligations is an old project, rooted in anti-colonialism, having its slow, yet necessary and inevitable, way with an international law that must one day give effect to its formal recognition that people in poor and powerless countries are actually and equally human. To associate a certain rediscovery of the importance of international cooperative obligations in Northern circles around the turn of this century, with any kind of normative ‘revolution’ undermines their weight and denies their actual age. It ignores the fact, universally acknowledged in the drafting of the ICESCR, that without international cooperation any theoretical universality of socio-economic rights emanating from basic human dignity is pure illusion.
5.3.1 - The Drafting of Article 2(1)

The pronouncements of the State’s representatives during the drafting process of Article 2(1) give a certain amount of definition to the obligation to cooperate. Perhaps surprisingly it was the United States’ delegation that took the lead in suggesting the inclusion of the phrase ‘international cooperation’.

This was agreed by consensus in clear recognition of the fact that external factors, in some shape or form, were essential for the realisation of the Covenant rights in poor countries. The representatives from Egypt and India respectively, stated that “the available resources of the smallest countries, even if utilised to the maximum, would be insufficient; [and] as a result, those countries would have to fall back on international cooperation”, and that “international cooperation [was] a point which was of cardinal importance to the under-developed countries, which needed help if they were to be capable of implementing economic rights.”

It is interesting to note that both these countries refer only to cooperation and not to assistance. Assistance was not mentioned in early drafts of Article 2(1), which referred only to

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73 Skogly, 2006, supra note 54, p. 84.
74 Ibid, pp. 83-96. In his analysis of the travaux Gondek concludes that “in the discussions, cooperation was seen as a very important element for the achievement of the rights in question rather than as a mere rhetorical device.” Michal Gondek, The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties (Intersentia, Antwerp, 2009), p. 300. Notably, in the earlier drafting of the Universal Declaration of Human Rights there was an equal consensus on the necessity of international responsibility and cooperation for the realisation of the rights enunciated, especially regarding socio-economic rights and a conducive international order (UDHR Articles 22 and 28). Aguirre, 2008, supra note 54, p. 281. Some drafters of the UDHR even held that international cooperation was essential to secure all human rights including civil and political rights. See, Gondek, 2009, above, p. 319.
75 Skogly, 2006, supra note 54, p. 85 (emphasis added).
cooperation. In the second drafting session Bolivia, Chile, Colombia, Mali and Ecuador sponsored the replacement of this singular reference with “international assistance and cooperation, especially economic and technical.”  

As stated by Künne mann, it would seem clear that “assistance was added later on (and put in front), obviously to underline its importance as a form of cooperation”, a proposition well borne out by the expansive vision of cooperation expressed by the US at the time (see below).

The Mexican representative stated that “international economic assistance was mainly a means of countering economic maladjustments arising from external causes”, and further, that what was required of international cooperation by developing countries “went far beyond ... financial and technical assistance” and included “for instance ... permanent international machinery for preventing sudden and excessive fluctuations in the prices of primary commodities, which could be disastrous for developing countries.”  

In a similar vein the representative from Egypt asserted that, “by international cooperation he meant the cooperation achieved through international bodies such as the United Nations, the International Monetary Fund, the Technical Assistance Board, etc.” The Chilean representative held that “the effective realisation of the rights recognised in the Covenant very often necessitated technical assistance by experts from abroad and

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76 Gondek, 2009, supra note 74, pp. 299-300.
the investment of foreign capital,” and that this applied “also to legislative and cultural efforts and – a very important point – to commercial activities relating to basic commodities.”

The representative from Greece observed that international cooperation and assistance should be considered part of the “available resources” mentioned in the article. In other words the resources referred to apply both to those of the developing country and to those of the international community, specifically to those of wealthy developed States. Furthermore, these resources, collectively, should be applied to the realisation of the rights set out to the maximum of their availability. This was not seen in the drafting to be a controversial issue, indeed it was seen as a straightforward extension of the necessity for a reference to international assistance and cooperation approved by consensus in the first place.

Algeria was of the opinion that when developing countries “spoke of assistance and technical and economic cooperation they viewed them as a two-way venture; indeed the highly developed countries depend on the less developed countries for their very existence.” The effects of colonialism and a concern that a form of economic neo-colonialism would replace it were clear preoccupations of some States. The representative of Mali, for instance was of the view that “international cooperation was owed to the formerly colonised States in repatriation for the ’systemic plundering of their wealth under

80 General Assembly, Seventeenth Session, Third Committee 1202nd meeting, Official Records, Agenda Item 43, paras 15 and 17, as quoted in Skogly, 2006, supra note 54, p. 86
81 Skogly, 2006, supra note 54, p. 85, FN 321.
82 Alston and Quinn, 1987, supra note 78, p. 187.
83 Ibid.
84 Ibid, p. 189.
colonialism.”85 It was also noted by another representative that “nations that were or had been colonised did not go begging, but called for the restoration of their rights and property.”86

Finally, the US was quite adamant in expression of a very wide definition of international cooperation, the representative stating that, “the words ‘international cooperation’ in the original text of article 2, paragraph 1 adequately covered all forms of international assistance. The addition of qualifying phrases could only limit the possible range of cooperative activities.”87

On the basis of their analysis of the drafting history in Alston and Quinn suggested in 1987 that, as one “type of analysis by which it might be possible in the future to attribute specific implications to the undertaking contained in Article 2(1)”, an understanding of the meaning of international cooperation based on a requirement that wealthy States should

conduct their economic policies in a manner which takes into account the interests of other countries by appropriate procedures of consultation; in the legitimate exercise of their economic sovereignty, they should seek to avoid any measure which causes substantial injury to other States, in particular to those interests of developing States and their peoples.88

85 Ibid.
86 Ibid.
87 Skogly, 2006, supra note 54, p. 87.
88 Alston and Quinn, 1987, supra note 78, p. 191-2.
Therefore, a first step in deducing the meaning attributed to the term cooperation in the drafting process would be to characterise it as a *means of addressing the power differential* between wealthy influential States and those States unable to realise the rights of their people, largely due to inbuilt structural disadvantage in the international economic order. The concept of cooperation would then be fundamentally linked to this power differential, and obligations to cooperate would be based on any given State’s relative power to effect the realisation of rights in any other given State. This would seem to be intuitively quite a sound and satisfactory basis as it allows for a finer distinction of obligations beyond simple considerations of wealth, and acknowledges that there are a very broad range of modes in which power can be exercised to effect rights realisation. It will also allow for a principled delineation of obligations that one developing country may have toward another developing country (for example negotiations over a trade agreement between China and Vietnam), or between developed countries (for example between Germany and Greece with regard to the terms of sovereign debt bail-outs).

More detail can be added to the concept of international cooperation by looking at what it was *not* meant to mean. Here the delineation of what was meant by the concept of assistance becomes important. There is a clear textual basis for an express distinction between assistance and cooperation in the statement by the Mexican representative, which is very revealing. He described assistance as “*mainly a means of countering* economic maladjustments arising from external causes.”\(^{89}\) This is in reference again to the disequilibrium in

\(^{89}\) Craven, 1995, supra note 78, p. 144, FN 234, and p. 146, FN 243 (emphasis added).
power and influence of wealthy States at the level of the international order where these adjustments are made. But assistance here is clearly not meant to address these disequilibria, maladjustments and external causes *directly*. It is there only to counter them, to offset them, or to in some way compensate for them. These disequilibria, maladjustments and external causes negatively effecting the development of poor nations and the realisation of the Covenant rights of their peoples, may be termed structural obstacles. So, this statement is made in clear recognition that while assistance may to a certain degree offset their effects, it is not meant to address or remove these structural obstacles. Assistance leaves the structural obstacles intact and unchallenged, because it is oblivious to the underlying power differential that creates those obstacles in the first place.

What drives this point home, and what is crucial to the argument here, is in the second part of the statement by the Mexican representative. He goes on to say that what was required by developing countries from international *cooperation* “went far beyond” assistance, addressing the sort of measures that would be needed to remove structural obstacles directly. Thus it cannot be understood to be legally acceptable simply to provide assistance to somewhat ameliorate the negative effects of a deleterious international order. It is necessary to address that order itself, which, it is posited, was the logical and original intention of the concept of cooperation within the legal framework of Article 2(1). As such, cooperation is the key operational legal principle for the realisation of the promise of socio-economic rights and an

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90 Craven, 1995, supra note 78, p. 144, FN 234, and p. 146, FN 243
91 The utter inadequacy of ameliorative assistance is highlighted by Ooms and Hammonds. Ooms and Hammonds, 2012, supra note 64, pp. 476-477.
enabling international order expressed in Articles 22 and 28 of the UDHR.92 The very purpose of drafting the Convention was to give expression to the binding requirements of these declaratory articles. Cooperation must therefore have been foreseen as a binding obligation.93

Furthermore, human rights treaties in particular are to be considered living instruments, maintaining relevance to changing circumstances.94 In our present world the delineation of concrete obligations to cooperate in specific contexts for the realisation of socio-economic rights is an increasingly pointed necessity to provide the underlying prerequisite social and economic security recognised by the UN Charter for the attainment of global peace and security. Therefore, Alston and Quinn’s assertion that considerable changes “subsequent to the adoption of the Covenant in 1966 may be such as to necessitate a reinterpretation of the meaning to be attributed today to Article 2.1” is now acutely relevant.95

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94 Tyrer v. United Kingdom, European Court of Human Rights, Application No. 5856/72, Judgment, 25 April 1978, para 3. For further discussion of the ‘living instrument’ and ‘practical and effective’ doctrines as formulated by the European Court of Human Rights see, Alistair Mowbray, ‘The Creativity of the European Court of Human Rights’ 5 Human Rights Law Review 1 (2005). The Vienna Convention on the Law of Treaties also states that subsequent agreements between States and changes to the practice of applying particular treaties must be taken into account in their interpretation; Vienna Convention, supra note 58, Articles 31 (3)(b), and 31 (3)(c).

95 Alston and Quinn, 1987, supra note 78, p. 191.
5.3.2 - The Committee

The pronouncements of the Committee administering the Covenant hold a somewhat ambiguous position in international law. Yet there is no doubt that, aside from the interpretations of State Parties themselves, the Committee is the pre-eminent independent authority, and therefore the primary source of international legitimacy where the delineation of obligations flowing from the Covenant is concerned. The legal status of such delineation was at one time the focus of the International Law Association, which adopted a final report on this matter in 2004.\(^\text{96}\) It noted that, while the views of the Committee are non-binding on States and national courts,\(^\text{97}\) a number of domestic judges have observed their “authoritative status under international law” and have used them to interpret the details of domestic constitutions.\(^\text{98}\)

Tomuschat argues that States are under an obligation of good faith not to discard the views of treaty bodies without


\(^{97}\) Ibid, p. 628.

\(^{98}\) *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*, High Court of South Africa, Witwatersrand Local Division, 6 BCLR 625, Case No. 01/12312, Judgement, 5 September 2001, paras 17-18. The highest level of the Federal Court of Australia has noted the propriety of reference to the findings of the human rights treaty bodies “as the opinions of an expert body established by the treaty to further its object[jives]”.\(^\text{98}\) *Minister for Immigration & Multicultural & Indigenous Affairs v. Al Masri*, Federal Court of Australia, [2003] FCAFC 70, 15 April 2003, para 148. Also in Australia, international law has been legislatively defined as including “general comments and views of the United Nations human rights treaty monitoring bodies.”\(^\text{98}\) Human Rights Act 2004, Australian Capital Territory, Dictionary (definition of “international law”, para (b)).
very good reason and clear explanation.99 Scheinin adds that it is the States themselves who declared the obligations of human rights treaties as binding, if necessarily vague, and who set the treaty bodies up expressly to elaborate on and apply these binding obligations in specific contexts with regard to concrete facts. He concludes that if such bodies find violations of these rights then States are obliged to remedy the situation.100 Similarly, Gondek argues that State agency in the establishment of the treaty bodies engages their consent to the elaboration and interpretation of internationally binding obligations. States thereby “delegated at least part of the authority to interpret”, and it is “reasonable to assume that a lack of objection to a general comment, which is publicised and addressed to all State Parties, can be considered as acquiescence in a particular interpretation.”101 He concludes that at the very least “the authoritative value of General Comments is very high.”102 Against this background the Committee has made no attempt to date to systematically address or define the phrase ‘international assistance and cooperation’ either legally or conceptually.103 Yet it has nonetheless begun the process of developing context and shape with regard to the nature of the international obligations inherent in Article 2(1), albeit in a relatively ad hoc fashion.104

102 Ibid, p. 45.
104 “[T]he notion of extraterritorial human rights has been approached by courts and human rights expert bodies in a purely ad hoc fashion... the principles remain vague and unarticulated.” Olivier De Schutter, ‘Foreword’, in Coomans and Künnemann (eds.), 2012, supra note 5, p. vi.
In General Comment 2 the Committee elaborates some broad standards that can be seen to form certain contexts for these obligations. For instance, in relation to international development projects administered by UN agencies the Committee notes that all such projects should take into account the principles, object and substantive content of the Covenant, and human rights impact statements should be prepared. Reference is made to austerity measures linked to structural adjustment programmes and international processes administered by the IMF and the World Bank. The Committee notes that these measures “should take full account of the need to protect economic, social and cultural rights through, inter alia, international cooperation.” Furthermore, the World Trade Organisation has also been targeted by the Committee and urged to formulate a methodology for assessing the impact of trade and investment policies on human rights realisation.

General Comment 3 on the nature of States parties’ obligations under the Covenant is specifically devoted to an analysis of Article 2(1), where the intention of the drafters mentioned above is confirmed, that available resources “refer to both the resources existing within a State and those


106 Ibid, para 8 (b).
107 Ibid, para 9.
available from the international community.”

It emphasises the “essential role of cooperation in facilitating the full realization of the relevant rights” and goes further to state unequivocally that international cooperation “is an obligation of all States” grounded in the UN Charter and “well-established principles of international law.”

Despite amorphous content, which is, to a greater or lesser degree, the case with any legal norm, the obligation to cooperate is binding under international law. Elsewhere the Committee has made it clear that the degree of obligation is a function of a State’s capacity and power.

The Committee initiated a more focussed development of the extraterritorial effects of the Covenant with the advent of

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110 Ibid.
111 Ibid, para 14.
General Comment 12 on the right to food. It contains a separate section of five paragraphs devoted to international obligations and elaborates on the nature of cooperation by use of the tripartite typology of responsibilities. Thereby each State “should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.”114 With regard to the establishment of international agreements States should “ensure that the right to adequate food is given due attention.”115 At least with regard to the right to food and baseline obligations to respect, there is evidence for a widespread acceptance by all States of duties towards the populations of other States in the context of international agreements. A number of resolutions on the right to food within the UN General Assembly repeatedly stress that all States should make all efforts to ensure that their international policies of a political and economic nature, including international trade agreements, do not have a negative impact on the right to food in other countries.116

Later General Comments have also included sections on international obligations, though most go no further than the above in defining the content of cooperation or assistance.117 A

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114 CESCR, General Comment 12, UN Doc. E/C.12/1999/5, 12 May 1999, para 36. “States should also refrain at all time from policies of which the effects can be foreseen or that they are aware will have negative effects on the right to food.” The Right to Food: Report of the Special Rapporteur on the Right to Food, Jean Ziegler, UN Doc. E/CN.4/2005/47, 24 January 2005, paras 51-52.

115 Ibid.


117 See, General Comment 13, The Right to Education, UN Doc. E/C.12/1999/10, 8 December 1999, para 56; CESCR, General Comment 14, supra note 113, paras 38-42; CESCR, General Comment 17, supra note 113, paras 36-38; CESCR, General Comment 18, supra note 113,
particular exception is Comment 15 of 2002 on the right to water. This Comment represents the Committee’s cutting edge on the content of international obligations under the Covenant. Stronger wording is used and a certain degree of detail is added. For instance, the Committee holds that,

To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realise the right to water for persons in its jurisdiction.\textsuperscript{118}

The language here of compliance and requirement is a marked evolution from the ubiquitous ‘should’ in earlier Comments, and is adhered to throughout all subsequent Comments. Accordingly, the obligation to respect the rights of peoples in other countries, at all times and in all circumstances, is now regularly applied by the Committee as a mandatory obligation, applicable immediately and not subject to any qualification of incremental or progressive implementation.\textsuperscript{119} However, with reference to the tripartite typology, this language is only used in relation to the lowest level of obligations to respect. When


118 CESC, General Comment 15, supra note 113, para 31.

119 In applying the right to health, for example, ICJ Justice Weeramantry has declared that all State Parties to the ICESR “recognise the right of ‘everyone’ and not merely of their own subjects. Consequently each state is under an obligation to respect the right to health of all members of the international community.” \textit{Legality of the Threat or Use of Nuclear Weapons}, International Court of Justice, Advisory Opinion, Weeramantry dissenting, 8 July 1996, p. 144.
the analysis moves to obligations to protect and fulfil ‘should’ makes a return:

Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.¹²⁰

However, it must be noted that in the earlier General Comment 14 the Committee refers to the obligation on States to protect in such instances in mandatory terms.

To comply with their international obligations in relation to article 12, States parties have to ... prevent third parties from violating the right [to the highest attainable standard of health] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.¹²¹

It may be surmised that the Committee concluded the time was not yet ripe, and has subsequently stepped back to the use of less demanding language in respect of positive obligations to protect in later Comments. What is now commonly argued is that support for multinational corporations from the home State, in the form of export credit, investment guarantees and general financing, should be made conditional on respect for human rights in their overseas operations. Recent US legislation requiring human rights reporting from its investors in Burma would seem to be moving in this direction.¹²² As this example indicates however, taking

¹²⁰ CESC, General Comment 15, supra note 113, para 33.
¹²¹ CESC, General Comment 14, supra note 113, para 39 (emphasis added).
a 'lower' level of respect seriously in the case of socio-economic rights, as binding in all contexts and circumstances, has the consequence of necessitating some protect-like mechanisms. This issue is addressed further below.

The necessity of due diligence in the negotiation and structuring of international agreements is reiterated in General Comment 15, and greater detail is added.

With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country’s capacity to ensure the full realization of the right to water.123

The emphasis is on the principle of ensuring no harm and the necessity of having procedures of awareness and prior assessment. Specifically, this last sentence can only be interpreted as applying directly to the activities of the World Trade Organisation, as well as the negotiation of bilateral and regional trade, and by extension, investment agreements, which together form a significant proportion of the framework of the international economic order. There is no logical reason to require a norm of no harm in regard to trade liberalisation and to disregard it in relation to the inseparable process of investment liberalisation.

In this way the Committee can be seen to be elaborating on the foundations of the concept of cooperation as deduced above from the drafting history, by directly addressing power differentials between States. The Committee regularly points to

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123 CESC, General Comment 14, supra note 113, para 35.
the need for a mechanism ensuring that the exercise of power in the formulation of the international economic order, at the least, does not inhibit another State’s capacity to realise the Covenant rights of its people. In the same vein, the Committee again mentions the influence of the IMF and the World Bank as in General Comment 2, but this time differentiates the obligations to the level of States parties as individual actors within those organisations, rather than addressing the organisations as totalities:

States parties that are members of international financial institutions ... should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures.\(^{124}\)

The Committee has even used mandatory language elsewhere in the same context.

States parties have an obligation to take whatever measures they can to ensure that the policies and decisions of those organizations are in conformity with their obligations under the Covenant, in particular the obligations ... concerning international assistance and cooperation.\(^{125}\)

Such mandatory language prompts the assertion of a set of positive obligations. Magdalena Sepulveda, for instance, argues that obligations of international cooperation require that States take specific actions, both administrative and penal, to regulate non-State actors under their jurisdiction and within their influence where their practices may undermine socio-economic rights in other countries.\(^{126}\) Despite its clarity

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\(^{124}\) *Ibid*, para 36.

\(^{125}\) CESCR, General Comment 17, supra note 113, para 56.

\(^{126}\) Sepulveda, 2003, supra note 54, p. 282.
and consistency on the mandatory nature of obligations to respect it would be helpful if the Committee clarified the status of obligations to protect within the rubric of international cooperation. This would seem to be something of an intractable grey area. In his analysis of the Committee’s work Coomans, for instance, concludes that “obligations to respect seem to be clearer and more solid, while obligations to protect and fulfil in different types of situations ... are still largely undefined and consequently weak.”  

127 Though the two authors differ in some respects, Skogly makes comparable conclusions:

[Ex]traterritorial obligations are primarily negative in that they refer to obligations to refrain from violations, rather than positive obligations to actively ensure human rights enjoyment for every individual abroad. ... If the negative obligations ... are emphasized ... the concept of universality of human rights obligations becomes far more manageable.  

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Finally, the Committee has followed up on these statements within its concluding observations on States parties’ periodic reports. For example in its observations on one of Ireland’s reports the following was stated:

The Committee encourages the State party, as a member of international organisations ... to do all it can to ensure that the policies and decisions of those organisations are in conformity with the obligations of States parties under the Covenant, in particular the obligations contained in Articles

128 Skogly, 2006, supra note 54, pp. 203, 206.
2(1), 11, 15, 22, and 23 concerning international assistance and cooperation.\textsuperscript{129}

Ireland was also urged “to ensure that its contribution to international development cooperation reaches 0.45% of GNP by the end of 2002 ... and that this annual figure increases, as quickly as possible to the United Nations target of 0.7% of GNP.”\textsuperscript{130}

With regard to the State’s actions within the international financial institutions very similar observations have been made of Germany, Finland, France, Japan, Sweden, Italy, Belgium and the United Kingdom.\textsuperscript{131} And with regard to levels of ODA, again similar observations relate to the aid programmes of Japan, Germany and Finland.\textsuperscript{132} In addition, the Reporting Guidelines for State Parties currently require States to report on the method by which it is “fully” taking account of its obligations not to infringe upon or undermine the socio-economic rights of persons in other countries “when

\textsuperscript{129} CESCR, Concluding Observations: Ireland, UN Doc. E/C.12/1/Add.77, 5 June 2002, para 37.
\textsuperscript{130} Ibid, para 38.
negotiating or ratifying international agreements." The Guidelines also require States to report on the extent to which efforts at development cooperation have resulted in the realisation of socio-economic rights. This requirement has been pressed by the Committee in relation to Swedish development cooperation, as well as the effects of Swedish trade policy on the realization of Covenant rights in developing countries. Germany has been chastised for supporting projects that have reportedly resulted in the violation of economic, social and cultural rights, such as in the case of the land-titling project in Cambodia. ... The Committee recommends that the development cooperation policies to be adopted by the State party contribute to the implementation of the economic, social and cultural rights of the Covenant and do not result in their violation.

From the practice of the Committee it is therefore clear that, at a minimum States are under an obligation to inform their processes of development cooperation with the intent of

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realising socio-economic rights. In other areas the Committee has been forthright in recent Concluding Observations with respect to Germany.

The Committee notes with deep concern the impact of the State party’s agriculture and trade policies, which promote the export of subsidised agricultural products to developing countries, on the enjoyment of the right to an adequate standard of living and particularly on the right to food in the receiving countries. ... The Committee urges the State party to fully apply a human rights-based approach to its international trade and agriculture policies, including by reviewing the impact of subsidies on the enjoyment of economic, social and cultural rights in importing countries. ... The Committee expresses concern that the State party’s policy-making process in, as well as its support to, investments by German companies abroad does not give due consideration to human rights. .. The Committee calls on the State party to ensure that its policies on investments by German companies abroad serve the economic, social and cultural rights in the host countries.

A certain level of acceptance of these obligations on behalf of developed States has been indicated. The German Federal Ministry for Economic Cooperation and Development has stated in a recent publication that “[h]uman rights impose obligations on States not only within their territory but also in relation to their actions in international organisations and in

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other countries.” In addition, the Accra Agenda commits donor States to “ensure that their respective development policies and programmes are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability, and environmental sustainability.” This leads to the logical conclusion that,

at least in the context of development cooperation, all developed countries have accepted that they have an obligation under international human rights law to refrain from negatively interfering with human rights in other countries.

5.3.3 – The Utility of the Optional Protocol

Unsurprisingly, there is a certain divide between developed and developing countries over the binding nature of international obligations to cooperate. This division is neither as sharp or defined as is often presumed, however it was certainly visible during negotiations over the recently adopted Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). The OP-ICESCR established an individual complaints mechanism,

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140 Accra Agenda for Action, Third High Level Forum on Aid Effectiveness, 2-4 September 2008, para 13(c). This commitment was affirmed by over 100 States at the Forum, including all developed countries.
141 Khalifan, 2013, supra note 59, p. 410.
among other notable advances in the formalisation of
generalised cooperation between State Parties for the
by the African Group and a number of Latin American States,
developing countries premised their participation in the
negotiations on the expectation that attention would be given
to enforcing international obligations of cooperation and assistance.\footnote{Ibid, p. 26.} On the other hand, Sepulveda notes that

some ‘Western’ countries seem to remain unconvinced that
international cooperation is amenable to adjudication ...
Moreover, for some of these States, the obligations related to
international assistance and cooperation are of a moral
character.\footnote{Sepulveda, 2006, supra note 137, p. 273.}

Nevertheless some nations within this group, such as Finland
and Belgium supported the African/Latin American position
from the start. Those initially denying legal obligations in this
area included the UK, the Czech Republic, Canada, France
and Portugal. However, it is important to note that all
members of this latter group except Canada had moved onto
the fence, or jumped over it, by the third session of
negotiations.\footnote{Ibid, p. 273, FN 9.}

It may be that the effectiveness of the OP-ICESCR was
greatly damaged by some States taking ideological positions
rather than negotiating from a true concern for the universal
realisation of the Covenant rights.\footnote{See for example, Arne Vandenbogaerde and Wouter Vandenhole, ‘The
Optional Protocol to the International Covenant on Economic, Social and...
Vandenhole characterise these States as “the sceptical camp”, which initially opposed the Protocol and, when it became inevitable, sought to postpone its adoption and weaken it where possible.\textsuperscript{149} They number amongst this camp, Australia, Canada, the Netherlands, New Zealand, Sweden, the UK, the USA, and Poland. However, they too note that some European States, such as Finland, Spain, Croatia, Belgium and Germany, supported the Protocol and some became more amenable to its effectiveness over time. Generally the issue of international assistance and cooperation played out roughly along North-South lines, and was reduced, as is usual, to a narrow dispute over the obligation or otherwise to provide development aid.\textsuperscript{150} Yet, it was evident that these lines are far from fixed, and a number of Northern States would seem open to the existence of broader obligations beyond this singular and least important issue.\textsuperscript{151}

More general disagreements crystallised over the concept of jurisdiction. Although there is no reference to jurisdiction in the Covenant such a clause was introduced into the OP-ICESCR, fundamentally limiting its scope to individual complaints against the domestic State, and carving out the prima facie application of obligations of international cooperation and assistance.\textsuperscript{152} On the surface individuals are

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{149} Ibid, p. 210.
\item\textsuperscript{150} Ibid, pp. 228-230.
\item\textsuperscript{151} “Northern countries, and in particular the EU, have gradually adopted a more constructive approach to the issue.” Vandenhole, 2009, supra note 53, p. 60.
\item\textsuperscript{152} “Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party.” OP-ICESCR, supra note 143, Article 2. To establish a jurisdictional link under these circumstances the Committee will have to diverge substantially from the tests of ‘overall’ or ‘effective’ control utilised by the European Court of Human Rights and
\end{itemize}
\end{footnotesize}
precluded from bringing a complaint against a State other than the territorial State under whose jurisdiction they abide. This would seem to apply even to the least controversial level of international obligations on States to respect the rights of people living in other countries.

The introduction of this clause was deemed necessary to accommodate the views of a number of Northern States that legal enforcement of an obligation to cooperate would overburden them with claims for mandatory provision of development assistance.\(^\text{153}\) In contrast developing countries were concerned that, without acknowledgement of international obligations, the OP-ICESCR could subject them to unrealistic demands for the enforcement of a level of rights provision beyond the capacity of their insufficient resources.\(^\text{154}\) As compensation for the limitation of the jurisdictional clause, mechanisms were instituted for inter-State complaints,\(^\text{155}\) an inquiry procedure,\(^\text{156}\) a communications procedure regarding international assistance and cooperation,\(^\text{157}\) and the establishment of a trust fund for provision of expert and technical assistance.\(^\text{158}\) However, it is generally acknowledged that the full extent of the rights and duties instituted and enshrined by States' ratification of the Covenant are

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\(^{153}\) Gondek, 2009, supra note 74, p. 329.
\(^{155}\) OP-ICESCR, supra note 143, Article 10.
\(^{156}\) Ibid, Articles 11, 12.
\(^{157}\) Ibid, Article 14(1) and (2).
\(^{158}\) Ibid, Article 14(3).
unfortunately not covered by the OP-ICESCR, largely due to the addition of a jurisdictional requirement.\textsuperscript{159}

The interpretation and application of cooperative obligations may nevertheless be facilitated by the other mechanisms provided in the OP-ICESCR. As noted by Salomon, limited jurisdiction does not apply to inter-State complaints and the inquiry mechanism, nor does it affect the existing evolution of obligations addressed through traditional State reporting requirements addressed above.\textsuperscript{160} Inter-State complaints may only be heard by the Committee if both States involved in the dispute have additionally ‘opted-into’ this procedure, and are also reliant on the complaint being politically expedient for the State concerned.\textsuperscript{161} The inquiry procedure again requires an additional act of acceptance by the country under question, and is dependent on “reliable information indicating grave or systematic violations by a State Party”, setting a high threshold.\textsuperscript{162} On the other hand, advantages include its natural focus on systemic issues and the fact that it may be initiated by those immediately affected.

The possibility exists that an inquiry under this procedure could illuminate the role played by extraterritorial States in any systemic violations by the domestic State. A number of Special Rapporteurs of the Human Rights Council have made very convincing connections in the process of their own

\textsuperscript{159} See for example, Christian Courtis and Magdalena Sepulveda, ‘Are Extraterritorial Obligations Reviewable under the Optional Protocol to the ICESCR?’ 27 Norvegian Journal of Human Rights 1 (2009), p. 58.
\textsuperscript{160} Salomon, 2013, supra note 152, p. 290.
\textsuperscript{161} Inter-State complaints mechanisms in other human rights treaties have been widely under-utilised for political reasons. Furthermore, the individual or community affected will have no voice in the presentation and argument of the case. Courtis and Sepulveda, 2009, supra note 159, p. 59.
\textsuperscript{162} OP-ICERSC, supra note 143, Article 11(2).
inquiries.\textsuperscript{163} There would not seem to be any obstacle to the Committee finding similar causality. Superficially the mechanism would only seem to foresee an inquiry into a single State. However, its relevance to the illumination of violations stemming from extraterritorial actions of other States cannot be ruled out.

For the purposes of the present study it is worth noting that under the inquiry procedure civil society organisations and relevant communities may bring reliable information to the attention of the Committee to the effect that the involvement of their national government in negotiations on trade or investment at an international level, or negotiations with a foreign investor at the domestic level, threatened systematic violations of their socio-economic or cultural rights. For example, this would potentially be relevant to individuals and groups within El Salvador, which is a State Party to the OP-ICESCR and has made the relevant declaration,\textsuperscript{164} should it resume currently stalled negotiations on trade and investment with Canada.\textsuperscript{165} Feasibly, following an initial inquiry, the Committee might request cessation of the negotiations as an interim measure “to avoid possible irreparable damage to the victim or victims of the alleged violations”, in accord with OP-ICESCR Article 5.\textsuperscript{166} The evidence presented above suggests

\textsuperscript{163} See references at footnotes 60-63 above.
\textsuperscript{164} El Salvador has made the required declaration opting into the mechanism. See, United Nations Treaty Collection, Status of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, at \url{http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en#EndDec} (1-8-2014).
\textsuperscript{166} The Committee Expert and Country Rapporteur has indeed touched on this issue, posing the following question to the government’s delegation in
strongly that until the current approach to these negotiations is substantially altered there a foreseeable risk of serious harm to the socio-economic rights of the people of El Salvador. Negotiation should then only proceed in the presence of sufficient safeguards to ensure that this eventuality does not occur. The nature of these safeguards is addressed in detail in the next chapter.

The possibility also exists, although perhaps marginal,\(^{167}\) that the Committee, in the course of addressing individual complaints may interpret the notion of jurisdiction expansively.\(^{168}\) A causal connection less extreme than effective or overall control, may be deemed sufficient to establish responsibility. For instance, Salomon asks rhetorically;

Might the Committee conclude that persons negatively affected by decisions on loan conditions made by the respective Executive Directors, or ultimately by the Executive Boards of the World Bank and International Monetary Fund (IMF), fall within the ‘jurisdiction’ of those


\(^{168}\) The legal theoretic basis for such interpretation is set out in detail by Scheinin, focussing on a practical approach whereby a factual causal/influential link, evident from a “nuanced contextual assessment of the factual circumstances” that ground an attribution to the respondent State of certain conduct harmful to the individual complainant, should settle the question of jurisdiction. Martin Scheinin, ‘Just Another Word? Jurisdiction on the Roadmaps of State Responsibility and Human Rights’, in Langford (et al eds.), 2013, supra note 39.
member States of the IFIs party to the Covenant that supported the decision?\textsuperscript{169}

In the end it will be reliant on the petitioner to meet a seemingly heavy burden of proof, a fact complicated by the limited access to resources and information suffered by most potential petitioners in the South.\textsuperscript{170} However, the Committee will also have to be constantly cognisant of its previous statements in General Comments and Concluding Observations confirming the relevance of international obligations to cooperate, making specific mention of international organisations and trade and investment arrangements. Without due regard there is scope for the Committee to contradict itself.\textsuperscript{171}

Along the same lines, another point of interest would be the response of the Committee in a situation where a developing country raises these obligations, particularly incumbent on the North, in its defence in the course of a complaint by one of its own citizens. Austerity measures conditioned by donors and IFIs are an obvious example. It is very difficult, on the basis of its past statements, to envision that the Committee could dismiss such a defence where it is backed by solid evidence. The question then becomes whether it would take the next step and draw a jurisdictional connection to one or more other States. The situation is greatly complicated, for example, in the highly likely event that the complaint regards an alleged violation of Article 11 of the Covenant, establishing the right to an adequate standard of living. This article makes two textual references to international cooperation, one in particular

\textsuperscript{169} Salomon, 2013, supra note 152, p. 291.
\textsuperscript{170} Courtis and Sepulveda, 2009, supra note 159, p. 58.
\textsuperscript{171} Salomon, 2013, supra note 152, p. 291.
denoting its “essential importance.” In effect, an analysis of a complaint simply cannot avoid consideration of cooperative obligations that are written directly into the right in question.

On statements made by some Northern governments denying any legally binding international obligations contained in Article 2(1) of the Covenant, there are a number of possible responses. As the discussion of the drafting makes clear, cooperation is not reducible to assistance, and the debate suffers immeasurably from this persistent reduction. Cooperative obligations, as argued further below, have more to do with general behaviour and conduct. They would require abstention from certain actions, or other behaviour involving due diligence efforts to ensure that no harm is done as a result of certain decisions or policies. It may be presumed that a denial of obligations understood in this robust way, as opposed to the straw man of assistance, would be very hard to sustain in light of the drafting, the plain text of Article 2(1), the object and purpose of the Covenant, and the clear statements of the Committee in its General Comments.

The recent assertions of the US that socio-economic rights do “not give rise to international obligations”, or of Sweden that “there is no legal obligation of international cooperation and assistance”, are very hard to square with the fact that the US led the push for the inclusion of the term ‘international cooperation’ during the drafting of the Covenant, reflecting the unanimous recognition that such cooperation would be essential for the Covenant to have any meaning in the vast majority of developing countries. At that time the US was adamant that nothing should “limit the possible range of

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172 ICESCR, supra note 57, Article 11(1).
cooperative activities.” 174 It is very difficult to see how a fundamentally essential element in an intentionally legally binding treaty could subsequently be interpreted to have no legal effects.175 Perhaps to prevent such revisionism the more recent Convention on the Rights of Persons with Disabilities contains a stand-alone article on international cooperation. To confuse matters, the overwhelming majority of Northern States have ratified this convention and bound themselves to the full range of duties, negative and positive, including Canada, Australia and others who were vocal against international obligations during negotiations on the OP-ICESCR.

Ultimately, the negotiations over this instrument illustrate the need for greater attention to the education and placation of Northern States, to allow for a greater convergence over the blurred divide between their positions and those of the developing countries. One key recurring concern is the confusion that the recognition of obligations here will result in the attempted enforcement of mandatory aid contributions, while the position of developing States does not reflect this approach. The latter are more concerned with structural reform than with financial transfers, and always have been since the drafting of the Covenant. Structural reform is an issue that Northern States should be more willing to discuss given significant recent changes in global economic relations. Dispelling such confusion would potentially achieve a great deal in making the powerful more amenable to the concession

174 General Assembly, Seventeenth Session, Third Committee 1204th meeting, Official Records, para 49, as quoted in Skogly, 2006, supra note 54, p. 87.
of legal obligations. The OP-ICESCR is a glass either half full or half empty, depending on one’s point of view.

5.4 – Further Theoretical Development

The academic and other literature has further developed the content, scope and nature of obligations to cooperate, moving beyond an established defence of their existence to a current stage of theoretical deepening and advanced standard-setting.176 In particular, Margot Salomon, building on the fundamental ethical theories of Pogge, Beitz and Ulrich, has developed a comprehensive theory on the legal content of international cooperation.177 Her work is focused on global economic governance and the influence wealthy States exercise with regard to structural obstacles to development.178 Her

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176 See, Vandenhole, 2013, supra note 54.
theory ties together the different legal sources of international cooperation to centre on a concept which requires the institution of an equitable international order that facilitates the realisation of all human rights. Foremost among the positive duties that must adhere to a legal concept of cooperation is that of removing the structural impediments to that order, and giving legal expression to the notion that the ability of developing states to develop, and to fulfil their human rights obligations, relies on the complementary role of the international community to create an environment conducive to those objectives.  

This viewpoint highlights the essential and least controversial aspect of cooperative obligations, the duty to ensure respect for human rights, or to avoid causing harm in the creation and operation of a global economic order. This is a clear principle under general international and customary law.

In fleshing out the contours of a legal obligation to cooperate Salomon makes reference to Millennium Development Goal (MDG) 8 regarding the pledge by the international community

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180 “As a first step in international cooperation, each State should scrutinise its own patterns of conduct to ensure that it restrains activities under its control that could contribute to human rights violations elsewhere.” Lori Fisler Damrosch, ‘Obligations of Cooperation in the International Protection of Human Rights’, in Delbruck (ed.), 2002, supra note 7, p. 43.

to build partnerships for development between rich and poor nations.\textsuperscript{182} These partnerships are aimed at improving conditions at the global institutional level for developing countries, targeted in particular at the issues of aid, trade, debt relief and global governance. Despite broad criticism of inadequate design, implementation and accountability with regard to the MDGs in general, and MDG 8 in particular,\textsuperscript{183} these political commitments still demonstrate an openness on behalf of the wealthy and powerful nations to formulate specific programmatic goals for the universal attainment of certain human rights. They are not intended as legally binding, yet they do inform to some extent the logical content of a developing legal obligation to cooperate.\textsuperscript{184}


\textsuperscript{184} Despite deep reservations Fukuda-Parr notes that MDG 8 “is arguably the most significant step since the Covenant on Economic Social Rights in taking the idea of global solidarity and international responsibilities for development from a statement of principle to international policy.”
Though very little has been achieved with regard to MDG 8 since the announcement of these programmatic goals,\textsuperscript{185} their necessity for the attainment of the first seven MDGs, and thereby the realisation of certain human rights, is undisputed. Accordingly, MDG 8 entails the following; increased Northern market access for developing countries by reforming the perverse tariff and subsidy system currently enforced by the wealthy States;\textsuperscript{186} just and affordable access to medicines, food and education through the ability to utilise flexibilities in the WTO Trade Related Aspects of Intellectual Property Rights agreement; the creation of an international debt arbitration mechanism with the power to classify and cancel illegitimate debt; increased independence from the IFIs allowing the implementation of democratically decided development policies; and the restructuring of processes of global governance to allow for proper developing country representation and voice.

Particularly in relation to the last two points, the targets and indicators intended to give definition to MDG 8, however, “state broad objectives and outcomes without pinpointing the concrete policy changes required.”\textsuperscript{187} This political goal is therefore of limited use in delineating the content of obligations to cooperate, beyond the identification of a number

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\item \textsuperscript{185} Fukuda-Parr, supra note 183, p. 966. Elsewhere her reservations are summarised; Sakiko Fukuda-Parr, ‘Recapturing the Narrative of International Development’, Gender and Development Programme Paper No. 18, UN Research Institute for Social Development, June 2012, p. iii.
\item \textsuperscript{187} Fukuda-Parr, supra note 183, p. 982.
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of important issue areas in which concrete obligations on wealthy States would be productive. MDG 8 also lacks a human rights based motivation and therefore ignores central requirements from a human rights perspective.\footnote{On the parallel paths of human rights and MDG conceptualisation ,, Alston, 2005, supra note 183. See further, Peter Uvin, \textit{Human Rights and Development} (Kumarian Press, Bloomfield, 2004); Mac Darrow and Amparo Tomas, ‘Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation’ 27 \textit{Human Rights Quarterly} 2 (2005).}

Seeking more substantial normative guidance Salomon draws heavily on the framework of the right to development\footnote{Declaration on the Right to Development, UN General Assembly Resolution 41/128, annex, 41 U.N. GAOR Supp. (No. 53) at 186, UN Doc. A/41/128, 4 December 1986.} and the work of the UN High-Level Task Force on the implementation of that right.\footnote{Margot Salomon, ‘Towards a Just Institutional Order: A Commentary on the First Session of the UN Task Force on the Right to Development’ 23 \textit{Netherlands Quarterly of Human Rights} 3 (2005).} Certain aspects of the right to development give clarity to obligations of international cooperation.\footnote{See also, Villaroman, 2010, supra note 45.} In fact international cooperation could be described as the bedrock concept of the right to development, the common duty of all States that gives rise to its legal force.\footnote{Declaration on the Right to Development, supra note 189, Article 3(3). See also, Articles 3(2), 4(1), 4(2), 5, 6(1), 7, and 10. One of the core documents leading to the formulation of the Declaration on the Right to Development also bears out this fact; Commission on Human Rights, The International Dimensions of the Right to Development as a Human Right in Relation with Other Human Rights Based on International Co-operation, Including the Right to Peace, Taking Into Account the Requirements of the New International Economic Order and the Fundamental Human Needs, 35\textsuperscript{th} Session, UN Doc. E/CN.4/1334, 2 January 1979. See further, UN General Assembly Resolution 172, UN GAOR, 64\textsuperscript{th} Session, The Right to Development, UN Doc. A/RES/64/172, 24 March 2010, paras 9, 10(c), 10(e), 23, 32, and 35. See further, Khurshid Iqbal, The Declaration on the Right to Development and Implementation’ \textit{1Political Perspectives} (2007), p. 1; Roland Rich, The Right to Development as an Emerging Human Right’ 23 \textit{Virginia Journal of International Law} 2 (1983), p. 291.} Critical to this force is the principle that, as two sides of the same coin, increased power must of necessity bring increased obligation, and where there are obligations there are
rights.\textsuperscript{193} The vast majority of the world’s people whose health and life prospects are tragically compromised by current international arrangements therefore hold a right, and “developing states are endowed with the prerogative to invoke this right as against the public international order on behalf of their people.”\textsuperscript{194}

The discourse of a right to development supplants a purely economic conception of development with one which appropriately reflects its politico-legal aspects and recovers the realities of power distribution and social agency.

By casting development as a human right, the Declaration brought to the fore an appreciation that development does not occur solely as a result of economic growth or development planning; it is a process aimed at the creation of an international environment, and national environments, conducive to the realization of human rights, and it is through the exercise of their human rights that people will be able to develop in ways that are meaningful to them.\textsuperscript{195}

The right to self-determination, codified in Article 1 common to both the ICCPR and the ICESCR,\textsuperscript{196} is core to the right to development, “advocating nothing short of a demand for ‘self-determined development’, and a place that allows for functional equality of developing states on the international

\textsuperscript{193} For further detailed discussion of the right to development and its relation to the international economic order see, Aguirre, 2008, supra note 54; Isabella Bunn, \textit{The Right to Development and International Economic Law: Legal and Moral Dimensions} (Hart, Oxford, 2012).
\textsuperscript{194} Salomon, 2007, supra note 17, p. 198.
stage.”197 This overarching norm of economically self-determined development may well be the ‘meta-right’ of the twenty-first century, much as political self-determination was the ‘meta-right’ of the twentieth century.198 States must accordingly have the practical ability, in the context of international negotiations and in that of everyday domestic economic management, to implement human rights based development policies that directly benefit their people.199 The right to development and cooperative obligations therefore imply that human rights should have a strong bearing, conceptually and legally, on the definition of development, or in other words, they should at least limit the choice of permissible definitions.

Accordingly, human rights must be prioritised, empowered and utilised to condition economic policy at both the international and domestic levels, such that they provide the basis and motivation for a “particular process of development”, serving as boundaries that define the category of economic possibilities that may be labelled as the range of ‘acceptable’ development paradigms.200 This range of human rights based development paradigms differ markedly from the current neoliberal paradigm. For example, the limits set would mandate that a human rights deficit resulting from economic policies that promise an indeterminate and highly questionable future reward of an overall increase in wealth, cannot be

197 Salomon, 2007, supra note 17, pp. 112-113.
tolerated; “[t]he argument made for sacrificing distributional equity in favour of rapid accumulation is rejected.”\textsuperscript{201} The reality of resource constraints creates the necessity of trade-offs, yet a human rights trade-off must be made in reference to other human rights. Like should be balanced with like and the overall trade must be made within the broadly understood human rights paradigm. Furthermore, human rights create an initial presumption of deference profoundly altering the very context in which trade-offs are made, serving to balance the present de facto presumption of deference to narrowly defined economic imperatives.

The restriction of rights by other values must be justified by a legitimate aim that accords with human rights standards and imposes the least possible detriment given other alternatives. It must furthermore be of “limited duration and subject to review.”\textsuperscript{202} Any retrogression in the realisation of human rights as a result of the proposed development paradigm also requires justification within “the context of the full use of the maximum available resources”, which includes the resources of the international community.\textsuperscript{203} However, there exists a ‘core’ level of socio-economic rights below which no developmental process may incur any further loss.\textsuperscript{204} As such, these “core obligations establish an international minimum threshold that all developmental policies should be designed to respect.”\textsuperscript{205} According to the Committee, the

\textsuperscript{201} Salomon, 2007, supra note 17, p. 122.
\textsuperscript{202} CESC, General Comment 14, supra note 113, para 29.
\textsuperscript{203} CESC, General Comment 3, supra note 109, para 9.
\textsuperscript{204} Ibid, para 10.
realisation of this core level of socio-economic rights is mandated by customary international law.\textsuperscript{206} Taken together these considerations set a number of concrete parameters beyond which the formulation of appropriate economic policy should not trespass in order to maintain its legitimacy.\textsuperscript{207}

To ensure the legitimate formulation and implementation of such policies, the obligation to cooperate must further entail the reform of the present international institutional and legal framework.\textsuperscript{208} Within such a context obligations of conduct are emphasised in Salomon’s theory over obligations of result.\textsuperscript{209} Given the structural focus on a complex international institutional framework, the end goal of the universal realisation of all human rights, and the necessarily progressive nature of both that realisation and the required institutional reform, it is only logical to stress obligations of just conduct and correct procedure rather than immediate result.\textsuperscript{210}

Such procedural obligations should be detailed and strictly construed, as in the case of a duty to negotiate,\textsuperscript{211} discussed

\textsuperscript{206} CESCR, Concluding Observations: Israel, UN Doc. E/C.12/1/Add.9, 23 May 2003, para 31.
\textsuperscript{207} Salomon, 2007, supra note 17, p. 157.
\textsuperscript{209} Obligations of result (for example the attainment of political promises to allocate 0.7% GDP to overseas aid), nevertheless, retain importance, as both are key to the desired outcome. Salomon, 2007, supra note 17, p. 132. See also, CESR, General Comment 3, supra note 109, para 1. For detailed discussion of the conduct/result distinction in State’s obligations under international law see, Report of the International Law Commission on the Work of its 51st session, UN Doc. A/54/10, 3 May-23 July 1999, paras 132-186.
\textsuperscript{210} Delbruck (ed.), 2002, supra note 7, Discussion – Christian Tietje, p. 87.
\textsuperscript{211} For instance, Malanczuk is of the qualified opinion that “the general obligation to cooperate … can be understood as an obligation of conduct (to negotiate) and not as an obligation of result (to lead to a certain conclusion of such negotiations).” Delbruck (ed.), 2002, supra note 7, Discussion – Peter Malanczuk, p. 190.
further below. In the first instance, to ensure that matters do not become any worse, obligations of conduct mandate that States engage in meaningful due diligence to ensure that their action or inaction will not result in a human rights deficit, in any circumstance where there could be an effect on the rights of peoples in other countries. Detailed processes of assessment will therefore need to be broadly applied, the absence of which would entail a breach of the obligation to cooperate. Obligations of conduct are of particular relevance when States’ representatives act in the decision-making processes of international institutions. Furthermore, the emphasis on conduct and process ensures that the attainment of a vaguely defined goal does not excuse a human rights deficit in the method of achieving that goal. Any fortuitous increase in GDP resulting from the adoption of a given development paradigm that also entails indigenous dispossession of land for large-scale mining, for example, still results in a breach of the obligation to cooperate, as the process itself must respect human rights norms.

An important aspect of Salomon’s theory is its focus on a “duty to negotiate internationally ... [in] a serious attempt to

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214 Obligations of conduct aid in determination of State responsibility by “facilitating the answer to at least three important questions: how the breach of an international obligation was committed in any particular instance; whether a breach could be judged to have existed; and when a breach had occurred and was completed.” Report of the International Law Commission on the Work of its 51st Session, 3 May-23 July 1999, UN Doc. A/54/10, para 154.
reach a multilateral solution informed by an appreciation that the views and obligations of others matter.”

The duty to negotiate flows from the importance of obligations of conduct. Negotiations on any future international agreements, let alone those instituted to remedy the ill effects of the current economic order and to design solutions, must be engaged with in good faith. This duty to negotiate in good faith has been upheld by the Appellate Panel of the WTO in the Shrimp/Turtle Case, where the US was found to have violated the terms of Article XX of GATT 1994, as well as its own domestic legislation, by failing “to pursue negotiations for establishing consensual means” whereby certain international goals could be achieved.

Salomon notes that the duty to negotiate would entail the evaluation of the negotiating positions of developing countries in any multilateral or bilateral fora, to ensure that they adequately take account of the human rights of their peoples. However, on the other side and of equal importance, the negotiating positions of Northern States must also be evaluated to ensure that they too result in no extraterritorial harm to the human rights of peoples in other countries potentially affected by the agreement sought. Ultimately, the negotiating positions of all States involved must be evaluated for their likely human rights effects, domestic and extraterritorial. This would require a relatively independent application of ex-ante human rights impact assessments to the

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218 Taking a bare minimalist approach Malanczuk states that “a general obligation to cooperate may constitute no more than an obligation of conduct, namely an obligation to negotiate.” Delbruck (ed.), 2002, supra note 7, Discussion – Peter Malanczuk, p. 71.
respective negotiating positions of all States involved, inclusive of the effective participation of all who are potentially affected.

The strongest requirement on States incumbent in the obligation to cooperate is the Hippocratic edict to do no harm. This minimal level of legal obligation is recognised as *de lege lata*, a currently binding legal obligation on all State parties to the ICSECR.\(^{221}\) According to Vandenhoe and Benedek this obligation is “immediate”, the “lack of observance of which cannot be justified by invoking the primary responsibility of the domestic State.”\(^{222}\) In the usual parlance this accords with a basic duty to respect human rights at all times and in all contexts, though it cannot be thought of in purely ‘negative’ terms.\(^{223}\) For present purposes this minimal level will still have very significant effects, as long as it is strictly construed. Properly understood, in a current context where ongoing


\(^{223}\) The International Law Institute, for instance, states that the international obligation to respect human rights “further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world.” Institut de Droit International, Resolution 1989 III, The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States, Saint Jacque de Compostelle, 13 September 1989, at 338. The European Court of Human Rights has adopted a comparable doctrine in relation to the ‘primarily negative’, or respect-type obligations on States imposed through the European Convention (securing only civil and political rights): “[A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations *may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves*. X and Y v. The Netherlands, European Court of Human Rights, Application No. 8978/80, Judgement, 26 March 1985, para 23. See also, Airey v. Ireland, European Court of Human Rights, Application No. 6289/73, Judgement, 9 October 1979, para 32. See further, Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart, Oxford, 2004).
structural violation of human rights is the reality, an obligation to do no harm must logically result in reformatory action, or at the very least reformatory inaction.\textsuperscript{224} For example, it will require States to cease participating in institutions that have a harmful effect and cease following ‘laws’ or rules that result in extraterritorial human rights harms.\textsuperscript{225} If they did not they would be continuing to cause violations.\textsuperscript{226} Technically it is not the structure itself that directly causes the violation but action or inaction in accord with that structure. It is impossible to construe how the continued observation of a set of rules demonstrably prejudicial to human rights could be commensurate with an obligation on each State to do no harm. Unused, or unobserved, these institutions and laws would wither away. New institutions and new laws would fill the vacuum.

Furthermore, as Salomon points out, under international human rights law States will incur responsibility for human rights violations wherever they are in a position to prevent the violations, even where they or their agents did not directly cause the violation, and even where the direct perpetrator cannot be identified.\textsuperscript{227} Responsibility is also triggered when

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\textsuperscript{224} As Salomon puts it, “if basic rights have already been violated in a global context, and, for example, people are starving, then the obligation imposed is also positive ... so a positive obligation to act is derived from the negative obligation.” Salomon, 2007, supra note 17, pp. 192-193 (original emphasis).
\textsuperscript{225} “A human right is a moral claim on social institutions and therefore a moral claim against all those who participate in the coercive upholding of such institutions.” Thomas Pogge, ‘Human Flourishing and Universal Justice’ 16 Social Philosophy and Policy 1(1999), p. 353.
\textsuperscript{226} In relation, according to the ILC Articles on State Responsibility, with respect to serious breaches of peremptory norms States must “cooperate to bring [such breaches] to an end through lawful means”, and they may not “recognize as lawful a situation created by a serious breach ... nor render aid or assistance in maintaining that situation.” Draft Articles on the Responsibility of States, 2001, supra note 44, Article 41(1) and (2).
\textsuperscript{227} “An illegal act which violates human rights and which is initially not directly imputable to a State ... can lead to international responsibility of the State, not because of the act itself, but because of the lack of due
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State acts or omissions have the effect of impairing the realisation of rights, even where there is no intent to do so.\textsuperscript{228} Such considerations lead Salomon and others to question the propriety of the usual distinction between positive and negative duties in delineating and allocating international obligations to cooperate.\textsuperscript{229}

In line with obligations of due diligence and conduct, developed States must

\[\text{[t]ake measures to ensure the coherent and consistent application of [their human rights] obligations across their international policymaking processes. For example, a State's obligations of international cooperation should be understood and respected by those responsible for foreign affairs [and] those in finance and trade who represent the State in international negotiations on those issues,}^{230}\]

The very institution of such mechanisms of due diligence must be seen as a necessary, and necessarily positive, duty. Logically this would be achieved through the application of \textit{ex-ante} human rights impact assessments, the results of which would be used to guide decision-making, action and the design


\textsuperscript{229} Salomon, 2007, supra note 17, p. 191.

\textsuperscript{230} Office of the High Commissioner for Human Rights, 2006, supra note 213, para 104 (c).
of policies, institutions and legal instruments. Only in this way could States appropriately discharge a responsibility to avoid human rights harm.

These mechanisms should be understood as necessary steps towards knowledge generation, crucial to any legitimate policy-making process. Foreseeability is therefore a key standard in Salomon’s theory of attribution.231

At the heart of this standard of due diligence lies the premise that the duty-bearer may have failed in meeting its positive human rights obligations if it could have foreseen that its conduct and decisions would lead to violations occurring, that is, if it knew or ought to have known of the possible repercussions and failed to take measures within the scope of its powers which, judged reasonably, might have been expected to avoid said risk.232

For State responsibility to be engaged any human rights harm must first be a foreseeable result of its acts or omissions. This would set a limit to the attribution of responsibility for human rights harms insufficiently connected to the given State. But for a State to claim un-foreseeability, thereby avoiding responsibility, it must first demonstrate that it has discharged the effort to ‘see’ the likely outcomes of its acts and omissions. Human rights impact assessments would therefore be a necessary first step and an essential element of any State’s required due diligence.

231 “Thus, the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time.” Munaf v. Romania, Human Rights Committee, Communication No. 1539/2006, Admissibility and Merits, UN Doc. CCPR/C/96/D/1539/2006, 21 August 2009, para 14.2.

232 Salomon, 2005, supra note 190, pp. 418-419.
One of the major difficulties of this theory lies in specifying the chain of causation between a specific human rights harm in one State and a particular act or omission by another State.\(^{233}\) These chains may be long and the links can sometimes be tenuous from a legal standpoint. Salomon is of the opinion that the difficult process of apportioning responsibility to individual State actors of a generally 'undifferentiated international community', all of which are in some way responsible for ongoing structural violations of human rights, should not be held hostage to a strict requirement for narrowly defined direct causal demonstration of the harm done by each State or agent.

World poverty is also attributable to the existing global system, elements of which \textit{by design} cause and/or fail to remedy this widespread deprivation. The failure of influential states to remedy the causes of ongoing breaches through reform of the system perpetuates this deprivation.\(^{234}\)

\(^{233}\) See further, Sigrun Skogly, ‘Causality and Extraterritorial Human Rights Obligations’, in Langford (et al eds.), 2013, supra note 39. In also acknowledging the deficiency of strictly construed causality requirements, Skogly flags the utility of associated legal concepts of complicity and shared obligations. See also, Salomon, 2013, supra note 152.

\(^{234}\) Salomon, 2007, supra note 17, p. 186 (original emphasis). Elsewhere Salomon, Tostensen and Vandenhole note that, “It is widely accepted that a state’s failure to meet its positive obligations to exercise due diligence in preventing and adequately responding to human rights violations determines whether its responsibility is triggered, and not only whether the act that caused the violation was shown to have been committed by its agents and is thereby directly imputable to it ... [T]he test as to whether a state or an international organisation may have ‘caused’ violations of socio-economic rights might be best determined on the basis of a reasonable degree of likelihood, a suitable burden of proof might then require that the state or international organisation concerned rebut responsibility by proving that no causal relationship exists between its policies and the prima facie non-conformity with the economic, social and cultural rights.” Margot Salomon, Arne Tostensen and Wouter Vandenhole, ‘Introduction: Human Rights, Development and New Duty-Bearers’, in Margot Salomon (et al eds.), 2007, supra note 30, pp. 13-14. In addition to \textit{Velasquez Rodriguez v. Honduras}, supra note 227, see further, Human Rights Committee, General Comment 31, On the Nature of the General Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 8; \textit{Osman v. UK}, European Court of Human Rights, Application No. 87/1997/871/1083, Judgement,
The power to influence the international institutional and legal structure is therefore the determining factor in the allocation of responsibility,\textsuperscript{235} rather than the demonstration of a direct causal link satisfying both conditions of necessity and sufficiency. The application of a due diligence standard informed by a requirement to be informed of, to avoid and to prevent human rights harm should displace any demand for such a demonstration. In other words, an emphasis on proactive precaution over retroactive guilt places a greater importance on the establishment of foreseeable harm in allocating responsibility, over the post facto ‘proof’ of direct causal links between particular State actions and identified violations, in a situation of fundamentally shared responsibility for such violations as primarily caused by a given structure.

Shelton notes, in this regard, that there is a clear precedent. In 1925, an international arbitral tribunal was confronted by a dispute between the US and Great Britain, involving the looting by sailors of a US ship, the Zafiro, of property belonging to employees of Great Britain operating the wharf wherein the Zafiro was docked.\textsuperscript{236} During battle, the property of British subjects was looted and destroyed by an unascertainable

\textsuperscript{28} October 1998, para 116; \textit{Mastromatteo v. Italy}, European Court of Human Rights, Application No. 37703/97, Grand Chamber Judgement, 24 October 2002, para 68.


\textsuperscript{236} \textit{D. Earnshaw and others (Great Britain) v. United States (Zafiro Case)}, United Nations Reports of International Arbitral Awards (UNRIA/A), Volume VI, 30 November 1925, pp. 160-165.
group of individuals under mixed authority. What was known was that the “crew of the Zafiro took a substantial part in the looting of the houses of the claimants and destruction of their property.” The possessions were found and returned, yet the British subjects claimed for the damage. The tribunal had no difficulty in finding the US liable for the part played by its agents, the question was, how liable? As the acts committed and the amounts destroyed by each faction under different and separate authorities was not ascertainable, the tribunal concluded that the burden of proof had shifted to the US. No longer was it the onus of Great Britain to prove the extent of the damage done by the US agents, but for the US to prove what part of the damage was not done by its agents, in order to avoid responsibility for that part. It was impossible for a distinction to be made and the US did not even try.

As such, the tribunal concluded that despite the fact that “not all of the damage was done by the ... crew of the Zafiro ... As the Chinese crew of the Zafiro are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers cannot be identified, we are constrained to hold the United States liable for the whole.” By analogy, as identifiable States currently contribute to the damage being done to socio-economic rights realisation in the South through detrimental investment rules, for example, yet it is impossible perhaps to divide responsibilities meaningfully, each is potentially responsible for the whole damage; that is, unless each can prove that part for which it is not responsible. Perhaps the consequences are presently theoretical.

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Nevertheless, the point is that the legal tools to deal with the problem exist.239

Additionally, in the commentary to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Crawford takes a nuanced approach to causality, rejecting simplistic requirements of control for the attribution of responsibility.240 Furthermore, the Draft Articles refer to breaches consisting of composite acts. State responsibility may be found where there occurs a breach of an international obligation through a series of actions or omissions defined in aggregate as wrongful ... when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.241

Accordingly, it is appropriate to characterise as an internationally wrongful act the maintenance of an international structure that, in the aggregate, causes ongoing divergence from an international obligation to respect human rights, attracting the responsibility of all States involved.242 The remedy is the cessation of actions, or commission of others, necessary to affect conformity with the international obligation to respect. At a minimum, given the evidence, the burden of proving that actions or omissions in maintenance of

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239 Shelton notes that this doctrine of burden shifting is common in environmental law. Shelton, 2013, supra note 42, p. 390. See also, Ashfaq Khalifan, ‘Division of Responsibility amongst States’ in the same volume.
240 Skogly, 2013, supra note 233, p. 244.
241 Draft Articles on the Responsibility of States, 2001, supra note 44, Article 15.
the situation did not contribute to the ongoing violation, would lie with the powerful States upholding the status quo. Furthermore, the inaction of others in failing to dispose of this burden would not reduce the responsibility of each individual State to do so.\textsuperscript{243}

Finally, Skogly stresses the importance of attention to the ‘precautionary principle’, commonly used in environmental law.\textsuperscript{244} Accordingly, where ‘hard’ scientific research is nascent, scattered or inconclusive regarding a direct causal connection between an action on the one hand and a concretely observable harm on the other, and where a suspected general link between the two is clear, the action should not be taken. The obverse applies to the omission of protective or precautionary measures; they may only be omitted where there is conclusive evidence that there is no causal connection. In the present case of FDI and development, where a generous overview would conclude that the empirics are at least sparse, conflictive and inconclusive, and where, as argued here, it is more than reasonable to conclude that in the current ideological and legal environment the relationship is more likely to be negative, the application of the precautionary principle is highly advisable.

\textsuperscript{243} Draft Articles on the Responsibility of States, 2001, supra note 44, Article 47(1).

\textsuperscript{244} Skogly, 2013, supra note 233, p. 252. See, for example, Article 5 of the Convention on the Protection of and Use of Transboundary Watercourses and International Lakes, Helsinki 17 March 1992, ILM 31 (1992), entered into force 6 October 1996.
5.5 – The Maastricht Principles

The 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights deem it a human rights violation of conduct for the domestic State to fail “to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations”.245 Consequentially, “the State responsible must establish mechanisms to correct such violations”.246 Consistently, the Committee has made the same determination, stressing that such an omission is a plain violation of the Covenant requiring a remedy.247

The necessary reflexive point, made in the drafting and the text of the ICESCR, took a little longer to be expressed. This point is that influential nations affecting the structure of the international order must take their obligation to respect human rights in all contexts and circumstances into account as well, providing the remedy where this obligation is breached. In addition, universal provision of socio-economic rights will ultimately require the implementation of international obligations to protect and fulfil. Ultimately, the fulfilment of the domestic obligation is dependent on the fulfilment of the international obligation.

246 Maastricht Guidelines on Violations, supra note 245, para 16.
The Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (the Principles) embody this belated expression, and thereby begin to complete the elaboration of the State duties contained in the Covenant. They provide a coherent framework rooted in extant law and authoritative international jurisprudence, which covers all levels of obligation, respect, protect and fulfil, as well as duties of conduct and result. Parts remain controversial for some, at the more ‘resource intensive’ levels of obligation as commonly understood. Yet, the framework as a whole is intended as a beginning, not a definitive end. To begin the process of global collective ambulation, parts of the framework must also be acknowledged as ‘hard international law’, unqualified and immediately obligatory. Furthermore, they must be accorded their due superiority in certain contexts, as being directly required for human socio-economic well-being, over and above derivative goals with dubious consequences, such as economic liberalisation and market facilitation. This is to say, we must learn how to crawl. Where the Principles express minimum levels of obligation, correlated to respecting the human rights of all people in all circumstances, ensuring that no harm is done, and abiding by the conduct necessary to adhere to these minimum legal obligations, they are to be understood as the clearest codification to date of binding international law in this area. These codes are relied on in the next two chapters as a template for applying international law to the dual problem detailed in Part I.

The Principles were recently adopted by a group of experts based on a decade of legal research. As a product of “the most highly qualified publicists of the various nations [and therefore a] subsidiary means for the determination of rules of law”, these Principles form an acknowledged source of international law.249 The Principles are authoritative and influential,250 as the Committee, and other bodies, judicial and quasi-judicial, will no doubt refer to them closely in further elaboration and specification of cooperative obligations.251 They are fleshed out by a detailed commentary,252 and join the Maastricht Guidelines on Violations and the Limburg Principles on Implementation of Economic, Social and Cultural Rights, which have long held a high status as important referents in determinations of the state of international law and its application.

The details of the relevant Principles are engaged with in the process of their application in the following chapters, together with the commentary, and so are not analysed in detail here. Generally, the Principles hold that States have obligations to respect socio-economic rights in situations where their “acts or omissions bring about foreseeable effects on [those rights] whether within or outside its territory,”253 and where, acting separately or jointly, they are “in a position to ...

249 UN Charter, Chapter XIV, Statute of the International Court of Justice, Article 38(d).
251 For a detailed work on how such an adjudicatory methodology applying the Principles and other relevant international norms would play out in relation to 23 specific case studies involving cooperative obligations see, Coomans and Künemann (eds.), 2012, supra note 5.
take measures to realize economic, social and cultural rights extraterritorially”.254 States must not engage in “acts and omissions that create a real risk of nullifying or impairing” the socio-economic rights of peoples in other countries, where this negative effect “is a foreseeable result of their conduct”.255 It is clearly stated that “uncertainty about potential impacts does not constitute justification for such conduct”.256 In addition, States “must take all reasonable steps” to ensure the consistency of their actions with their international human rights obligation to cooperate in the realisation of socio-economic rights in other States.257

In clarifying such standards the question of jurisdiction was not avoided. The Principles continue to employ jurisdiction as a notion delimiting the boundaries of States’ human rights responsibilities. They reflect a certain broadening of the notion, though not an undue or ungrounded one.258 They judiciously expand its traditional conceptualisation in a manner now necessary, befitting our current global environment.259 We live on a planet where, [e]conomic globalisation results in a mismatch between the scope of influence of States and the way the scope of their legal responsibility is defined: it is one of the objectives of

254 Ibid, Principle 9(c) (emphasis added).
255 Ibid, Principle 13 (emphasis added).
256 Ibid (emphasis added).
259 “Overly strict control tests ... appear to permit States to violate human rights abroad with impunity, which raises not only ethical concerns but frustrates the object, purpose and arguably the wording of international human rights standards.” Malcolm Langford (et al), ‘Introduction: An Emerging Field’, in Langford (et al eds.), 2013, supra note 39, p. 25.
the Maastricht Principles to align human rights better with the realities of an interdependent world.\footnote{De Schutter, 2012, supra note 103, p. v.}

5.6 – A Provisional Formulation

Conceptually, we can draw on the drafting of Article 2(1) in supplying the content of international cooperation. Accordingly, it is an essential obligation, fundamental, necessary and indispensable to the universal realisation of socio-economic rights. As stated by India at the time, it is of “cardinal importance.” The obligation must be informed by and grounded in an analysis of power relations between States at the level of international social and economic management, such that it has a balancing effect at the point at which power is exercised. It must \textit{directly} address the existing disequilibrium.\footnote{“T]he focus is on the actual or available use of power and its effects on rights-holders.” Langford (et al), 2013, supra note 259, p. 25.} One primary purpose therefore, is to remove structural obstacles within the international order to the realisation of socio-economic rights, and replace them with enabling structures. It is therefore linked to other legal concepts such as substantive equality of arms and positive discrimination, whereby it is partially motivated by a concern to right the wrongs of colonialism, in recognition of the fact that the current wealth and influence of certain nations is due in large part to the injustices of the colonial era and its continuing effects. It encompasses, but cannot be reduced to, the concept of assistance and other charitable notions. Finally, it must be interpreted expansively.
States are clearly obliged to recognise that, although its exact content may remain unclear, international cooperation entails binding legal obligations on all States, placing additional requirements on wealthy and influential States, and by extension, to the more powerful party to any given set of negotiations. States must, at all times and in all circumstances, ensure respect for the socio-economic rights of individuals in other countries.\footnote{262} Thereby, States must not interfere negatively, either directly or indirectly, with the exercise or provision of those rights.\footnote{263} States must ensure that they do no harm to current levels of human rights in other countries, or knowingly impede the progressive realisation of fundamental human rights in other countries.\footnote{264}


\footnote{263} With respect to the EU and Articles 3(5) and 21 of the Treaty on European Union, “[t]here can be no doubt that these provisions cover not only extraterritorial acts, but also policies with extraterritorial effects. As to their nature, Article 21(3) TEU imposes a clear obligation on the EU to ‘respect’ human rights”. Lorand Bartels, ‘A Model Human Rights Clause for the EU’s International Trade Agreements’, German Institute for Human Rights, Berlin, January 2014, p. 17.

To provide these obligations with meaning, States are thereby obliged to enact effective and inclusive processes of conduct and knowledge generation, such as human rights impact assessments, where there are identifiable risks. By extension, to provide meaning, States are obliged to incorporate, and react to, the results of such processes in the course of decision-making, policy formulation and negotiations, in a manner that ensures the result of adherence to their obligation to ensure no harm. The resources of wealthy developed countries must be considered as part of those resources available for the realisation of socio-economic rights in developing countries.

Finally, States should, where feasible, where there is capacity to influence, and where this influence is appropriate for the realisation of human rights and in accord with international law, ensure that the rights of individuals and peoples in other countries are protected, from the States’ direct or indirect acts or omissions, and from those of third parties. Where capable, States should ensure that socio-economic rights are protected by the structure of the international economic order. States should ensure that socio-economic rights are protected in the operations of international financial and economic institutions of which they are members, both in their individual actions as well as in the policies and activities of the given institution as a whole. States should ensure that the operations and outcomes of bilateral and multilateral aid programmes actively protect human rights at a minimum, and aim specifically to progressively realise human rights. States, where capable, should provide a minimum of 0.7% of GDP as

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Official Development Assistance unless demonstrably unable. States, where capable, should provide the necessary humanitarian aid when required.

Christoph Schruer, an eminent authority on the international investment regime, states that “[t]he biggest problem confronting us is ... the latitude that is left to [States] not to cooperate. Therefore, the challenge is to close these gaps and to create a tighter web of compulsory cooperation.”265 We now seek to tighten the web around the given problematic.

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6 – RENEGOTIATING THE INVESTMENT REGIME

It is clear that international cooperation, as a legal obligation, has a great degree of relevance to the criticism surrounding the current investment regime. However, this analytic is rarely employed in the literature.\(^1\) Applying these obligations to the formation, structure and process of the regime has two central consequences. It substantially strengthens arguments for a fundamental renegotiation of the current regime by adding a layer of international legal obligation,\(^2\) and it provides the substantive building blocks of a set of guidelines for this renegotiation grounded in international law.

From the outset the whole ethos of the obligation to cooperate is holistic and structural in nature, readily lending itself to application in the present context. Given that the investment regime is having a demonstrably negative effect on socio-economic rights, and has the potential to do far more

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\(^2\) The idea of a fundamental renegotiation is not unprecedented in the investment sphere. A number of developing countries have long ago called for the renegotiation of the agreement on Trade Related Investment Measures under the WTO and proposed specific positions on such renegotiations. See, Douglas Brooks (et al), ‘Foreign Direct Investment in Developing Asia: Trends, Effects, and Likely Issues for the Forthcoming WTO Negotiations’, ERD Working Paper No. 38, Asian Development Bank, 2003, pp. 16-20, 24, 27.
harm, the maintenance of the status quo is unacceptable from the viewpoint of the obligation to cooperate. While relevant to the ‘troubled waters’ school, as categorised above, a critique from this viewpoint is most clearly aligned with the perspective of those warning of an imminent storm. The customary obligation on all States to ensure the minimum level of respect for the human rights of all people in all contexts potentially provides an overarching norm that could contain an approaching storm, and channel widespread discontent into a balanced outcome. The near future offers a unique opportunity to apply such a principled approach to the reconceptualization of the investment regime. According to UNCTAD,

More than 1,300 of today’s 2,857 bilateral investment treaties will have reached their “anytime termination phase” by the end of 2013, opening a window of opportunity to address inconsistencies and overlaps in the multi-faceted and multi-layered [investment] regime, and to strengthen its development dimension.³

In addition, at the Sixth High-level Dialogue on Financing for Development in 2013 “[c]alls were made for a new international agreement on cross-border investment that would take into consideration the development concerns of host countries.”⁴ This demonstrates clearly that the evident need for a comprehensive and principled renegotiation cannot be ignored indefinitely.

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⁴ Summary by the President of the General Assembly of the Sixth High-level Dialogue on Financing for Development, New York, 7 and 8 October 2013, UN Doc. A/68/627, 29 November 2013, para 52.
The following section measures the current investment regime against the most relevant of the Maastricht Principles and their commentary, arguing that the latter clearly favour a fundamental renegotiation of the former. Certain aspects of the principles are extracted for their relevance to the process of a principled renegotiation and are discussed in subsequent sections. A brief word on certain substantive issues concludes.

6.1 - Applying Cooperation to the Current Investment Regime

The Maastricht Principles number forty-four, nearly all of which are relevant to the investment regime to some degree. For reasons of space only the ten most relevant are discussed here.

Principle 2

*States must at all times observe the principles of non-discrimination, equality, including gender equality, transparency and accountability.*

Under human rights law such principles are fundamental and applicable under all circumstances. Non-discrimination must be applied to the process of respecting, protecting and fulfilling all human rights, and as a free-standing principle in its own right.\(^5\) The investment regime institutes its own version of non-discrimination that does not align with the

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demands of this principle in human rights law. For instance, human rights law requires positive discrimination to equalise substantive inequality, to the extent and for the duration of that inequality. This is disallowed by the investment regime. In the case of Piero Foresti\textsuperscript{6} an Italian foreign investor challenged positive discrimination legislation, obstructing the State’s duty to remedy historical inequalities.

Furthermore, in its design, from the drafting of model treaties, to negotiations, and to dispute resolution, the regime fails to adhere to the principles of equality, transparency and accountability. To this list, we can add participation. The regime is remarkably unresponsive to civil society in all regards. As demonstrated in chapter 4, even when direct submissions have been made to tribunals they have not been substantively engaged with. The lack of transparency is a recurrent factor in investment law, from the details of disputes to the negotiation of treaties. And as the Argentinean case again demonstrates, foreign investors can often use the regime to avoid, or at least discourage and mitigate, human rights accountability. All of these principles are of course essential to any renegotiation. However, there is a consensus that transparency and public participation are the most important.\textsuperscript{7}

\textit{Principle 7}

\textit{Everyone has the right to informed participation in decisions which affect their human rights. States should consult with relevant national mechanisms, including parliaments, and civil society, in the design and implementation of policies and}

\textsuperscript{6} Discussed in section 3.3.5.

\textsuperscript{7} “[T]ransparency is of particular importance when states act extraterritorially.” De Schutter (et al), 2012, supra note 5, p. 1088.
measures relevant to their obligations in relation to economic, social and cultural rights.

The right to public participation has been given special emphasis by the Committee on Economic, Social and Cultural Rights. As mentioned previously, rights to public participation are especially prejudiced under the current development paradigm. In light of this fact the Committee has mainstreamed participation within its work on the substantive socio-economic rights under the ICESCR. Participatory rights are equally essential to the provision of all socio-economic rights.

In the creation and design of the current BIT-based regime it is well known that this principle was not observed. One of the major difficulties faced by civil society during the negotiations on a Multilateral Agreement on Investment, for example, was access to information, which they only received when a draft of the document was informally leaked. Even national parliamentarians in Canada and France complained that they knew nothing about the negotiations on the MAI at the time of the leak. The principle of participation is also essential to any proper procedure for human rights impact assessments, covered in section 6.6 below. Principle 7 also

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11 See, for example; on housing, CESC, General Comment 4, The Right to Adequate Housing, UN Doc. E/1992/23, 1 January 1992, paras 9, 12, 14, 17; on food, CESC, General Comment 12, Right to Adequate Food, UN Doc. E/C.12/1999/5, 12 May 1999, paras 8, 10, 20, 23, 27.
Principle 8
For the purposes of these Principles, extraterritorial obligations encompass:

a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory.

b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.

The commentary explains that obligations arising from either of these situations will often overlap and will lead to similar legal consequences.\(^\text{12}\) This Principle affirms that the act of entering into negotiations with another State over an investment treaty engages the cooperative obligations of that State. In this context the acts or omissions referred to in 8(a) revolve around the preparation and nature of negotiating texts, the process and nature of trade-offs and bargains struck, as well as negotiating tactics of the States party to the proceedings, and will apply in all settings for negotiations, no matter how many States are involved or what venue is chosen.

Obligations of a global character, pursuant to 8(b) will be obviously applicable in the case of multilateral negotiations on an investment agreement designed ultimately to have a global effect. In this situation Principle 8(b) will require the implementation of institutionalised procedures during negotiations, and possibly permanent institutional

\(^{12}\) De Schutter (et al), 2012, supra note 5, p. 1101.
arrangements for subsequent monitoring. The establishment of the Aarhus Convention Compliance Committee provides inspiration. On a smaller scale, such as in regional, plurilateral or bilateral negotiations, obligations under Principle 8(b) will remain applicable as the resulting agreements will still have pervasive and systematic effects on the universal realisation of human rights. This is especially so if the argument set out in section 6.3.6 below is accepted; to the effect that any negotiations on international investment should be considered as aimed at the conclusion of development partnerships, or significant aspects of such partnerships.

Principle 9

A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;

b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;

c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is

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in a position to exercise decisive influence or to take measures to realize economic, social, and cultural rights extraterritorially, in accordance with international law.

Maintaining a focus on obligations to respect, the foregoing analysis presents arguments fitting all three of these sets of situations. Regarding Principle 9(a) developed Northern States, collectively at the global level, and individually at bilateral and regional levels, always exercise authority, and a great degree of control, over the negotiations on individual investment treaties and the provisions of the final text. Particularly at the bilateral level, they will sometimes exercise effective control due to the nature of the FDI dependent development paradigm and dramatic differences in bargaining power.\textsuperscript{14} Negotiations often proceed on the basis of a text prepared by the stronger State, which is presented inflexibly, amounting to a take-it-or-leave-it approach.\textsuperscript{15}

Where socio-economic rights are concerned control and influence exercised by certain States is subtle and complex, but no less effective. The current prospect of the EU, as a whole, negotiating investment agreements with individual

\textsuperscript{14} Usually, courts and human rights bodies have associated the phrase with personal custody or military occupation. It is argued that this is an unduly narrow construal, which allows powerful States in determinant positions too much opportunity for action with impunity. In realisation of this situation, there is a noticeable, though tentative, judicial expansion in the notion of jurisdiction evident in the jurisprudence of the European Court of Human Rights, which has begun to find jurisdiction at a lower threshold of ‘decisive influence’. The Court has found jurisdictional responsibility of the Russian State where it exercised a lower level of “effective authority, or at the very least ... decisive influence.” Ilașcu and Others v. Moldova and Russia, European Court of Human Rights, Application No. 48787/99, Grand Chamber Judgement, 8 July 2004, para 392.

developing countries, and simultaneously being subject to the European Convention on Human Rights,\textsuperscript{16} places the relevance of decisive influence and its consequences for negotiations in stark relief. It is evident that in exercising authority, control, and, at the very least, decisive influence in the formulation of the current regime, traditional capital exporting States have failed to ensure respect for the human rights of people both in their own and in other countries.

The direct responsibility of Northern States forms the focus here, and accordingly it might be argued that such responsibility is precluded under Article 20 of the ILC Articles, stating that the consent of another State given to the commission of an act removes responsibility. To this it might be questioned whether signature and ratification of BITs by developing countries is really consent to all their consequences? It is difficult to make the argument that developing countries consented to direct restrictions on their ability to provide human rights. The issue of what was foreseeable at the time is central, and for that restricted foreseeability Northern States themselves are actively to blame. They pushed treaties that they either knew or should have known would be prejudicial to host State policy space for human rights protection. Furthermore, given an assumed appreciation of the mode in which they themselves had developed, they should have known that these treaties would be prejudicial to development as well. It is not at all certain that ‘consent’ given to such eventualities, on such shaky

‘promises’ as were extended in BIT negotiations would equate
to any substantive (as opposed to a purely formalised)
definition of consent required by Article 20 to preclude
wrongfulness.

Article 45 of the ILC codes also states that there is a loss of
the right to invoke the responsibility of another State where
the injured State “has validly waived the claim”, and where,
through its conduct, it can be understood to have “validly
acquiesced in the lapse of the claim.” Again, it is not clear
what developing countries can be said to have waived or
acquiesced to as a result of submission to the BIT regime. It
was not foreseen, for instance, by any of the parties that
arbitrators would have taken the content of the treaties in the
directions of sovereign restriction that they have. The second
issue is that no State can ‘validly’ contract out of its human
rights responsibilities. Northern States are equally as
responsible for this effect of BITs on developing States as they
themselves are. They cannot absolve each other through
mutual contract. We are primarily interested in the
responsibility to ensure respect for fundamental human
rights, which is an obligation erga omnes, and therefore even
in the unlikely event that Article 45 could be applied, it results
in the loss of right by the directly injured State to invoke
responsibility, without prejudice to the rights of all other
indirectly injured States to make an invocation. This is
enabled by the fact that the Article does nothing to remove
responsibility itself.

Article 18 of the ILC code refers to framework of State
responsibility for assistance or coercion with regard to the
wrong-doing of another State. The coercing State must have
knowledge of the circumstances of the act. The argument
here is of structural coercion, which does not necessarily equate with individual State coercion, which would have to be proven in the deliberate use of a body of knowledge held and used by an identifiable group of people at a given point in time to effect the situation that developing countries are now in.\textsuperscript{17} This would have to be a body of knowledge extending over both the process of financing for development and the international investment regime, such that both are deliberately brought together for the purpose of leaving developing countries with no choice. Such \textit{structural coercion}, as a fact, is evident when one sits back and assesses the two sets of processes. Yet it may be difficult to prove that individual State actors or bodies have, or had, such overall knowledge at crucial points where it could have been used with the conscious intent seemingly required by Article 18.\textsuperscript{18} The division of responsibility in national government is still at such a stage where the required coherence threshold for the requisite knowledge and intent might not be met. At the international plane, levels of coherence are even lower. Yet, there is no doubt that this understanding of negative systemic pressures \textit{should} have been known, and with increasing current awareness there is decreasing justification for this

\textsuperscript{17} “BIT partners turn to the United States with the equivalent of an IMF gun pointed at their heads: others feel that, in the absence of a rival superpower, economic relations with the one that remains are inevitable. For many, a BIT relationship is hardly a voluntary, uncoerced transaction.” Jose Alvarez, The Development and Expansion of Bilateral Investment Treaties: Remarks’ 86 American Society of International Law Proceedings (1992), p. 552.

\textsuperscript{18} Sornarajah acknowledges the difficulty but notes that “compelling evidence of coercion ... may exist where the signing of the treaty is made conditional on the granting of aid, loans or trade preferences.” Muthucumaranaswamy Sornarajah, \textit{The International Law on Foreign Investment}, Third Edition (Cambridge University Press, Cambridge, 2010), pp. 178-179. “The U.S. “cookie-cutter” approach to BIT negotiation results in a one-way conversation of imposed terms. A BIT negotiation is not a discussion between sovereign equals.” Alvarez, 1992, supra note 17, p. 553. There is also the fact that investment guarantees and insurance will not be granted by some States, such as the US, if the host country does not have a BIT in place with that State.
lack of knowledge at levels and in bodies that may be accused of coercive intent.

In addition, Article 18 sets a high threshold, such that the coerced State has literally no other alternative but to follow the path or take the action chosen for it. This is a very high threshold of proof to establish responsibility. It requires external economic and political pressure to be equivalent to military force. And even so, there will still be the nominal ‘choice’ of perpetual underdevelopment and poverty, or a very slow and isolated process of self-contained development. In addition, it must be noted that external pressure will also require domestic collaboration to some extent to be successful, thereby blurring the lines of responsibility. Such is the lesson from the Argentinean example above.

This is not necessarily to deny Northern State responsibility under the ILC Articles for coercion and assistance, but to point out some difficulties in proving it given current legal formulations. This may be a reason to argue for a more nuanced formulation, although that is not the intention here. The word coercion is applied in this study independently of the ILC Articles, and is meant as ‘structural coercion’ only.\(^\text{19}\)

Yet, it is argued that under human rights law, responsibility is engaged by Northern States for specific acts in knowing creation of this structure for purposes that have the effect, due to its coercive nature, of negating respect for human rights in developing countries. Furthermore, special emphasis is put on the prior obligation of States to create methods of knowledge generation and assessment to determine the effects of perhaps innocently incoherent policies and positions.

Principle 9(b) describes situations in which it is far easier to make arguments for Northern State responsibility. In comparison to the state of affairs 20 or even 10 years ago, there is now a weight of evidence, as presented in chapters 3 and 4, demonstrating that the standard of foreseeable harm is clearly met. The international responsibility of these States is therefore engaged to adjust their conduct such that the harm is avoided. A fundamental renegotiation of the investment regime is therefore required. Adding mitigation devices to the existing structure will not suffice. In turn, it is argued that even a regime duly redesigned will not function adequately in the context of an FDI dependent development paradigm. Therefore, attention to the process of financing for development is also required. States are obliged to institute arrangements at this level so that the broader context of development as a whole does not preclude the proper functioning of a specialised investment regime that is designed to ensure respect for human rights.
Similarly, there is little doubt that these States are in a position to exercise decisive influence as described in 9(c), and no doubt that they can take measures to renegotiate the regime in such a manner as to take account of its foreseeable human rights deficits. The history of Norway's BIT programme is a lone example of an attempt to do just this, indicating that in effect, even if not in a stated manner, Norway is doing its best to abide by its obligation to cooperate under international human rights law in this instance.

Principle 11

State responsibility is engaged as a result of conduct attributable to a State, acting separately or jointly with other States or entities, that constitutes a breach of its international human rights obligations whether within its territory or extraterritorially.

As the commentary points out, State responsibility is an issue connected to, but distinct from, that of jurisdiction. Principle 11 restates Article 2 of the ILC code on State Responsibility, regarding the attribution of a wrongful act in reflection of customary international law. The conduct attributable here would refer to the stance taken by most Northern States in negotiation and justification of the current investment regime advocating strong investor protections with no balancing duties or accountability, with no regard for the human rights implications of this approach, and with no effort made to investigate and assess those implications. Chapters 2 to 4 describe the results of the conduct and make the argument for attribution. The status quo is a plain breach of the human rights obligations of these States; (a) to cooperate in the creation of an enabling international order (UDHR,

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20 De Schutter (et al), 2012, supra note 5, p. 1110.
Article 28), and (b) to implement solutions to international socio-economic problems, and the realisation of fundamental human rights (UN Charter, Chapter IX). At a bare minimum, it is a violation of the customary obligation to ensure respect for the human rights of those in impoverished countries at all times and in all circumstances (as embodied in ICESCR, Article 2(1)).

Taken together, the implications of Principles 8, 9 and 11 express an international legal obligation on Northern States to initiate and facilitate a renegotiation. The logical extension of this position is that this fundamental renegotiation must take into account these and all other principles of international cooperation in its process, to ensure that such violations do not recur.

**Principle 13**

*States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct.*

This is the most clearly applicable Principle to the current investment regime. It is now clearly established that the system not only runs a real risk, but factually impairs the realisation and protection of human rights. The question is not one of the existence of risk, but of what extent of change is required to ensure its avoidance. It is submitted here, for reasons detailed above, that to ensure respect for human rights and adherence to minimum international obligations,
there must be a renegotiation based explicitly on human rights principles themselves.

Again, marginal changes in the content and process of the current regime will not be adequate. Impairment of rights will be a continuing risk if human rights clauses are added to BITs that remain defined by their purpose to liberate FDI, protect investors and entrench dependence. The reduction of human rights law to an ‘investor-friendly human rights paradigm’ is the likely result. Principle 13 refers to the existence of a “real risk” that is a stronger requirement than the presence of a mere possibility. Yet the commentary notes that a real risk does not require scientific proof, but refers to “the actual potential for adverse effects on human health in the real world where people live and work and die.”21 The argument in previous chapters would seem more than adequate to characterise the failure to respect human rights in other countries as a real risk.

The requirement of foreseeability also requires that States instantiate procedures to inquire into the possible extraterritorial human rights impacts of their policy positions. Yet “[f]oreseeability serves an important limiting function by ensuring that a State shall not be surprised with claims of responsibility for unforeseeable risks that are only remotely connected to its conduct.”22 For States to escape responsibility, however, the ILC Articles require that the harm to human rights must not have been “of an easily foreseeable kind.”23 Moreover it is not required that the conduct

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22 De Schutter (et al), 2012, supra note 5, p. 1113.
23 Ibid, p. 1113.
foreseeably cause the damage directly. Responsibility adheres to the State for contributing to the real risk of harm even in the presence of other necessary contributions for the realisation of that harm. As argued above, the burden of proof would shift to each State to adequately demonstrate that portion of harm for which it is not responsible. In addition it is specified that responsibility accrues in the case where authorities “should have been aware of the risks and have failed to seek the information that would have allowed them to make a sounder assessment of the risk.”24 It is submitted that neither remoteness nor ease of gaining clarity is an issue in the present case. Nevertheless, these considerations underscore the indispensability of human rights impact assessments.

This reasoning is strengthened greatly by the final statement of Principle 13, bringing in the precautionary principle.25 Uncertainty about whether human rights mitigation, as ‘add-ons’ to the existing regime, will adequately ensure respect as such, absent attention to foundational issues, cannot justify the refusal or avoidance of a deeper approach to renegotiation that is far more likely to ensure the required respect. In short, uncertainty cannot be used to justify a failure to adopt a reasonable stance that mandates a baseline of respect for human rights.

24 Ibid, p. 1114.
25 The commentary notes that the precautionary principle is moving towards the status of custom. Ibid, p. 1115. See also, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, International Tribunal for the Law of the Sea, Seabed Disputes Chamber, Advisory Opinion, ITLOS Reports 2011, 1 February 2011, para 135.
Principle 14 – Impact Assessment and Prevention
States must conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights. The results of the assessment must be made public. The assessment must also be undertaken to inform the measures that States must adopt to prevent violations or ensure their cessation as well as to ensure effective remedies.

The commentary is clear that, even in ensuring the lowest level of human rights respect, States are obliged to take the minimal positive action of knowledge generation and self-education. It again refers to the work of the ILC:

[T]he obligation to ‘take all appropriate measures’ to prevent harm, or to minimize the risk thereof, cannot be confined to activities which are already properly appreciated as involving such a risk. The obligation extends to taking appropriate measures to identify activities which involve such a risk, and this obligation is of a continuing character.\(^\text{26}\)

Human rights impact assessments entail a specific set of procedures and the adherence to clear principles, and are addressed in further detail below in section 6.6. Yet here, it is important to note that they are a critical factor in both an argument for fundamental renegotiation of the current investment regime, and in the process of that renegotiation. The fact that no such assessments were made in the

formulation and creation of the current regime argues strongly for a fundamental renegotiation. This is especially so given that a post facto assessment of the regime demonstrates its active prejudice towards not only human rights, but towards human rights law itself. Furthermore, even now, despite a substantial amount of attention and research, the full effects of FDI (or the investment regime) on human rights are not fully understood. It will impact in different ways given differing economies, domestic legal regimes and types of investment, to name only a few of the important variables. Therefore the simple grafting of human rights clauses onto existing BITs may be far from effective.

Furthermore, the assessments provide points of reference for the wider participation of all stakeholders regarding the appropriate shape of a commonly desirable investment regime. This need for full participation is something that is ignored by the ‘add-on’ or ‘grafting’ approach to human rights and investment law. Also ignored is the fact that prior impact assessments may require States to amend their negotiating positions right from the start to avoid human rights violations in the process of negotiation itself. Negotiating positions themselves must be understood as State acts capable of violating the obligation to ensure respect for human rights extraterritorially, therefore requiring situational assessment prior to their formulation “to inform the measures that States must adopt” to ensure adherence in accord with Principle 14.

A final critique of the ‘add-on’ approach inherent in Principle 14 is the fact that the only remedy available without a fundamental reconceptualization of the system is that of pecuniary damages. If the full extent of the human rights impact inherent in a forced reliance on FDI and the operation
of the investment regime are properly understood, then the measures States must take to cease and prevent violations and to ensure effective remedies will surely not be satisfied by a single mode of monetary compensation.27

Principle 17
States must elaborate, interpret and apply relevant international agreements and standards in a manner consistent with their human rights obligations. Such obligations include those pertaining to international trade, investment, finance, taxation, environmental protection, development cooperation, and security.

As the commentary makes clear, this Principle applies also to the negotiating process, or elaboration, of international agreements. Clearly, the international obligations of all States to cooperate in the realisation of socio-economic rights were systematically ignored in the creation of the current investment regime. The appropriate remedy is a fundamental renegotiation applying a process whereby human rights determine the shape of a future regime to the extent that it at least ensures respect for human rights. In the absence of such a remedy the current regime will forever suffer from fundamentally questionable legitimacy, regardless of how it is modified. In addition this Principle indicates that the de facto ‘new constitutionalism’ of international economic law, as described by Gill and Schneidermann, must be countered by

27 See, Maastricht Principle 38 – “Effective remedies and reparation: Remedies, to be effective, must be capable of leading to a prompt, thorough and impartial investigation; cessation of the violation if it is ongoing; and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. To avoid irreparable harm, interim measures must be available and states must respect the indication of interim measures by a competent judicial or quasi-judicial body. Victims have the right to truth about the facts and circumstances surrounding the violations, which should also be disclosed to the public, provided that it causes no further harm to the victim.”
an explicit \textit{de lege} recognition of the primacy, and therefore the ‘legitimate constitutionalism’, of human rights. The commentary therefore states that this Principle imposes obligations essential “in order to reduce the risks associated with the fragmentation of international law and the emergence of conflicting obligations, and \textit{in order to ensure the primacy of human rights}.”\textsuperscript{28}

The commentary further reiterates the customary norm to ensure respect for human rights, and notes that according to the European Court of Human Rights even the UN Security Council is expected to ensure this respect at all times and in all circumstances.\textsuperscript{29} Though some are uncomfortable with the notion of a hierarchy of norms relevant to a conflict between human rights and investor protections, they must accept that it is difficult to foresee an international court judgement upholding a norm whereby the UN Security Council is prevented in all contexts from making any resolution infringing on the rights of foreign investors. This comparison exposes the vast legitimacy differential between human rights and investor’s rights that solidly underpins the rationale of a discourse on hierarchy.

\textit{Principle 19}

\textit{All States must take action, separately, and jointly through international cooperation, to respect the economic, social and cultural rights of persons within their territories and extraterritorially, as set out in Principles 20 to 22.}

\textsuperscript{28} De Schutter (et al), 2012, supra note 5, p. 1122.
\textsuperscript{29} \textit{Al-Jedda v. The United Kingdom}, European Court of Human Rights, Application No 27021/08, Grand Chamber Judgement, 7 July 2011, para 102.
Principle 19 neatly clarifies the fact that positive measures are necessary to ensure respect for human rights. Principles 20, 21 and 22 cover the straightforward obligations on States to take action to ensure respect in terms of direct interference, indirect interference, and sanctions respectively. Regarding indirect interference, the Principles state that conduct “which impairs the ability of another State ... to comply with that State’s ... obligations as regards economic, social and cultural rights”, is impermissible, in line with Articles 16 to 18 of the ILC Articles on State Responsibility. The commentary adds that indirect interference includes

the concepts of abetting and negligent assistance to the state in violation of its obligations to comply with economic, social, and cultural rights. Such acts fall short of coercion. They do not necessarily cause another state ... to breach their obligations in regards to economic, social, and cultural rights.

It is submitted that such a description clearly covers the case at hand, indicating that Northern States are at least in negligent assistance of developing countries where they fail to provide the socio-economic rights of their peoples. The Argentinean case even highlights the fact of a strong preventive force where developing countries attempt to provide these rights in good faith.

Some would argue that Northern States do not coerce developing countries into this situation, and they thereby have themselves to blame. This point was addressed above. Yet as the commentary points out, even accepting this argument, the

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31 Ibid, p. 1131.
liability of the other State party to the treaty is not annulled. That party would have breached its obligation to cooperate by undoubtedly aiding and assisting in the conclusion of the treaty and the creation of the necessary and sufficient conditions for the impairment of the host State's ability to protect the rights of its people.

Principle 31
Each State must separately and, where necessary, jointly contribute to the fulfilment of economic, social and cultural rights extraterritorially, commensurate with, inter alia, its economic, technical and technological capacities, available resources, and influence in international decision-making processes. States must cooperate to mobilize the maximum of available resources for the universal fulfilment of economic, social and cultural rights.

One very important aspect highlighted by this Principle is the fact that investment now increasingly flows from the South. Actual negotiations will not follow strict North-South divides. In the multilateral context this places due onus on newly industrialised and upper-middle income countries, from which this new investment mainly originates, not to abuse the relatively superior capacities they now enjoy. Such is a call not to do unto others as was done unsuccessfully, or attempted, unto them. Within the context of, nominally, South-South bilateral negotiations, this Principle places a greater burden on the more powerful State to ensure that the human rights of all are respected. A great deal will potentially hinge on the positions taken by these Southern States, yet they are under the same cooperative obligation as all States to ensure respect for the human rights of all people in other countries which their policies and diplomatic actions affect. As
such they will find themselves no differently subject to scrutiny and criticism.

To return to the traditional view, the far superior capacity of the Northern developed States, particularly in their influence over international decision-making processes, contributes substantially to the depth of their obligation to cooperate. The EU, for instance, will find itself saddled with very high expectations and will negotiate under a bright spotlight, commensurate with its huge bargaining capacity, being the largest source of trade, investment and aid to developing countries.

### 6.2 – Investment Negotiations

The following sections elaborate on certain aspects of a renegotiation highlighted, and in some cases mandated, by cooperative obligations.\(^{32}\) They pertain to the purpose of the investment regime, ensuring participation in its formulation and the choice of negotiating forum, the status of certain negotiating positions under international law, and human rights impact assessments. However, it is first necessary to

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have a picture of the existing nature of investment negotiations, and to pursue some general points on their future restructuring.

In most States investment agreements are generally negotiated by the executive branch. They are based on a draft or model agreement that is usually formulated on the basis of standard documents drawn up to meet the interests of Northern corporations in the 1980s or earlier, which, in most cases, have only been modified slightly over time. These drafts leave little room for significant modification and no room for conceptual change. They are texts which have settled “most of the non-essential issues”, and are generally prepared by economic experts and investment lawyers in tandem with business interests. This process is carried out in government departments (usually trade or foreign affairs) disconnected from those tasked with international development or human rights, and free from broad oversight. There is “little or no scrutiny of parliamentary assemblies of such agreements, and no involvement of civil society organisations.” With the exception of some developing parliamentary oversight of the final outcome of negotiations, this is true at all stages of the negotiation and implementation of these agreements.

Civil society is excluded at virtually all points and there is little evidence that human rights are specifically considered, though there is some indication that this situation is due to

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34 Ibid, p. 172.
change.35 The last set of multilateral negotiations, on the MAI, initially followed the same insulated pattern, however, some direct contact was made by negotiators with international civil society not long before the process was abandoned. In addition, the EU Commission has announced a short three month window for public comment related to a draft of the investment section of the currently proposed EU-US free trade agreement.36 Nevertheless, in both cases consultation is conducted through political concessions to the ‘public interest’ to better take into account public ‘concerns’, rather than as a legal requirement under human rights law to address State obligations under that law. There remains vast scope for the implementation of procedural guidelines requiring attention to human rights consequences, as well as broad participation and transparency.

It is trite though true to say that such negotiations are complex. The multiple layers of investment agreements at many levels of international relevance, as well as individual investor-State agreements and domestic law, and finally the constraints of the regime of financing for development, together set the frame for future negotiations. As Cotula expresses it, the consequences of this frame “create ‘bargaining endowments’ that affect the balance of negotiating power between the parties and the outcome of negotiations.”37 That is, all negotiations occur in the ‘shadow’ of existing legal and economic arrangements that, without counter-balancing rules, significantly foreclose certain outcomes. The number of

potential actors and the many sites of negotiation and dispute resolution further complicate matters. The complexity is significant, even without the direct involvement of potentially affected communities, civil society organisations, international NGOs and inter-governmental organisations, and in the absence of substantive procedures of democratic accountability to the full range of elected officials. This picture serves to clarify expectations, yet it also highlights the high stakes, and the ultimate need for multilateral organisation and a principled approach.

In this regard some important sets of principles have already been proffered. Of note, the UN Office of the High Commissioner for Human Rights has formulated a set of principles on the human rights approach to poverty reduction strategies. According to these principles each developing State is advised to

> [g]ive careful attention to its international human rights obligations to the poor living in its jurisdiction when engaging in bilateral, multilateral or corporate negotiations. A State may wish to argue that these obligations constitute an international minimum threshold below which individuals and groups within its jurisdiction may not fall and that, therefore, it is impermissible for the State to conclude any agreement that is inconsistent with the international human rights it owes to the poor living in its jurisdiction.\(^{38}\)

Professor John Ruggie has proposed a set of principles for application in the area of investor-State negotiations, providing

guidance on the alignment of investor responsibilities and host State human rights obligations.\textsuperscript{39} The principles stress the necessity of the inclusion of human rights assessment at the earliest stages of negotiations. Generally speaking, the basis of Ruggie’s proposal is transferable to the plane of inter-State negotiations. At both levels there must be a focus from the start on State human rights obligations under international law as limits on the process and the outcome. As advocated here, the overarching norm applied by Ruggie is the duty for both parties to ensure respect for human rights.\textsuperscript{40}

Further indications of the appropriate conduct required of States may be drawn from the High-Level Task Force on the Implementation of the Right to Development. The Task Force has drawn up criteria for the assessment of Global Development Partnerships mandated by the Millennium Development Goals.\textsuperscript{41} From a structural point of view, the criteria include the extent to which such partnerships contribute to an enabling international environment, drawing directly on the positive content of human rights instruments in the elaboration of development strategies and their monitoring and evaluation, requiring the harmonisation of foreign policies. The criteria on the process of partnerships are the most relevant and are quite detailed.

\textsuperscript{40} Ibid, para 10.
Transparency is an overarching requirement,\textsuperscript{42} and meaningful participation is a close corollary.\textsuperscript{43} The partnership must ensure respect for “the right of each State to determine its own development policies ... and the role of national parliaments to review and approve such policies.”\textsuperscript{44} Systematic assessments of the human rights impacts of the policies and programmes implemented under the partnership must be carried out regularly.\textsuperscript{45} Finally, for the effectiveness of these assessments to be ensured, the criteria specify the inclusion of “fair institutionalized mechanisms of mutual accountability and review.”\textsuperscript{46}

In the process of renegotiation, the investment regime itself could be reconceived as such a development partnership, or at least a key agreement within a broader partnership. These criteria would then apply directly to the negotiations and to the monitoring of the outcome. A reconceptualization along these lines should not be seen as a large step. The understanding of developing countries at least, has always been that the regime formed a ‘grand bargain’ whereby sovereignty was traded for development in the form of FDI. The fact that the bargain proved faulty and misguided was not due to any bad faith on their part. A core part of this reconceptualization is the prospect of balancing investor protection with the right of each State to determine its own development policies.

In a submission to the High-Level Task Force, Vandenhole develops certain of these criteria further. With direct

\textsuperscript{42} Ibid, criterion (h).
\textsuperscript{43} Ibid, criterion (j).
\textsuperscript{44} Ibid, criterion (k).
\textsuperscript{45} Ibid, criterion (m).
\textsuperscript{46} Ibid, criterion (n).
application to the present context of negotiations, he states that human rights law should play an essential role by functioning first of all as imperative law that protects the weaker contracting party. Human rights law would thus impose constraints on the contractual freedom of countries in the North and international organisations, in that they would not be allowed to impose conditions that are contrary to international human rights law.⁴⁷

This provides the basis for a claim that certain negotiating positions of Northern States that will foreseeably result in a human rights deficit must be regarded as ‘illegal’, null, void, or inapplicable. To the extent that certain negotiating positions, in the context of vastly unequal negotiations, constitute ‘imposed conditions’ they would violate a fair process of international contract formulation. The choice of terminology is not necessarily relevant as long as it is understood that such positions are not acceptable in a legal sense, and must be reformulated such that they pass a human rights impact assessment before they can play a part in the negotiations proper.⁴⁸ Where now there is effectively an unstructured power struggle, there could be ‘fair play’ and a sense of rational order, as is customarily enforced between unequal contractual partners on the domestic plane.⁴⁹ However, it is essential to


⁴⁸ “Absolute contractual freedom is therefore not an option ... A minimal international legal framework that regulates the contractual freedom of countries entering into development contracts is required.” Vandenhole, 2005, supra note 47, p. 2.

⁴⁹ As in domestic systems, legal limits on agency in these contexts must be acknowledged, and agreements between two parties that effectively violate
note that the effects of such an understanding are not restricted to Northern States. All States will be constrained from exercising and exploiting whatever comparative bargaining advantage they have, from wealth, technology and corporate capital, to cheap labour, permissive tax regulation, natural resources and more efficient agricultural production, in such a way as to create a real risk of harm to the human rights of people in other States. This understanding is discussed further in section 6.5.

In addition, Vandenhole argues that human rights law has the potential to inform the normative content of a development partnership, in fact this is the entire basis of the human rights approach to development. If we are to reconceive the investment regime as a development partnership, then this would provide logical reason to reformulate the purpose of that regime as the realisation of human rights. Further arguments along these lines are developed below in section 6.3.6.

As Vandenhole points out, however, the requirements of monitoring, providing remedies and perhaps even ordering direct modifications of development partnerships thus conceived, would seem to necessitate the creation of a new supervisory mechanism. This would be the natural conclusion, as addressed further below, where multilateral negotiations on investment are concerned. A supervisory body will be essential in this context, firstly to ensure the screening of initial negotiating positions, secondly to oversee the process

the rights of third parties, cannot be said to be valid. No two individuals in a domestic system may form a valid contract to sell a child for example. The rights of the child circumscribe the contractual freedom and the legitimate exercise of power by the parties to the agreement. It should no longer be recognised that two States may conclude valid and enforceable contracts that do not respect human rights.

51 Ibid, para 23.
of negotiations, and third, to carry out the subsequent monitoring function.\textsuperscript{52}

Finally, it is important to note that a panel of the WTO Dispute Settlement Body has rendered a decision that sheds light on the conduct expected of States in international negotiations.\textsuperscript{53} Despite the differences in adjudicative versus administrative function, the panel’s reasoning provides certain principles that would also guide the operations of the supervisory body. The subject of particular concern in the relevant case was the negotiation of a multilateral agreement for the protection of sea turtles. Specifically, Malaysia and other States questioned the seriousness, or good faith, in the efforts of the US to engage in the negotiation of the agreement. In determining “what is required to avoid abuse or misuse” by the US of its rights granted by WTO law, the panel noted that an important object and purpose of that body of law was the sustainable development of all members and it was bound to keep this fact in the forefront during its deliberations.\textsuperscript{54} The panel further observed a “common opinion” among States, which posited “multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature.”\textsuperscript{55} There would seem to be no

\textsuperscript{52} This body could be modelled along the lines of the Committee on World Food Security, designed as an intergovernmental body with strong participation of UN organisations, civil society, NGOs, research institutes and others active on the issue of food security. See, Olivier De Schutter, ‘Reshaping Global Governance: The Case of the Right to Food’ 3 Global Policy 4 (2012), pp. 480-482.


\textsuperscript{54} United States – Import Prohibition of Certain, 2001, supra note 53, paras 5.50, 5.54.

\textsuperscript{55} Ibid, paras 5.50, 5.56.
reason for a distinction between environmental problems and other developmental or investment problems of a global nature in this regard. In concluding on the issue of an abuse of rights the panel stated that, in the given context, the absence of “serious efforts ... to negotiate a multilateral agreement ... might constitute an abuse or misuse” of rights. The panel then turned to the definition of ‘serious efforts’.

In its determination of “the extent of the obligations of the United States with respect to the negotiation of an international agreement”, the panel found that the US must “take into account the different situations which may exist” in other countries. Dissatisfaction was expressed with the fact that the US was more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States ..., even though many of those Members may be differently situated.

Therefore, the context in which a given US negotiating position will impinge on and affect other countries, particularly vastly different developing countries, must be known, assessed and explicitly balanced with other factors in the process of negotiations. In this respect good faith is central. The principle of good faith is core to international law and international cooperation. The International Court of Justice has held that States are

56 Ibid, para 5.31.
57 Ibid, para 5.46. “Thus, efforts to negotiate should be made taking into account the situations prevailing in the other negotiating countries.” Ibid, para 5.73.
58 Ibid, para 5.73.
59 Nuclear Test Case (Australia v. France), International Court of Justice, Judgement, ICJ Reports 1974, 20 December 1974, para 46. See further, Anne Peters, ‘Cooperation in International Dispute Settlement’, in Jost
under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation ... [T]hey are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.\textsuperscript{60}

The duty of good faith in the process of negotiation entailed a “continuity of efforts ... not a particular move at a given moment, followed by inaction.”\textsuperscript{61} The panel found that the duty to negotiate in good faith did not include an obligation to actually reach an international agreement. The obligation is one of conduct and not result. However, the US was obliged to ensure that negotiations included all those countries which had a stake in the issue, that the negotiations were “aimed at establishing consensual means” for achieving the collectively desired ends and that “serious efforts in good faith” had to be exhausted before other actions were taken.\textsuperscript{62} In this regard, the panel comes very close to applying a duty to actually reach an agreement benefiting all parties by stating that “[s]erious good faith efforts must take place continuously up to the satisfactory conclusion of the negotiations.”\textsuperscript{63} In addition, the

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\textsuperscript{60} \textit{North Sea Continental Shelf Cases}, International Court of Justice, ICJ Reports 1969, 20 February 1969, para 85.
\textsuperscript{61} \textit{United States – Import Prohibition of Certain}, 2001, supra note 53, para 5.60.
\textsuperscript{62} Ibid, para 5.66.
\textsuperscript{63} Ibid, para 5.66, FN 212. A similar tension is evident in the wording of the Permanent Court of International Justice; “Where the parties are under an obligation to negotiate ..., they are under an obligation not only to enter into negotiations, but also to pursue them as far as possible with a view to concluding agreements ... But an obligation to negotiate does not imply an obligation to reach an agreement.” \textit{Railway Traffic between Lithuania and
panel clearly places more demanding obligations on wealthy and powerful States. “The United States is a demandeur in this field and given its scientific, diplomatic and financial means, it is reasonable to expect rather more than less from that Member in terms of serious good faith efforts”;\textsuperscript{64} As in the field of environmental protection, so in the fields of international investment and financing for development.

In this context the panel holds clearly that States are not free to act in whatever manner asserts their best interests. There are limits and standards that apply, preventing States from conducting themselves in certain ways and adopting certain negotiating positions and tactics.

\[T]\text{he standard of serious good faith efforts imposed in relation to the negotiation of an international agreement ... may be quite demanding. ... We are mindful of the potentially subjective nature of the notion of serious good faith efforts and of how difficult such a test may be to apply in reality. We note, however, that in the present case a number of guideposts are available.}\textsuperscript{65}

These standards are inherently contextual and may not always be clear before their application to specific circumstances. However, they clearly exist, and in every circumstance there will be visible guideposts, when they are sought.

In sum, although there are a certain amount of complexities, this only provides greater reason to begin the practical process of lesson-learning in the ‘real world’. There is


\textsuperscript{64} \textit{United States – Import Prohibition of Certain}, 2001, supra note 53, para 5.76.

\textsuperscript{65} Ibid, paras 5.73, 5.75, 5.76.
PART II RENEGOTIATING THE INVESTMENT REGIME

a well theorised basis for such a beginning, pointing out key requirements; a duty to negotiate in good faith, transparency, and participation; the concrete application of positive human rights law; close attention to the purpose of the venture; limits on contractual freedom consisting of a pre-negotiation phase, human rights impact assessments and continuous oversight; a mechanism or body tasked with initial screening and monitoring of the negotiating process and the outcome; the resolution of necessary trade-offs on human rights terms based on legitimation through participation; etc. The following seeks to fill in certain details.

6.3 - The Nature and Purpose of an International Investment Regime

A renegotiation on the terms addressed here not only raises fundamental questions about the proper nature of an international investment regime but provides a new approach to the formulation of its purpose and its basic design. As discussed in chapter 4, a range of answers have been advanced to most of these questions, correlating to an equally wide range of reform proposals, some of them foundational. Yet there is a lack of coherence and coordination. There has

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67 “If a shift does occur towards the recognition of the rights of people, the role of international law in investment protection will require radical rethinking.” Sornarajah, 2010, supra note 18, p. 54.
been little effort to identify principles that cut across or are common to various visions for a future investment regime. The international obligation to cooperate provides a set of principles that may serve to encompass and unify a number of these critiques and their design prescriptions under an umbrella vision sharpening the focus and increasing their effectiveness. This would clearly be a large project. The present section intends only to explore some considerations by which it could begin. It briefly redresses some of the more fundamental critiques and indicates the alignment of their reform proposals with the dictates of a renegotiation in accord with cooperative obligations. In addition it argues for the reconceptualization of the investment regime as a form of development partnership as understood by Millennium Development Goal 8 and the High-Level Task Force on the Implementation of the Right to Development. Finally, it is suggested that these considerations may coalesce to indicate the logic of proposing that the guiding purpose of an investment regime be explicitly nominated as the realisation of human rights.

6.3.1 - Constitutional Critique

Gill and Schneiderman’s critique is familiar from the introduction. The antidote proposed is a re-vitalisation of broad-based debate, participatory values, pluralism, and ultimately democratic governance in the formulation and operation of the investment regime. An implementation of the constitutionalism of de Toqueville is advocated at the international level, to bound the investment regime, which
ensures that “channels of change” are kept open and States are not forced to enter “legal strictures” that deny their citizens’ ability to adopt alternative development strategies in accord with their democratically determined preferences.68

Implementing obligations of cooperation will require due attention to this reform proposal as a core, if not overriding, component. Respect for basic democratic rights of participation, access to information, transparency and free speech is mandated. The core norm of economic and political self-determination, common to both international covenants on human rights, must be ensured. The call for a democratic international constitutionalisation is an important part of the movement to solidify the international bill of human rights, and aspects of the UN Charter,69 as the guiding constitutional norms of an international community of States.70 Cooperative obligations may prove to be a cornerstone in this process of human rights constitutionalisation. This approach also highlights the relative legitimacy deficit in the constitutional

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69 It may not be the intent of this movement to further entrench the current representational structure of the Security Council and the relative balance of power between it and the General Assembly, for example.

aspirations of an investment regime protecting a very small investor class, by immediately posing a higher set of norms protecting the entire class of humans.

6.3.2 - Global Administrative Law Critique

From another closely related perspective the investment regime resembles widespread national systems of administrative law designed to review and control the administrative actions of governments in accord with set principles. It institutes supposedly objective international values in the form of investor guarantees that act as a basis for contesting the legality of government action. States have accepted a form of international supervision, by which their laws, courts and administrative agencies may be judged by the standards of investor’s expectations and their fair and equitable treatment, for example.

Yet, substantial differences exist between the operation of the investment regime and the process of national administrative law. For one, national law is generally restricted to ordering a correction in procedural defects, and only very rarely may it order monetary compensation, while pecuniary damages form the core remedy in the

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administrative modality of the investment regime. In addition, national systems of administrative oversight operate within, and are bound by, democratic checks and balances and apply rules that impose duties on both parties, while investment tribunals do not consider themselves so bound and apply rules imposing duties only on one party. The most striking difference however, is the fact that administrative regimes are wholly public regimes at the national level, while investment tribunals exhibit at best a hybrid public/private nature, yet have more private characteristics than public ones.

The reform proposals emanating from this perspective align with those of the critique addressed below at section 6.3.4 regarding the public/private divide, and revolve around incorporating the investment regime fully within the broader strictures of public law. As human rights law forms a core, if not constitutional, part of public international law, the broad aim of these proposals aligns directly with an obligation to ensure respect for human rights. Most important to the case at hand, the standards of administrative oversight and control applied must be formulated and accepted according to democratic processes, and must represent a shared standard balanced by reference to the interests of all those potentially

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74 “In common law jurisdictions, for instance, the ultra vires doctrine, the separation of powers and the rule against fettering are all aimed at limiting the powers of review exercised by the adjudicators”. Daria Davitti, ‘On the Meanings of International Investment Law and International Human Rights Law: The Alternative Narrative of Due Diligence’ 12 Human Rights Law Review 3 (2012), p. 436.
affected by the full range of government action. This amounts to the necessity for the standards set by an investment regime to be formulated “by the whole society” as they touch on “matters of concern to the society as such.”76 Again, this insight accords directly with the obligation of States to ensure full and effective participation.

Furthermore, as Alvarez notes, this perspective of the investment regime demands that those administering it must be accountable to public procedures. Arbitrators must therefore, “engage with other bodies of rules concerning the good administration of the laws and the promotion of the rule of law ... [such as] international human rights courts”, and that “every effort ought to be made by the treaty’s interpreters to render its rules compatible with those in relevant international regimes”.77 Kingsbury and Schill state that if investment rules are seen as administrative law they may not simply seek to protect investors only, nor is additional attention to economic growth and development sufficient. An investment regime can ultimately only be justified by a simultaneous “promotion of democratic accountability and participation, the promotion of good and orderly State administration, and the protection of rights and other deserving interests.”78

As such, the vindication of human rights values is a public good that an international investment regime must provide to

76 Kingsbury and Schill, 2009, supra note 72, p. 6.
78 “The currently existing system of investor-State arbitration is undoubtedly limited in its ability to fully vindicate any of the normative justifications of the public-regarding and governance-regarding dimensions of investor-State arbitration. Vindication of these values is a public good that for structural reasons is likely to be under-supplied. Major reform may well be needed.” Kingsbury and Schill, 2009, supra note 72, p. 8.
be a legitimate mechanism for review of government action. The negotiating process necessitated by cooperative obligations and the required subsequent oversight is specifically designed to ensure that such vindication occurs. In particular, it provides the necessary travaux préparatoires that adjudicators must refer to, which makes the public (human rights) purpose of the regime clear. However, if this is deemed potentially insufficient to ensure the accountability of adjudicators to public procedures and values then clear public goals must be textually identified in the agreement itself. Presumably human rights realisation would be high on the list of such public goals.79

6.3.3 - Hegemonic Law Critique

To dramatically simplify a broad and complex critique, the Third World Approach to International Law and associated standpoints see the investment regime as a tool of post or neo-colonial subjugation of the developing world.80 Particularly with reference to the earlier generation of BITs it is argued that the investment regime is a product of the North-South divide, a legal institution reflecting a high point of hegemonic Northern influence. It is tainted by a vast imbalance in power

79 Such a process of renegotiation may end in the plain textual nomination of a realisation of human rights as the ultimate purpose of an investment regime so constructed, as detailed further in section 7.3.6 below.
during its construction, and is inherently against the political and economic interests of developing countries and therefore detrimental to the human rights of their populations.

There are factors dissipating the present force of the hegemonic critique in its simplest forms. Yet, while it is certainly true that there has been a slight weakening of investor protections in recent BITs favouring the regulatory space of States, that capital flows are increasingly originating in developing countries, and that BITs are increasingly concluded between them,\textsuperscript{81} this does not relegate a strong hegemonic influence on the investment regime to history. In short, from the essential fact that there has been a shift in international power relations from the traditional North somewhat towards the BRICS it does not follow that a hegemonic pattern has disappeared.\textsuperscript{82} Roughly 150 States are left directly unaffected by this power shift, and instead may be even more affected if the BRICS’ investment agenda does not deviate significantly from that of the traditional North.\textsuperscript{83} From the perspective of many of the poorest countries, at a relative level of abstraction, instead of indicating the obsolescence of

\textsuperscript{81} These common factors are often raised by those down-playing the effects of State power in the investment regime. For discussion see, Alvarez, 2011, supra note 77, pp. 437-438.

\textsuperscript{82} For example, there is evidence that, in general, new South-South BITs differ in character to the second generation BITs of a North-South nature, typically offering a lower level of investor protection. See, Lauge Poulsen, ‘The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis’ 30 Northwestern Journal of International Law and Business 1 (2010). However, this difference should not be exaggerated according to Malik. Mahnaz Malik, ‘South-South Bilateral Investment Treaties: The Same Old Story?’, Background Paper for the IV Annual Forum for Developing Country Investment Negotiators, New Delhi, 29 October 2010.

\textsuperscript{83} “China’s more recent treaties are, however, premised on the fact that the current significant outflows of foreign investment from China need to be protected. Its newer treaties are becoming very similar to those which Western industrialised states sign.” Sornarajah, 2010, supra note 18, p. 174. On the other hand, Brazil shows no intention of initiating any BIT programme, and South Africa is now overhauling its previous BIT programme that followed the Northern agenda.
the North-South divide it may have simply shifted that divide five countries further south.\textsuperscript{84}

However, this debate does not need to be definitively settled for present purposes. To reduce it to its lowest denominator, the main inescapable point of this critique is that there are insufficient checks and balances on the exercise of power in the process of negotiations between States over international economic arrangements. There is a lack of procedural legitimacy that will always expose negotiations to charges of hegemonic influence. Cooperative obligations take the same viewpoint, and their implementation is coextensive with most of the reform proposals suggested by the hegemonic law critique. Most significant is the common focus on legitimising the process of negotiations. These obligations, in their minimalist formulation as employed here, will not eradicate power disparities in negotiations, as may be the ultimate goal of a hegemonic critique. That is not their present purpose.\textsuperscript{85} Yet, they will directly bear on those disparities to ensure that the process and the result at least do not equate with a failure to respect basic human rights. They will not bring about substantive equality in negotiations, but they will ensure that existing inequality does not have these specific negative effects. They have the further advantage of relevance beyond the confines of a North-South debate. Obligations of cooperation will have this balancing effect on any power

\textsuperscript{84} The continuing relevance of the North-South divide has been defended above at section 3.5.

\textsuperscript{85} This is in no way to prejudice a view whereby cooperative obligations extend beyond the minimalist interpretation pursued here. Margot Salomon provides a much broader basis for cooperative obligations that aligns more fully with the reforms envisaged by hegemonic law critiques. See, Margot Salomon, \textit{Global Responsibility for Human Rights: World Poverty and the Development of International Law} (Oxford University Press, Oxford, 2007).
disparity in negotiations, no matter which global category the States party to the negotiations belong to.

What a sustained attention to a hegemonic critique of the investment regime does make very clear however, is that, in addition to a continuing relevance of a North-South divide at the horizontal international level of States, there is a developing awareness of a direct diagonal clash of interests between people in one State and investors in another, which States are doing little to ameliorate and much to exacerbate, creating a field ripe for investor exploitation. To quote Alvarez:

Today’s investment regime has a distinct pro-market ideology that originated in the North but is no longer defined by it. The “hegemony” of the investment regime today is non-territorial and de-racinated ... Participation in regimes like that for investment ... or the WTO, is no longer a choice for most States. ... Participation and compliance with them is, increasingly, the only option States have. These regimes have no clear rival. To refuse to participate in them ... is tantamount to political or financial suicide.86

States have created, and continue to create, an investor’s legal empire. It is not just about developing countries versus foreign investors and Northern States any more. It is also now clearly about people in all States struggling to ensure a net benefit from foreign investors. The main relevance of States in this picture is the extent to which they currently skew the field of struggle in favour of investors, in disregard not only of people in other States but also, ultimately, of their own people. A short-sighted dependence on FDI makes all States blind to the consequences of creating an investor’s legal empire to which

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they must all succumb eventually. Ultimately, it would seem that even traditional capital exporters will soon not be immune from systemic pressure to sign BITs in order to maintain their attractiveness to FDI, rather than simply to ensure protection for ‘their’ investors abroad, if this is not already the case. The picture is inevitably one of all States vying for fickle corporate favour and only injuring each other in the process.

If all States are potentially in the same boat, it should be asked how they might collectively adopt another strategy, and what principled approach this strategy could take. Upholding human rights principles and instituting collective obligations to cooperate provides such a strategy. If States continue to accept and entrench the present mutually destructive paradigm in a collective competitive delusion that there is no alternative, then human rights are a clear handicap, a comparative disadvantage. However, if a principled method is sought to halt the dwindling relevance of democratically elected institutions in comparison with private power, and a dangerous diminution of substantive equality, then they are a mutually agreeable cooperative programme and a set of building blocks. Foremost is their capacity to re-instil the public purpose in all States and to reinstitute a public power that has been unwisely abrogated to the market and the private sector over the last thirty years, countering the hegemony of deracinated private power and re-embedding the transnational capitalist class. Echoing the paradox referred to in the introduction, human rights are curse or saviour; it all depends on the perspective.

6.3.4 - Public/Private Critique

These considerations go to the heart of the public/private critique of the investment regime. Mills, for example, draws attention to two fundamental axes of tension at the regime’s core.\(^88\) The first is a tension over the very nature of the regime, as one of public or private international law, and the second relates to its purpose or primary goal, whether that purpose is to serve public or private interests and objectives. In parallel to the position taken here, Mills argues that the plethora of problems which some believe are more or less superficial to the regime and therefore supposedly remedied by technical solutions of varying complexity and depth, “may in reality ... be products of these deeper underlying theoretical uncertainties.”\(^89\) The unresolved tensions create an identity crisis at the heart of the regime. Is it “about empowering states, a mechanism for them to promote their economic development and administrative sophistication? Or is it about disciplining them, a means of protecting investors (and globalized markets) from unfair regulatory excess?”\(^90\)

On the one hand, the regime is seen as a progressive realisation of increasing agreement over the technical standards that should be applied to investment protection, a simplistic viewpoint deconstructed in chapter 3. On the other hand, the regime is viewed as a current manifestation in a long and unresolved contest between fundamentally

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89 Ibid, p. 469.
90 Ibid, p. 470.
competing interests in a capitalist market system. From this perspective, governments have abused the power entrusted in their public office by abdicating it to private tribunals and democratically unaccountable interests.\textsuperscript{91} As Van Harten states, “the significance of international [investment] arbitration for juridical sovereignty is its privatization of the authority to define the very concept of the public sphere”, thus creating “a legal order in which private actors formulate bodies of law without direct supervision by the State.”\textsuperscript{92}

The unresolved tension between public and private at the conception of the regime must be settled. This requires a fundamental renegotiation. Adhering to cooperative obligations under human rights law in the process of this renegotiation ensures the resolution of the tension. It self-consciously sets the very negotiations themselves in core principles of public international law. The private functionality of the resultant agreement will then naturally be bounded and informed by public values.

Many, if not all of the specifically proposed adjustments to the dispute settlement system would be implemented as a matter of course. However, the most important change would have been set in the foundations of the agreement. It will have

\textsuperscript{91} For a treatment of this abdication of public authority at the international level in a wide range of contexts, from the law of the sea to WTO and investment treaty dispute settlement see, Caroline Foster, ‘Public International Legal Authority in the Transnational Economic Era: Diminished Ambitions?’ 17 Journal of International Economic Law 2 (2014).

been clearly nominated as having a public purpose, the achievement, or at the very least the respect, of which is necessary in its partially private function, investor protection. This function will still enable foreign investors to rely on universal standards for the treatment of their investment, and through resolving the public/private tension will also mean that the standards set by this process are far more stable and predictable due to their social legitimacy. States would remain bound not to frustrate the legitimate expectations of investors however these expectations would then be more realistically formulated.93 This will better contribute to the goals of the investment community, to provide an efficient and durably standardised and consistent market for investment. After all, a market that escapes public control is inherently unstable, in and of itself.94

6.3.5 - Sustainability Critique

Clearly prioritising the public purpose of an investment regime places the goal of equitable and sustainable economic development in the centre of the picture. Despite the widespread allusion to economic development and raised living standards in most preambles, this “professed purpose” is not carried through into the substantive operation of BITs.95 Yet regardless of an absence of concrete legal commitments to include a development dimension, there is no doubt that, from

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93 See for example, the commentary to the 2007 Norwegian Model BIT. Comments of the State Secretary Committee on the Model for Future Investment Agreements, 19 December 2007, p. 10.
a developing country standpoint, this was an essential requisite of the ‘grand bargain’.\textsuperscript{96} The sustainable development critique\textsuperscript{97} derives from the observation that this grand bargain was struck under false pretences and is failing on its own terms to meet the expectations of all stakeholders.\textsuperscript{98} The chosen means has replaced the professed end.\textsuperscript{99} The major thrust of the critique is that the investment regime must be ‘engaged’ such that it “promotes sustainable development goals.”\textsuperscript{100}

The reform proposals from the sustainability critique are by far the most refined and comprehensive of all those questioning the fundamentals of the investment regime, and from a human rights perspective the many progressive textual and procedural reforms are highly desirable. This reflects the broad convergence between sustainable development and human rights visions, and the fact that human rights form an important element of most definitions of sustainable


development, especially more recent ones.\textsuperscript{101} All of the concrete proposals canvassed by the IISD Model International Agreement on Investment for Sustainable Development, for example, would align with a human rights approach. Obligations of cooperation under human rights law can then clearly encompass a sustainability critique.

We are concerned here with existing minimum international obligations on States under custom to ensure respect for human rights extraterritorially. As a straightforward legal guide for the behaviour of States in designing an investment regime this offers a greater overarching framework than the law of sustainable development, of which it is noted that “[t]he precise legal character of sustainable development commitments by States remain contested”,\textsuperscript{102} as does its core definition. Based on the previous chapter, it is suggested that obligations of States to ensure a minimum respect for human rights are less contestable, as is the definition of what amounts to a failure to respect human rights. They are also arguably less open to co-operation.\textsuperscript{103}


\textsuperscript{102} Marie-Claire Cordonier Segger and Andrew Newcombe, ‘An Integrated Agenda for Sustainable Development in International Investment Law’, in Cordonier Segger (et al eds.), 2011, supra note 97, p. 110. The same authors note further that, “The status of sustainable development in customary law is unclear. However ... [e]ven if there is no legal obligation to develop sustainably, there may nevertheless be, through incremental development, law “in the field of sustainable development”’. Ibid, p. 142.

\textsuperscript{103} “Worldwide, big companies have taken over the term sustainable development. They ... publish so-called sustainability reports, which in addition to being a tool of transparency and accountability also serve a public relations function.” Brigitte Hamm, Anne Schax and Christian Scheper, ‘Human Rights Impact Assessment of the Tampakan Copper-Gold Project, Mindanao, Philippines’, Misereor, Aachen, 2013, pp 68-69.
It is evident that, if reliably married to an environmental commitment the approach advocated here is sufficiently broad to ensure the objectives and obligations of sustainable development. It is not so evident that a sustainable development approach can equally ensure respect for human rights in all contexts and at all times, due essentially to the fact that the concept of sustainable development as already argued. The human rights framework demonstrates a potentially higher resistance to the FDI dependent development paradigm and therefore a heightened ability to catalyse alternative visions of development. An appropriate conceptualisation to concretise in the preamble of an investment agreement would therefore be a three-step structure, in which the direct functionality of the agreement, investment protection, is to serve the purpose of sustainable development, which in turn must aim at the realisation of human rights (or, at the very least, ensure respect for human rights).\textsuperscript{104}

6.3.6 – The Investment Regime as a Development Partnership

Neumayer seeks to evaluate the extent to which in their BIT programmes Northern States might follow a similar rationale or pattern to the one by which they establish aid relationships with developing countries.\textsuperscript{105} Academic work on aid allocation

\textsuperscript{104} In accord with Article 31(2) of the Vienna Convention on the Law of Treaties, this would ensure that the intent of the parties was express and clear, and that any subsequent interpretation of the substance of the treaty, regardless of the nature of the person or body interpreting, must respect human rights.

posits three core motivations for bilateral aid programmes; donor interest, recipient need, and good governance. Neumayer tests the degree to which Northern State BIT programmes are motivated by the same factors, concluding that Northern State self-interest is the driving factor. However,

[ata] the same time, poorer developing countries have more, not fewer, BITs, which suggests that developing country need also plays a role in developed countries’ BIT programs. Good governance in the form of either democracy or human rights protection does not matter.\textsuperscript{106}

According to Neumayer then, despite the fact of a present emphasis on developed country self-interest and a relative disregard of governance, democracy and human rights, the indication that developing country need plays a significant role means that the investment regime might be usefully likened to aid allocation.

The BIT programs, which despite their immense importance have been largely ignored by development and international relations scholars, can thus be understood and interpreted within the same theoretical framework familiar from and successfully used in the aid allocation literature.\textsuperscript{107}

It is worth noting that this may also indicate the extent to which aid allocation is presently informed by economic and investment motives. Nevertheless, Neumayer’s account opens up a very productive angle of analysis. It suggests that an investment regime should have characteristics similar to an ideal form of aid allocation, even if these characteristics are currently very underdeveloped. This is an observation that

\textsuperscript{106} Ibid, p. 261.
\textsuperscript{107} Ibid, p. 262.
chimes very strongly with the analysis in chapter 2. If the process of financing for development creates a dependence on one form of financing, then this source of financing must be made developmentally effective in a similar manner as traditional aid. That is, it must be targeted to the poorest and most in need, it must be accountable to public direction and oversight, and its negative effects must be actively curtailed. Most importantly however, it must be ensured to have a positive net developmental benefit and, to the extent that human rights and development are linked, it must be ensured to at least respect human rights.

These considerations must then displace an overriding profit motive and market allocation rationale from the internal process of foreign investment, replacing it with public utility goals as in the case of traditional aid. Given that this may not be likely, and that multinational companies may not successfully internalise a new primary identity and dynamic as beneficial third world developers, then these considerations naturally imply a developmental/human rights rationale as the purpose of an investment regime which externally governs the process of investment. If they do not, then international financing for development that promotes a system of FDI dependence will fail on fundamental conceptual and theoretical grounds. Any developmental benefit that arises from it will be a result of pure chance rather than logical design.

Currently, at the international level, investment is ‘guided’ only by efforts to induce its mere presence by offering the highest possible profits and the lowest possible risk, which are the exact conditions under which its positive developmental benefits are least likely to materialise. The illogic of this
process is borne out in the fact that the countries that are most in need of development finance are the least favoured by FDI under the present system. As Chang observes, without a public interest framework in which to direct FDI, the current system is intended to operate on a premise that is in most cases the exact opposite to observed empirical reality; namely, that FDI will bring development, where it is generally development that will bring FDI.108

Norway’s model BIT is of great interest here. It would seem to strongly imply the recognition of the nature of the investment regime as a form of aid allocation, at least in substantial part, based, as it is, on the understanding that “the promotion of sustainable investments is critical for the further development of national and global economies ... [and] that the promotion of such investments requires cooperative efforts of investors, host governments and home governments.”109 The human rights basis for such further development is set by a “commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with [the Parties’] obligations under international law.”110 A cover letter accompanying the model affirmed that although the primary reason for concluding investment agreements was to protect Norwegian investors, “it is also an important consideration that the agreements are meant to promote investments in developing countries, thereby contributing to economic development in these countries.”111

110 Ibid.
PART II  RENEGOTIATING THE INVESTMENT REGIME  |  425

The aid programmes of Northern States are increasingly informed by a human rights-based approach to development,\textsuperscript{112} nominating human rights as both the means and the end of development practice. A recent statement from Germany is indicative of a clear trend, at least within Europe. The German government considers that

\begin{quote}
[h]uman rights are a guiding principle for German development policy ... Human rights thus form the overarching framework for development policy ... Germany and the majority of its development partners have ratified the international human rights conventions and have thus recognised the implementation of these conventions as a legally binding obligation. This also provides the \textit{binding} frame of reference for Germany’s development cooperation with partner countries,\textsuperscript{113}
\end{quote}

This would suggest that aid allocation for Germany is, at least nominally, \textit{governed} by human rights goals.

\begin{flushright}
\footnotesize\textsuperscript{113} BMZ (German Federal Ministry for Economic Cooperation and Development), 'Human Rights in German Development Policy', Strategy Paper 4, 2011, p. 3 (emphasis added).
\end{flushright}
Therefore, the extent to which it is accepted that the investment regime should have aid allocation characteristics, dictates a similar acceptance that it should follow a human rights-based approach. The perspective from financing for development only strengthens, clarifies and gives greater urgency to the need for an investment regime to be considered as a method of governing aid allocation. This leads to the conclusion that either a respect for human rights at a minimum, or the more desirable goal of a realisation or fulfilment of human rights, should be expressly nominated as the guiding purpose of the regime. This is necessary to direct the internal profit motive of the ‘chosen’ means of development and to curb its external effects, such that an expectation of actual development as a result is at least not substantially unfounded. Further detailed direction and guidance would also presumably be needed within the substance of the regime.\(^{114}\)

This ties in clearly with an approach that begins to consider the investment regime as a development partnership within the meaning given to such partnerships under Millennium Development Goal 8.\(^{115}\) Target 12 of the MDGs refers to the creation of an international trading and financial system conducive to good governance, development and poverty reduction. Though the aspect of an investment regime in this international order is not mentioned explicitly, there would

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\(^{114}\) For instance, one major aspect is the emphasis placed by the IISD Model Treaty on home state obligations, firstly to provide remedies within their own jurisdiction to non-citizens harmed by ‘their’ FDI, and secondly to actively promote the delivery of beneficial FDI to host countries.

seem to be no theoretical reason for its exclusion. On this understanding the regime would have to serve the ends of the Millennium Declaration.\textsuperscript{116} Even if the regime is not seen as a development partnership in and of itself, nevertheless its sheer importance must be acknowledged, in terms of affecting the prospects of any dedicated development partnership or aid programme, such that it may easily destroy any positive potential of such a partnership if it is not somehow synchronised with its aspirations and operation.\textsuperscript{117} To this effect then, the regime must still be subject to the same design as that of a development partnership under MDG 8.

As Vandenhole elaborates, this would involve compliance with the criteria drawn up by the High-Level Task Force on the Implementation of the Right to Development, to ensure that the process by which the investment regime is created must adhere to “[a] minimal international legal framework that regulates the contractual freedom of countries entering into development contracts”,\textsuperscript{118} or more specifically in accord with a minimalist conceptualisation, on countries entering into agreements that bear very significantly and fundamentally on such dedicated contracts.\textsuperscript{119} The approach

\textsuperscript{116} UN General Assembly Resolution 55/2, UN Doc. A/RES/55/2, 18 September 2000.
\textsuperscript{118} Vandenhole, 2005, supra note 47, p. 2.
\textsuperscript{119} The Cotonou Agreement therefore proclaims that trade cooperation “shall be directed towards sustainable development centred on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights.” Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States of the Other Part, Signed in Cotonou on 23 June 2000,
of designing a renegotiation in accord with international cooperative obligations to respect human rights naturally incorporates these criteria.\(^{120}\)

It is suggested that human rights form the common current through all of these fundamental critiques of the investment regime, and furthermore, that none are done any damage by an elevation of the importance of human rights to that of a guiding principle. Likewise, none of the reforms proposed are compromised by the structural framework of human rights as formative and operational parameters, indeed many, if not all, are enhanced. Thus all of these disparate positions would be served by States’ adherence to obligations of international cooperation.

6.4 - Participation, the Importance of Multilateral Negotiations and the Choice of Forum

Bilateral and regional negotiations on investment are the current default, due essentially to the fact that powerful States could not achieve the objectives of their investors in circumstances of broad participation, general representation, and the accompanying relative balance of power.\(^{121}\)

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Nevertheless, it is widely understood, and particularly stressed by UNCTAD, that

[t]he existing IIA network has serious system-immanent deficiencies that result from its highly atomized and fragmented nature. These flaws can only be overcome by changes to the system itself: namely a move toward a more coordinated multilateral approach.\textsuperscript{122}

There is an obvious need to enhance multilateral consensus building aimed at a “gradual harmonisation” of the system leading to the “clarity and stability of investment relations, and ... the consistency of rules” desired by all parties.\textsuperscript{123}

The aim of cooperative obligations to ensure respect for human rights, aligned with the developmental priorities of developing countries, clearly mandate a preference for the broadest possible participation in the creation of an investment regime, and therefore multilateral over bilateral or plurilateral negotiations. As UNCTAD states, this would be the only way to achieve a “higher degree of homogeneity, transparency and recognition of legitimate development concerns”, which is necessary given the

risk that the system eventually degenerates into an increasingly non-transparent hodgepodge of diverging rules that countries, especially capacity-constrained developing


countries, find more and more difficult to cope with. ... Therefore, an international investment framework remains an important goal ... As long as countries are not ready to come together at the negotiation table, multilateral discussions of the further evolution of the [investment] universe in a forum like UNCTAD remain crucial.\textsuperscript{124}

Despite widespread scepticism of its political viability, certain commentators still advocate a multilateral path for the future of the investment regime, as the most desirable way to improve its legitimacy and respond to a general disillusion regarding its promise.\textsuperscript{125} What is often termed the absence of ‘the development dimension’ is crucial and will only be properly addressed in a multilateral forum.\textsuperscript{126} In addition, curiously, at the multilateral level, as evidenced in the failing dynamics of the MAI, the developed nations “turn out less unified than their shared goals of investment protection and liberalisation might suggest.”\textsuperscript{127} This would indicate the need for an extended period of concerted multilateral consensus building.

Vast imbalances in negotiating capacity, technical expertise, and ‘external leverage’ can be best mitigated in a multilateral forum, but more so in some than others. On the issue of technical expertise, this is one particular reason to favour UNCTAD over the WTO as a preferable setting for a

\textsuperscript{126} De Man and Wouters, 2013, supra note 125, p. 252.
\textsuperscript{127} Ibid, p. 255. See also, Wouters (et al), 2009, supra note 123, p. 291.
renegotiation. The body has amassed a prodigious amount of knowledge and data on foreign investment. This properly facilitates an evidence-based discussion, which can minimise excessive or ‘negative’ politicisation. However, politicisation per se is unavoidable, and is in fact desirable from the viewpoint of creating an inclusive and full debate that an exclusive focus on technical issues may foreclose. While its constitutional bias toward the interests of developing countries may be a reason for Northern State reticence and possible disengagement, conversely this founding bias together with its wealth of knowledge make UNCTAD a prime option for a multilateral forum for a renegotiation. It also provides a central basis for the integration of an approach based on cooperative obligations within the organisation’s work on investment rule-making.

UNCTAD’s recent adoption of a sustainable development rationale for consensus building on the future of the investment regime may be seen as a welcome step in the right direction. Aside from the reservations repeated above regarding sustainable development as the governing rationale for the regime, UNCTAD’s Investment Policy Framework nevertheless addresses many of the core concerns that are

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128 This may also be a reason for its “progressive marginalization” and relative exclusion “from shaping the international institutional framework that has evolved to address development issues in a globalizing world.” UNCTAD, Report of the Panel of Eminent Persons: Enhancing the Development Role and Impact of UNCTAD (UN, Geneva, 2006), para 19.

129 A number of countries would seem to be in favour of UNCTAD as the venue of choice for the development of a coherent international policy towards investment. See for example, Speech by Mr. Robert Davies, Minister of Trade and Industry of South Africa at the session on UNCTAD’s Investment Policy Framework for Sustainable Development (IPPSD), Geneva, 24 September 2012, printed in, ‘South African Minister: New Approach Needed on Investment Treaties’ 69 South Bulletin (21 November 2012), p. 7.

common from a human rights approach. The close overlap between this and the sustainability approach has been noted. Thus, despite involving a significant conceptual and legal reorientation, there exists a clear basis in UNCTAD’s current approach for the eventual establishment of an alternative framework based on States’ cooperative obligations. This alternative framework would also resolve the inherent tensions in UNCTAD’s current approach as described in section 3.5 above, which at times render its advice incoherent and contradictory.

Discussion of these obligations would dovetail with recommendations by a Panel of Eminent Persons recently established by UNCTAD to assess ways of revitalising the institution. This Panel advised that “member States should overcome confrontational attitudes, build trust and create a comfort zone to nurture a spirit of development partnership and “shared success”.”¹³¹ Specifically, the Panel stated that UNCTAD should establish a Development Observatory of Global Economic and Financial Governance and a Virtual Consortium of Think Tanks on globalisation to define “development-centered” globalisation, and identify new development strategies, “to safeguard and advance developing countries’ interests in the emerging new global economic and financial governance structures.”¹³² Furthermore, UNCTAD’s annual World Investment Forum is widely regarded as the primary global platform for evidence-led and inclusive high-level deliberation and policy setting for investment for development.¹³³

¹³² Ibid, p. xv.
Nevertheless, UNCTAD’s current state would have to be reformed and remodelled along the original lines by which it was created, to ensure that it did not become yet another forum co-opted by the powerful States. This is especially so regarding a rejuvenation of UNCTAD’s traditional role as a forum for negotiations on legally binding international agreements related to trade and development processes.\(^{134}\) UNCTAD should be given the mandate to review the inequities in the existing structures of international economic law, and to resolve them through a dialogue guided by the principles of cooperative obligations.\(^{135}\) At one point, as former UN Secretary-General Boutros Boutros-Ghali points out, during UNCTAD’s “golden era”, it acted to harmonise States’ trade and related macro-economic development policies:

This used to be done under the item on interrelationalship between money, finance, trade and development. Subsequently the developed countries took their own macroeconomic policies outside the pale of UNCTAD deliberations.\(^{136}\)

This removal needs to be reversed, and UNCTAD’s former trademark plurality of approaches to international economic

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\(^{134}\) UNCTAD’s original Charter stated that one of its key functions was to “initiate action ... for the negotiation and adoption of multilateral legal instruments in the field of trade”, yet this was a function long closeted by Northern States in favour of institutions and processes over which they had better control. Establishment of the United Nations Conference on Trade and Development as an Organ of the General Assembly, UN General Assembly Resolution 1995 (XIX), UN Doc. A/RES/1995(XIX), 30 December 1964, para 3. See further, South Centre, ‘Reinventing UNCTAD? Comments on the Eminent Persons’ Panel Report on Enhancing the Development Role and Impact of UNCTAD’, Analytical Note, SC/GGDP/AN/GPG/2, Geneva, December 2006, para 7; Boutros Boutros-Ghali, ‘Reinventing UNCTAD’, South Centre Research Paper 7, Submitted to the Panel of Eminent Persons on Enhancing UNCTAD’s Impact, July 2006.

\(^{135}\) Boutros-Ghali, 2006, supra note 134, p. 16.

\(^{136}\) Ibid, p. 1.
problems needs to be re-instituted. Northern States may currently be more open to reinstituting such systemic discussions within UNCTAD, as the WTO has lost significant relevance as a discursive forum due to longstanding deadlock, and as it is increasingly obvious that such systemic discussions, inclusive of developing countries, cannot be avoided.

To the extent that they desire multilateral rules on investment, Northern States may not currently have the luxury of their first preferences, as history has effectively removed two other prospective fora from a potential list, the OECD and the WTO. Attempts at multilateral negotiations on investment in both these settings have failed over the last fifteen years, due largely to perceptions of developing State exclusion or disadvantage.137 This may leave only two options, UNCTAD and a new purpose built forum or institution, such as a Multilateral Investment Organisation.138 The option of a framework convention approach with its own institutional home is also sometimes aired.139 Nevertheless, given current institutional realities UNCTAD remains the first choice for an

appropriate forum. An interesting approach may be to follow a framework convention pathway through UNCTAD.  

However, the distinct possibility remains that the conclusion of a multilateral regime, which once instituted will be very difficult to modify, in the current climate of FDI dependence, risks locking in a more protective set of rules to the detriment of host State policy space than would be the case in the absence of such dependence. To put it simply, although it may be an immediate improvement it may also look like an undue concession on the part of developing countries in hindsight. This would depend on the prospects for shifting the global development paradigm away from dogmatic neoliberalism and entrenched FDI dependence. The arguments presented in the next chapter would suggest that the prospects are reasonable. Therefore, patience may well be the best counsel.

6.5 - The ‘Illegality’ of Certain Negotiating Positions and a Pre-Negotiation Phase

The obligation to cooperate provides the basis for assessing the ‘legality’, or the acceptability or legitimacy, of States’ initial negotiating positions. Maastricht Principle 11 acknowledges that the State’s responsibility is engaged due to conduct attributable to it which constitutes a breach of its extraterritorial human rights obligations. Principles 8, 9 and 13 establish that such obligations consist of acts taken which

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140 On the institutional requirements see, Abbott and Snidal, 2004, supra note 139, pp. 74, 78. In regard to an investment agreement UNCTAD would be ideally suited to meet all of these requirements.
have the effect of creating a real risk of impairing the socio-economic rights of populations in other countries, where such acts are taken by a State in a position to exercise decisive influence or to take measures, and where the given effect of that act is foreseeable. Principle 13 also establishes that uncertainty about the effects of the act, as could well be argued exists in the context of multilateral negotiations involving a large number of parties, nevertheless does not suffice to justify it. Finally, Principle 17 holds in unambiguous terms, that States must not engage in acts inconsistent with their extraterritorial human rights obligations in the process of negotiating international agreements.

In sum this provides the basis for the assessment and ultimate acceptance or rejection of the initial negotiating positions of States as they arrive at the table, or ideally before. For those States taking the international obligation to cooperate in good faith seriously it provides a mechanism for screening their own positions before the onset of negotiations proper. This would be the purpose of a pre-negotiation phase,\(^1\)\(^4\)\(^1\) intended to mitigate the possibility of an initial negotiating position that is in a sense ‘illegal’; which does not satisfy that State’s obligation to ensure a baseline of respect for the human rights of people in the territory of the other State(s).\(^1\)\(^2\)

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\(^1\)\(^4\) See further, references at supra note 32.
\(^1\)\(^2\) In relation to the domestic obligations of Azerbaijan, the UN Committee on the Rights of the Child (CRC) has recommended that the State party ensure “that prior to the negotiation and conclusion of free trade agreements, human rights assessments … are conducted and measures are adopted to prevent violations.” CRC, Concluding Observations: Azerbaijan, UN Doc. CRC/C/AZE/CO/3-4, 12 March 2012, para 29(d) (emphasis added). For other examples of the CRC recommending assessments prior to negotiations see, CRC, Concluding Observations: Australia, UN Doc. CRC/C/AUS/CO/4, 28 August 2012, para 28; CRC, Concluding Observations: Republic of Korea, UN Doc. CRC/C/KOR/CO/3-4, 6 October 2011, paras 26, 27. There would be little point in placing an obligation on one party to the negotiations, to internally ensure a respect
The criteria to be applied have been set out above. The appropriate standard is that of a real risk of harm; harm which is foreseeable, which reasonable steps of knowledge generation have been instituted to clarify, address and avoid, and which errs on the side of precaution where there is uncertainty. The initial position of the State as it approaches the table should meet these criteria. Government agencies would engage a process, involving all other relevant agencies, investors, civil society and national human rights institutions, in producing a detailed analysis of the extraterritorial effects of the various positions possibly taken at the initiation of formal negotiations. This process would need to involve representatives of government and civil society in the territories potentially affected, requiring a significant level of international engagement to ensure that major issues were not overlooked. It may suffice for a delegation from the national human rights institutions of the countries affected to make a public presentation or make a formal, publically available, submission.

This process, performed by all State parties to the negotiations, would effectively set the human rights limits to the negotiations themselves, which could be detailed in annexations to the draft texts if not bracketed into the substance of the drafts directly. There would result a set of ‘markers’ that would frame the negotiations, which would then occur within a space set by the human rights obligations

\[\text{for human rights prior to negotiations, if it is not reflected in a similar obligation on the other party/parties to the negotiations to ensure respect externally as a necessary complement.}\]

\[\text{143 The possibility arises that two States beginning formal negotiations will find discrepancies in their interpretations of the limits themselves. The body tasked with human rights oversight during negotiations will be expected to mediate between the views of States in this regard. Yet, such differences should be viewed as a normal part of any negotiations.}\]
of all parties to ensure due respect. The detailed negotiations per se would be carried out much as they are now, predominantly based on detailed economic considerations and legal facilitation. However, there would be a certain amount of human rights oversight that would indicate where considerations began to touch on a ‘marker’ (in which case human rights criteria would apply to the range of economic choices suggested and the process of trade-offs), and where they were irrelevant and need not play any part in deliberations. During formal negotiations, it would have to be understood by those conducting oversight that human rights in this stage are not intended to be forensically determinant of every outcome, but are guides providing firm limits at critical junctures.\footnote{On this limiting mode of operationalising human rights norms as opposed to current attempts to ‘mainstream’ human rights in virtually all governance contexts see, Eoin Rooney and Colin Harvey, ‘Better on the Margins? A Critique of Mainstreaming Economic and Social Rights’, in Aoife Nolan, Rory O’Connell and Colin Harvey (eds.), \textit{Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights} (Hart, Oxford, 2013). See also, Philip Alston, ‘Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals’ \textit{27 Human Rights Quarterly} 3 (2005), p.827.} Much would depend on the quality of the pre-negotiating phase, as this is where human rights should be understood as determinant. Although, not of the treaty as such, but of the obligatory framework for its negotiation, namely its boundaries, markers and guideposts. In a sense, human rights law should mark a space and patrol it. The space will mostly be filled by other specialists and politico-economic discourses, but these discussions will be closely monitored for their relevance to the markers set. Conflicts will of course occur, but this is the very point; the conflict indicates the boundary at a stage in the negotiating process where something fundamentally constructive can be done about it. This avoids far more costly and damaging conflict after the treaty is in force.
This should be seen simply as a process of ensuring coherence with pre-existing and superior international obligations. A clear precedent has been set by the EU Court of Justice, wherein Austria, Sweden and Finland have been ordered by the Court to bring their BITs into line with EU rules regarding capital movements. Under Article 258 of the Consolidated Treaty on European Union, the EU Commission may bring a case against a member State to the Court for a failure to fulfil its obligations under the Treaty. Under Article 351 one of these obligations is to ensure that where incompatibilities arise between the EU rules and those established by other agreements of member States with third countries these States must “take all appropriate steps to eliminate the incompatibilities established.” Such incompatibilities arose between provisions in BITs concluded by Austria, Sweden and Finland allowing the unrestricted international transfer of capital on the one hand, and EU rules on the other.

The Commission argued that the BIT provisions compromised its power under these rules to ensure that member States at times restrict the free movement of finances. The Court agreed and found the member States in

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147 The Commission has also argued that one investment tribunal has erred in awarding compensation to an investor in disregard of the State's obligations under EU law. The Commission also argued that the award may not be enforceable due to conflict with overriding EU law. See, Luke Peterson, 'In Romania Case, EU Expresses Doubts as to Legality of Ordering EU State to Compensate Investors for Lost Incentives'; IA Reporter, 6 January 2014. The case is Micula and others v. Romania, ICSID Case No. ARB/05/20, Award, 11 December 2013. Reportedly, in response to these circumstances an ICSID ad-hoc annulment committee has sought to establish its authority over EU law by requesting an assurance from the Romanian State that it will commit itself “subject to no conditions
breach of EU law by not bringing the terms of their BITs within the bounds of its requirements. Furthermore, due to the fact that the BITs have survival clauses of 10 to 20 years, the Court noted that

the possibility of relying on other mechanisms offered by international law, such as suspension of the agreement, or even denunciation of the agreements at issue or of some of their provisions, is too uncertain in its effects to guarantee that the measures adopted by the Council could be applied effectively.\footnote{Commission v. Austria, Court of Justice of the European Union, Case C-205/06 [2009] ECR 1-0000, Judgment, 9 March 2009, para 40.}

In effect the Court demanded compliance with the precautionary principle. The immediate effect of the decision would seem to be that the member States would be obliged simply not to observe their duties under the BITs where they conflicted with EU law. In the middle-term it would imply that a renegotiation of the BITs would be mandatory, and further, it sets limits on the process of that renegotiation to ensure compliance with EU rules.

These cases make it clear that EU member States must take into account ‘higher order’ norms regarding capital movements when negotiating investment agreements with other countries, and what is more, mechanisms are in place to ensure such ‘taking into account’. This is the same language used by the Committee on Economic, Social and Cultural Rights. Therefore there is no practical obstacle to the realisation of mechanisms to carry out this process of ‘taking

\footnote{Commission v. Austria, Court of Justice of the European Union, Case C-205/06 [2009] ECR 1-0000, Judgment, 9 March 2009, para 40.}
into account’ with respect to socio-economic rights. The process is not necessarily amorphous, open-ended or vague. It is simply unrealised. These cases beg the question; if for regulation of capital movements, why not for regulation of respect for fundamental human rights? Admittedly, substantive requirements diverge, however the principles of procedural verification and legitimation relative to a higher order of controlling norms is exactly the same.\textsuperscript{149}

Ironically, with respect to the current investment regime the European Union’s own position on investment negotiations is of great concern. The EU position declares “the need for ‘the highest possible level of legal protection and certainty for European investors’ abroad” and seeks “to build upon the ‘experience and best practice’ of the hundreds of bilateral investment treaties concluded formerly by EU member-States.”\textsuperscript{150} The ‘full slate of protections’ are set to be pursued, within certain limitations present in some member State BITs to guard the public interest. Human rights are not specifically mentioned. Relative to bilateral negotiations the maximised protection and the multiplied negotiating leverage of the EU presents an even greater risk of the impairment of socio-economic rights extraterritorially, particularly in agreements concluded between the EU and developing countries.

\textsuperscript{149} Of relevance, Mauritius has introduced “a number of human rights instruments into the discussion in the Committee on Agriculture”, the point of which has been to argue that “negotiations and WTO policy reform ought to be undertaken in a way that is consistent with other multilateral commitments.” Andrew Clapham, Human Rights Obligations of Non-State Actors (Oxford University Press, Oxford, 2006), p. 177. See further, Ernst-Ulrich Petersmann, ‘The ‘Human Rights Approach’ Advocated by the UN High Commissioner for Human Rights and by the International Labour Organisation: Is it Relevant for WTO Law and Policy?’ 7 Journal of International Economic Law 3 (2004).

\textsuperscript{150} Luke Peterson, ‘EU Member-States Approve Negotiating Guidelines for India, Singapore and Canada Investment Protection Talks; Some European Governments Fear “NAFTA-Contamination”’, IA Reporter, 23 September 2011.
Though further details on the EU position would have to be known to make a sound assessment, it seems unlikely that it would pass an assessment mandating that the position avoid creating a real and foreseeable risk of impairing the realisation of human rights extraterritorially. The European Court of Justice has observed that, “it is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures”, and that ultimately “[r]espect for human rights is therefore a condition of the lawfulness of Community acts.” The EU is under a duty to ensure the primacy of human rights in all international negotiations. The European Council has made it clear, in accord with obligations set out in Article 21 of the Treaty on the European Union, “[t]he EU will promote human rights in all areas of its external action without exception. In particular,

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151 For example, one recent assessment has found a number of inconsistencies between initial EU negotiating mandates on investment and respect for the rights of vulnerable communities in India regarding the relevant section of a proposed EU-India free trade agreement (FTA). Armin Paasch (et al), ‘Right to Food Impact Assessment of the EU-India Trade Agreement’, Misereor, Aachen, 2011. While the assessment finds that rights to land, food, water and cultural rights are already threatened by BITs existing between India and 21 European States, the position of the EU in negotiations serves to substantially heighten those threats.


153 Accession of the European Community, 1996, supra note 152, para 34. Elsewhere the Court has stated that “the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, on all the institutions and bodies of the Union.” European Parliament v. Council of the European Union, Court of Justice of the European Union, Judgement, Case C-130/10, [2012] ECR I-0000, 19 July 2012, para 83.

it will integrate the promotion of human rights into trade, investment, technology and communications”, and “will place human rights at the centre of its relations with all third countries”.\footnote{Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, Luxembourg, 11855/1225, June 2012. See also, Treaty on the Functioning of the European Union, Article 208(1); “The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries”. See further, European Commission, EU 2013 Report on Policy Coherence for Development, SWD(2013) 456 final, Brussels, 31 October 2013. Relevant also is the operation of the newly appointed High Representative of the Union for Foreign Affairs and Security Policy charged with ensuring consistency and coordination of EU external action.} Accordingly, the EU will also,

[d]evelop methodology to aid consideration of the human rights situation in third countries in connection with the launch or conclusion of trade and/or investment agreements ... [and] [e]nsure that EU investment policy takes into account the principles and objectives of the Union’s external action, including on human rights.\footnote{Council of the European Union, 2012, supra note 155.}


It is perhaps an awareness of this situation that has led the European Parliament to be a long-time advocate of the use of
human rights impact assessments. In 2010 the Parliament advocated that the European Commission conduct human rights impact assessments of trade agreements, before, during and after negotiations. This resolution further recalls that ... the right to development is an inalienable human right ... [and] considers, therefore, that the EU has an obligation not to undermine this right and, indeed, to incorporate it into international agreements and use it as a guideline for European policies.

In a 2011 resolution, the Parliament took “the view that [it] must be adequately involved in the shaping of the future investment policy and that this requires proper consultation on the mandates for upcoming negotiations.” The parallels with the present approach based on obligations of international cooperation are prominent, yet such enlightened recommendations remain largely unacknowledged and unimplemented by the Commission. This may not remain a possible option for the Commission in the near future however. In a recent policy document, the Council of the European Union has also placed an ongoing responsibility on

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159 European Parliament, Resolution on Human Rights, Social and Environmental Standards in International Trade Agreements, 2009/2219(INI), 25 November 2010, paras 19 (a) and (b).


the Commission to “incorporate human rights in all impact assessment” in relation to “legislative and non-legislative proposals, implementing measures and trade agreements that have significant economic, social and environmental impacts, or define future policies.”

The fundamental point of this section is that even in the unlikely event that a final investment agreement produced under the current process of negotiations seemed to formally comply with human rights norms, it should still be rejected as illegitimate as the process of negotiations themselves does not ensure respect for human rights. Cooperative obligations of conduct and due diligence would still have been breached. In any case, it cannot reasonably be expected that a process dominated by initial positions that ignore human rights at the outset, and actively jeopardise them, will result in an agreement which respects them. Such a result would indeed be pure chance, especially where the dominant negotiator is mainly responsible for the jeopardy. The very act of formulating and pressing negotiating positions inconsistent with these cooperative obligations is the proper primary object of their prohibitive force under international law. The result of the negotiations, the final agreement, is equally important, but is nevertheless a secondary object of concern from the present viewpoint.

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6.6 – Human Rights Impact Assessments

Human rights impact assessments (HRIAs) will need to be applied at multiple stages in the lifetime of an agreement. The requirements foreseen here to ensure respect for human rights throughout will not allow of a once-off exercise. At different stages these assessments will have a different focus and be applied for different purposes. Four distinct phases are advocated here: pre-negotiation (setting the framework for negotiations); during negotiations (policing boundaries and ensuring timely assessment of distinct issues and trade-offs); post-negotiation (assessing the final draft agreement prior to ratification); and implementation (periodically assessing the impacts in fact). In the pre-negotiation phase HRIAs will obviously be prospective, however, they will not be overly speculative as they will be based on the concrete effects of existing clauses in investment agreements in force, and should be able to make predictions, based on more than twenty years of experience, that will enable accuracy if the assessment is carried out appropriately. At this level they will be lengthy, and as inclusive and detailed as possible, providing an extensive framework within which to conduct the negotiations proper. The pre-negotiation phase is essential to the correct formulation of this framework. Pre-negotiation HRIAs are necessary to meet the requirements of knowledge generation to ensure the foreseeability (or reasonably establish otherwise) of potential State actions and negotiating positions.

The viewpoint of cooperative obligations in international law highlights the pivotal nature of the pre-negotiation phase, and
the need to properly frame the process of negotiations before they begin. This phase is therefore to be distinctly separated from the onset of negotiations themselves and understood as the critical phase of impact assessment, having the power to truly inform reasoned choice and ensure compliance with international obligations in a timely manner.\textsuperscript{163} As such it forms the central focus in the following discussion.

During the negotiations, assessments will necessarily be more flexible and limited in scope and participation. A well-executed pre-negotiation phase, resulting in a clear and exhaustive framework for actual negotiations will accommodate the practical necessities of negotiations. Targeted HRIAs during negotiations should not then be overly time-consuming, nor will they be forensically determinant. They will be engaged in when aspects of negotiations touch on the ‘markers’ defined clearly in the pre-negotiation phase. At this stage there will be the need for a relatively light touch, and the necessary realism of engagement in concrete trade-offs.

Within such trade-offs, results of an assessment in one area (for instance technical assistance) will need to be compared to the results in other areas (for example performance

\footnote{HRIAs in this context are usually considered as a necessary part of the process of negotiations, rather than a necessary a priori determinant of the process itself. For instance, De Schutter notes that “States are encouraged to finalize a feasibility study that incorporates a human rights impact assessment prior to entering into the final phase of formal negotiations.” Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, Addendum, Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, UN Doc. A/HRC/19/59/Add.5, 19 December 2011, Principle 3, Commentary, para 3.1. In contrast, the position taken here is that assessments are necessary both during the negotiations and before the onset of negotiations. State duties of conduct are stressed in this regard, and States bear the burden of ensuring the propriety of their conduct not late in the process of negotiations but from the outset.}
requirements) allowing for trade-offs in details. Yet, there will nevertheless be limits in both areas which cannot be crossed. To illustrate: The process must result in some technical assistance to those countries in need, as required under Article 2(1) ICESCR, though the amounts and form will be negotiable. In the same way, all performance requirements will not be able to be excluded from a final outcome, such that the developing country is left with almost no control over its industrial policy space, though some may be traded for other benefits. As such, a timely human rights assessment, involving a small group of experts in law and economics, with the oversight of a given body tasked with this duty (ensuring adequate participation, either in its composition or through external engagement), will probably conclude that there are no overall, or negligent, human rights effects in a trade-off between reduced technical assistance and a gain in the ability to impose a particular performance requirement. However, a result where there were reductions in both may not be acceptable, without other sufficient counter-balancing considerations. Thus, the process will take close note of Cotula’s point regarding ‘bargaining in the shadow of the law’, but will change the nature of the law that is bargained under, and therefore the ‘shadow’, or light, that is actively cast.164

Assessment upon implementation will be different again, based in concrete assessment of verifiable effects, and should therefore prove less conceptually complex, or potentially controversial. Specific arrangements at this stage are necessarily the most speculative from the present standpoint, as it is not the purpose of procedural rules on negotiations to unnecessarily foreclose potential (beneficial) alternatives. However, a right of withdrawal or denunciation must be

164 Cotula, 2012, supra note 37.
assumed to be vested in States (where such a right is not specifically inscribed within the agreement itself) when the agreement as a whole or certain aspects prove incompatible, in fact, with the State’s human rights obligations.

6.6.1 - Framework

Despite differing settings, at all stages these assessments must adhere to certain minimal requirements. The Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements (the Guiding Principles)\(^\text{165}\) provide a clear method of ensuring State’s compliance with their international cooperative obligations under human rights law. This method provides the means for States to satisfy the necessary requirements of due diligence. Furthermore, they enable adherence to the precautionary principle. Without these assessments there is no way of knowing what is or is not uncertain. These assessments are a necessary condition only, to ensure compliance with the obligation to respect human rights. They are not definitively sufficient to ensure that no harm is done. However, it is submitted that human rights impact assessments at the pre-negotiation stage are a minimal requirement, without which States can make no claim to have properly discharged their cooperative obligations under human rights law.\(^\text{166}\) States should therefore legislate for this pre-negotiation process such that it is not reliant on the disposition of the particular government in power.\(^\text{167}\)

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\(^{165}\) Guiding Principles, 2011, supra note 163.

\(^{166}\) Ibid, Principle 1, Commentary, paras 1.1-1.3, 2.6.

\(^{167}\) Ibid, para 3.
Guiding Principle 4 elaborates the essential requirements of HRIAs. They must be independent, transparent, inclusive, adequately funded and expertly informed, and finally, effectively debated and applied.\textsuperscript{168} The finer details of the methodology of these assessments may be realised in various ways,\textsuperscript{169} however, overall, the assessments must comply with this minimum description.

Independence, for example may be satisfied by creation through statute of a dedicated body that would administer the assessment, staffed and financed by decision of parliament, through an appropriately inclusive, merit based, and transparent process.\textsuperscript{170} However, it would seem more appropriate to utilise currently existing national human rights institutions (NHRIs) to avoid duplication.\textsuperscript{171} These institutions

\textsuperscript{168} Ibid, Principle 4.


would be well placed to ‘house’ the pre-negotiation process, part of their mandate being the assessment of existing or proposed legislation or policy with State’s human rights obligations and the delivery of advice to government.\textsuperscript{172} Additionally, NHRI’s will usually have powers to summon government trade representatives, negotiators and government agencies to provide relevant information. Other venues may not have such authority and may also fail to be perceived as sufficiently independent and qualified.\textsuperscript{173}

Substantial information would be required directly from other States involved in potential negotiations, and this would most appropriately come from other national human rights institutions within these States. The connections naturally fostered between nations during this pre-negotiation assessment stage, would align with current efforts through the UN Office of the High Commissioner for Human Rights, and the International Coordinating Committee of NHRI’s (ICC), to increase links and understanding between these institutions in all countries.\textsuperscript{174} In fact, in the event of prospective multilateral negotiations, the ICC, based in

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\item UN Office of the High Commissioner for Human Rights, 2010, supra note 171, pp. 44-54, 134. As Simma and Desierto note, the Committee on Economic, Social and Cultural Rights could also be productively involved at this stage. Bruno Simma and Diane Desierto, ‘Bridging the Public Interest Divide: Committee Assistance for Investor-Host State Compliance with the ICESCR’ \textit{10 Transnational Dispute Management} 1 (2013), p. 4.
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Geneva and consisting of a representative 16 national human rights institutions from all regions of the world, would be a natural centre for the coordination of pre-negotiation HRIAs from all countries concerned.\textsuperscript{175} Should NHRIs be tasked with administration there will be a need to commission outside expertise on which to base accurate assessment, including knowledge and empirics drawn from economics, trade and investment experts, as well as the relevant requirements of investors and the business community.

Participation at the pre-negotiation stage must necessarily include the concerns, in as much detail as is feasible, of communities in the potentially affected nations.\textsuperscript{176} This will be


\textsuperscript{176} In regard to participation, the experience of negotiations on the UN Convention on the Rights of Persons with Disabilities (CPRD), led by the EU and involving high levels of participation from relevant CSOs and NGOs as well as NHRIs from developed and developing countries, would perhaps provide current best practice. See, Graine de Bürca, The European Union in the Negotiation of the UN Disability Convention’ 35 European Law Review 2 (2010); Charles Sabel and Jonathan Zeitlin, ‘Learning from Difference: The New Architecture of Experimentalist Governance in the European Union’ 14 European Law Journal 3 (2008). The EU has furthermore acceded to the Convention, thus binding all EU institutions to its provisions, which shall prevail over EU acts. See, Ring and Skouboe Werge, Court of Justice of the European Union, Joined Cases C-335/11 and C-337/11, Judgement, 11 April 2013, para 28. Notably, the CPRD has a stand-alone clause mandating measures of international cooperation. In some respects at least, the EU view such transnational cooperation with
facilitated by the action of submissions from international and national human rights NGOs based in the particular country carrying out the pre-negotiation assessment. However, transnational participation must also be facilitated such that concerns may be ascertained from within the affected extraterritorial communities themselves, to the extent possible. In the interests of a certain amount of efficiency, extraterritorial submissions may be legitimately collated and presented through the national human rights institutions of each country affected.

Finally, the appropriate status of final assessments must be ensured. That is, they must be enabled to have a clear effect on subsequent governmental deliberation. The process must not be one restricted to mere formality. The results of a pre-negotiation HRIA should then form the basis for consideration by an all-party parliamentary committee established for this purpose, such as the permanent Joint Committee on Human Rights in the UK. The committee will in a sense be tasked with verifying the human rights impact assessment, and ensuring that the results are such that they may form a clear basis for government decision making. Ultimately the committee should make recommendations to the government regarding the reasonable restrictions that exist on its international contractual freedom in upcoming


negotiations, such that it may formulate its negotiating positions accordingly. Preferably, however, the original assessment emanating from the NHRI should not be lost or adulterated. Ideally, both the NHRI report and that of the committee should be furthered on as companions. Parliamentary debate would form the next stage, penultimate to the decision of the executive on the exact nature of the negotiating position(s) to be taken upon entry to the negotiations proper, mindful of the fact that the end agreement must be returned to parliament for ratification.

To give effect to these core principles, the process of HRIAs must make explicit reference to the content and scope of human rights law. Measuring human rights impacts cannot be adequately done when reference is made solely to related yet alternative goals such as sustainable development, poverty alleviation, increasing GDP, good governance, rule of law, or loosely defined social protection. Such related goals will necessarily play a part, but they will be subsidiary in nature. Measurement must ultimately be made in accordance with established international human rights law, treaty, custom and general principles, informed by domestic and international jurisprudence, as elaborated by dedicated human rights treaty bodies in respect of individual communications, concluding observations and general comments. This body of law has provided the basis for detailed human rights indicators, which should be applied in the process of all assessments. Such indicators will relate to structure, process and outcome.

179 Ibid, Principle 5(b).
For example, in the present context structural indicators will assess the degree to which a proposed agreement as a whole, and detailed provisions within the agreement, will make it more difficult for the State [or States] concerned to ratify particular human rights instruments, to adapt its regulatory framework to the requirements of human rights, or to set up the institutional mechanisms that ensure compliance with its human rights obligations.\textsuperscript{180}

Process indicators will address the effect of the treaty, and specific provisions, on the extraterritorial State(s) implementation of its domestic human rights obligations through direct policies and programmes, or the proper and adequate functioning of institutional mechanisms.\textsuperscript{181} For example, these indicators will seek to identify obstacles potentially created by the agreement to the proper functioning of health and security systems, administrative mechanisms and the courts, and also to the democratic governance process of the State itself. Outcome indicators will build on structure and process analysis to give a concrete assessment of the likely effects on progressive realisation of individual rights, and the availability and maximisation of resources in other States, given particular baseline levels in existence.\textsuperscript{182}

At the pre-negotiation stage, the details of particular trade-offs will not have to be settled. The purpose is to ‘flag’ or ‘mark’ particular areas where trade-offs are likely and the extent to which they will or will not be acceptable. Where they are foreseen and acceptable, the purpose is furthermore to delineate the terms on which they should be understood, that

\textsuperscript{180} Ibid, para 5.2(a).
\textsuperscript{181} Ibid, para 5.2(b).
\textsuperscript{182} Ibid, para 5.2(c).
is, the probable human rights effects of certain trade-offs, as well as effects on other complimentary or competing variables.\textsuperscript{183} These trade-offs will be decided in the process of negotiations proper, and assessed again after the fact for the requisite balance. Certain mechanisms of built-in flexibility may be employed in the agreement where trade-offs are highly sensitive, or when foreseeable consequences are most difficult to establish. Concrete trade-offs in sensitive areas within negotiations, however, will have to ensure adequate consultation with affected groups and constituencies, facilitating a participatory, transparent and inclusive approach on which to base the legitimacy of the outcome.

There are, nevertheless, clear human rights limits on acceptable trade-offs, setting broad but strict parameters on outcomes.\textsuperscript{184} Ultimately, States may not allow trade-offs to result in the exacerbation of existing inequality, in unjustifiable discriminatory outcomes, or in retrogression with respect to particular rights.\textsuperscript{185} The rationale of trade-offs should also be based on efforts to ensure that benefits and costs are as equitably distributed as possible.\textsuperscript{186} Vulnerable and marginalised populations and groups should be prioritised, and compensatory policy measures detailed such that those benefiting the most may contribute concretely to a balancing effect. States should also look as far as possible to the long-term, refusing to sacrifice security, and to overly compromise economic sovereignty, for uncertain and unstable

\textsuperscript{183} Walker also speaks of this marking and flagging function of human rights impact assessments. Walker, 2009, supra note 169, p. 197.
\textsuperscript{184} For further discussion of the human rights-based approach to trade-offs in similar contexts, emphasising principles of participation over narrow consideration of economic efficiency and cost-benefit analysis see, De Schutter, 2013, supra note 33, pp. 179-187. See also, Walker, 2009, supra note 169, pp. 196-198.
\textsuperscript{185} Guiding Principles, 2011, supra note 163, Principle 5.2(c).
\textsuperscript{186} Ibid, Principle 5.2(c).
promises of short-term economic or political gain. In helping to ensure this long-view States must not accept trade-offs that foreseeably result in the denial of a core minimum of human rights realisation.

Accordingly, human rights impact assessments of the concluded agreement, and of the realities of implementation, may have a number of possible consequences. In this respect accountability may involve judicial oversight, such that convergence of the agreement with existing constitutional requirements and the international human rights obligations of States might be ensured. In the extreme, the agreement may be terminated or amended, or specific provisions declared as void. As stated plainly by De Schutter,

a right of denunciation or withdrawal may be implied in any trade or investment agreement to the extent necessary for a State to comply with its human rights obligations, even in the absence of such an explicit clause. This follows from the fact that human rights obligations prevail over other treaty obligations.

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6.6.2 – Precedent

Events regarding the Canada-Colombia Free Trade Agreement (CCFTA) provide something of a precedent, albeit a failed one, regarding HRIAs and a pre-negotiation phase, from which some valuable lessons may be learned. In 2006, a year before the opening of negotiations on the CCFTA, the Committee on Economic, Social and Cultural Rights “reminded” Canada of the potential negative consequences of trade liberalisation, recommending that “the State Party consider ways in which the primacy of Covenant rights may be ensured in trade and investment agreements”.\(^{190}\) With respect to the environmental impacts of international agreements, Canada is a leader in the application of \textit{ex ante} assessments formally factored into its negotiating processes.\(^{191}\) Canada’s Framework for Conducting Environmental Assessments of Trade Negotiations has been in operation since February 2001, proving that, where political will exists, impact assessments of trade and investment negotiations themselves are entirely feasible as a practical matter. The key to the relative success\(^{192}\) of Canada’s

\(^{190}\) CESC, Concluding Observations: Canada, UN Doc. E/C.12/CAN/CO/5, 22 May 2006, para 68.


\(^{192}\) The outcome of the negotiations has been heavily criticised for ignoring adverse environmental impacts in Colombia, especially as most FDI from
environmental Framework lies in the fact that an initial impact assessment must be concluded and publically released prior to the onset of negotiations, as was done in the case of the CCFTA.

In contrast, with regard to human rights impacts, either domestic or extraterritorial, Canada was far more complacent. In 2008, after a year of negotiations, mounting civil society protest led the Parliament’s Standing Committee on International Trade to conduct a study on the human rights and environmental impacts of the negotiations. However, before it could be concluded and released, the government announced that negotiations were complete. In reaction to the abuse of democratic process the Standing Committee released the report as scheduled, which advised that an “independent, impartial and comprehensive human rights impact assessment . . . [should] be carried out by a competent body which is subject to levels of independent scrutiny and validation”, stating further that “the recommendations of this assessment should be addressed before Canada considers signing, ratifying and implementing an agreement with Colombia.” These recommendations were taken strongly by civil society, and for a time by the parliamentary opposition, yet were ignored by the government.

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194 Ibid.

195 See further, Sheila Katz and Gauri Sreenivasan, ‘Against the Odds: Fighting Canada’s Free Trade Deal with Colombia’, North American Congress on Latin America, May/June 2010.
Nevertheless, a coalition of Canadian civil society organisations, under the umbrella of the Canadian Council for International Co-operation (CCIC) produced an impact study of their own.\textsuperscript{196} The report found numerous points of concern regarding negative impacts on the Colombian people. In particular, it was concluded that the introduction of strong investor protections and international arbitration\textsuperscript{197} ran a very high risk of repressing “democratic dissent and tilt[ing] the scales further against already disadvantaged, excluded and victimised groups.”\textsuperscript{198} Furthermore, the investment chapter was said to “restrict the ability of governments to put in place public policies and regulations needed to ensure that foreign investment contributes to development and that development benefits are shared equitably.”\textsuperscript{199} Again, the report called for a full, comprehensive and independent HRIA to be carried out prior to the finalisation of the agreement.

Instead, the government led by Prime Minister Harper “ignored this recommendation and decided to proceed without due diligence with regard to human rights.”\textsuperscript{200} An eventual compromise was reached through the insertion of a clause into the agreement requiring both the Canadian and Colombian governments to produce annual reports on the factual human rights consequences of the CCFTA in its


\textsuperscript{197} There was no previously existing BIT between Canada and Colombia.

\textsuperscript{198} Canadian Council for International Co-operation, 2009, supra note 192, p. 4.

\textsuperscript{199} Ibid, p. 4.

implementation. However, this clause provided no remedies and directs no concrete action as a result of a reported human rights deficit.\textsuperscript{201} Implementing legislation was passed and the agreement came into force on August 15\textsuperscript{th}, 2011. Canada has tabled two reports to date,\textsuperscript{202} both of which have been heavily criticised.\textsuperscript{203} From the perspective here the most notable feature of both reports is that neither contains any analysis of the human rights impact of the CCFTA in Colombia,\textsuperscript{204} therefore providing no information on the effect of the agreement on Canada’s obligations under the rubric of international cooperation. As such, in detailing only the economic effects of the CCFTA, the second report does not even adhere to its own prescribed methodology, as set out in the first report. There was no significant public consultation, either in Canada or in Colombia,\textsuperscript{205} and the second report

\textsuperscript{201} Agreement Concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia, at http://www.treaty-accord.gc.ca/text-texte.aspx?id=105278 (2-8-2014). The only consequence of negative findings in these reports is set out in Article 2(1), whereby “[t]he Parties may consult with one another to review the implementation of this Agreement.”


\textsuperscript{204} There is an exception in the second report, regarding the cut flowers and sugar sectors.

\textsuperscript{205} The second report notes that a “public call for submissions was posted on the website of Foreign Affairs and International Trade Canada.” However, “[n]o submissions were received through this consultation mechanism.” This was most probably because the posting was unpublicised and only seven working days were provided for responses. No
concludes simply that, “it is not possible to reach any conclusion on whether any changes in human rights in either country have occurred.”

Therefore, to date, the recommendation of the CESC, to explore ways in which the primacy of human rights may be ensured within its trade and investment agreements, has been entirely obviated by the Canadian government. The deficiencies of the negotiating process and the result of the CCFTA from the present standpoint need no elaboration. The Canadian government had a clear opportunity to become aware of and comply with its international obligation to cooperate, however the initial assessment by the Standing Committee was crucially miss-timed. The ‘inevitable’ economic momentum of the agreement had already become sufficient to carry it through, and the cross-party solidarity displayed by the Standing Committee’s recommendations dissolved.

The interesting point is that the solidarity did exist, and real anger was momentarily displayed by elected representatives at the Executive’s disregard for the democratic process. There was a clear indication of acknowledgement that Canada should take into account the extraterritorial human rights effects of the agreement it was negotiating, and furthermore, for a brief time, the political will to pursue the consequences of this acknowledgement to their proper conclusion did materialise. Despite ultimate failure, this does suggest an inevitable build-up of pressure, both within and outside the Canadian Parliament (and even the conservative government),

further action was taken. To give some balance the CCIC provide a list of known human rights violations linked to Canadian companies in the first year of operation of the CCFTA. See, CCIC - Americas Policy Group, ‘Briefing Note: The Canada-Colombia Free Trade Agreement Human Rights Impact Report’, May 2012, Annex 2.
for the timely application of HIAs. The key lesson from the CCFTA, no doubt learned well by many activists and parliamentarians, is that the initial assessment must be carried out as early as possible, ideally before the onset of negotiations themselves. This translates into a political demand for a properly conducted pre-negotiation phase when the intention to discuss the next new agreement is announced. The political call may then be grounded in the correlated legal demands set out here.206

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6.6.3 - Objections

Generally, the call for human rights impact assessments to be carried out by governments in all manner of areas is an old one and has long been officially disregarded, yet it is gaining far greater traction in recent years.\textsuperscript{207} The main arguments of resistance from governments have traditionally pertained to their supposedly unsettled methodology, alleged duplication of existing social impact assessments, and assumed impracticality and cost-inefficiency. With a now-substantial literature firmly establishing the ‘added-value’ of HRIAs, and growing evidence of efficient State-related and private practice in this area, displaying a current convergence on widely agreed principles and methodology,\textsuperscript{208} such arguments are

\textsuperscript{207} In the context of trade agreements the European Parliament, for example, “asks the Commission to carry out impact studies on human rights in addition to those on sustainable development, with comprehensible trade indicators based on human rights and on environmental and social standards”. European Parliament Resolution, 2010, supra note 35, para 19(b). It would seem that some attention was paid to human rights impacts in negotiations over an EU-China BIT, yet it was not sufficient to satisfy the Parliament. European Parliament Resolution on the EU-China Negotiations for a Bilateral Investment Agreement, 2013/2674(RSP), 2 October 2013, para 26.

increasingly untenable. There is now a clear convergence on the particular acceptable methodology of these assessments, and their actual application in practice belies their alleged impracticality.\footnote{As regards cost calculation,\footnote{More wealthy Parties should be expected to bear a greater financial burden. Gehring notes that there is a precedent here. “[I]n the Environmental Review for the US-Jordan Free Trade Agreement, USAID provided funding for the Jordanian side of the Impact Assessment process.” Markus Gehring, 'Impact Assessments of Investment Treaties', in Cordonier Segger (et al eds.), 2011, supra note 97, p. 169, FN 73.} it is evident now that the human cost, and probably also the long-term financial cost,\footnote{This is especially so when assessed by a disaggregation over whole populations, paying attention to norms of non-discrimination and taking into account long-term effects of attenuating inequality, while furthermore attending to realistic expectations of GDP growth and an increased risk of economic crisis, as explored in chapter 2.} indicates that holistic considerations of efficiency can no longer afford to ignore them.

Arguments that simply dismiss the requirements set out here, as too cumbersome, complex, or overly restrictive of States’ negotiating capacity and strategy, cannot be accepted.

due to the imperative of the underlying international legal duties on States which necessitate them. On a practical level, such a dismissal cannot be accepted given the sheer weight of human suffering that the avoidance of these requirements has so far not only allowed but caused. As the Canadian example demonstrates, these obligations are no longer widely viewed as overly complex or restrictive. More serious arguments revolving around the nature of the details of these requirements and how they will in fact be implemented deserve greater respect. Yet, it is the position here that existing literature and practice contain more than enough answers to begin implementing the theory that we have, trusting to the process of implementation to settle numerous details in further practice and open debate.\textsuperscript{212}

Underlying these arguments are undoubtedly fears of the associated devolution of power and the ‘opening-up’ of decision-making in areas currently compartmentalised from widespread debate. Regarding these fears, one can hardly be apologetic for instigating them. They are clearly pressing concerns of justice in our current times reflected in mounting public concern and widespread calls for impact assessment and greater democratic control. There is no surprise, therefore, that Walker identifies the greatest obstacle to the employment of HRIAs as their effect of politicising negotiations.\textsuperscript{213} We must be clear however, that politicisation, transparency and debate in this context are just as desirable from the perspective of the increasingly visible and long

\textsuperscript{212} Walker, 2009, supra note 169, p. 219.

\textsuperscript{213} Ibid, pp. 201-203. From another perspective Sant'Ana nominates full participation of stakeholders, credibility of the assessment team and lack of standardised practices as the greatest challenges for future HRIAs. Matthias Sant'Ana, ‘Foreign Direct Investment and Human Development: Two Approaches to Assessing Impacts on Human Rights’ 3 Human Rights and International Legal Discourse 2 (2009), p. 229.
suffering losers in the process of liberalisation, as they are anathema to the dominant and powerful. Balance will require care in deciding the degree to which it is appropriate to be apologetic for politicising negotiations. Politicisation in itself is not to be avoided, but rather welcomed in many respects, particularly as the formative process of economic law at both the international and national levels is currently conducted far from public vantage and is mired in technocracy and opacity. Indeed with an inevitably increased focus on international economic negotiations a parallel increase in politicisation will be unavoidable.

Nevertheless, as Walker identifies, this brings a risk that HRIAs may be carried out as an ideological process with fixed intentions beyond those of an impartial, balanced, and if necessary restrained, application of human rights law. They may become convenient implements of a particular political agenda and may alienate important actors and communities. Given that there is a widespread perception that human rights is traditionally grounded in the left of the political spectrum, the risk of such ‘negative politicisation’ is perhaps also unavoidable, and may even be characterised as a tendency. Much will therefore depend on the degree to which this risk is managed, and the credibility and legitimacy of the HRIAs conducted. Human rights advocates must maintain a focus on facts and the law, and eschew preconceived opinions and desires to stretch that law in unfeasible directions.

Lessons may be learnt from the history of environmental impact assessments, which were similarly perceived as a ‘leftist strategy’ at their initiation. It is worth noting that the rise of environmental assessments has been coterminous with the distinct shift of the entire political spectrum to the
conservative right, belying fears of a biased political effect adhering to the widespread use of such assessments. On the contrary, this raises the issue of the possible annexation or appropriation of the HRIA process by those opposed to its expected results, or through a more mundane process of miscomprehension and malpractice. Such considerations highlight the fact that, in general, all these risks may only be avoided through diligent formulation of a credible and balanced HRIA process in accord with the principles set out above, the close monitoring of its administrators, and its vigilant maintenance. In this way the risks can be managed.

More specifically however, it is clear that HRIs must remain grounded in empirical data, evidence, and rational argument, restricted to the existing body of human rights law,214 and must eschew an ideological stance in favour of a clearly principled and reasoned one. An important result of an evidence-based focus is that HRIs must by nature give accurate weight to the potentially positive effects of a certain trade or investment policy. This will reduce the likelihood and credibility of charges of politicisation. More importantly however, possible gains from liberalisation or investor protection (such as increased export earnings and valuable added capital) bear significantly on human rights realisation and must be accurately and clearly presented for the process to qualify as an acceptable impact assessment according to its own standards. In other words, the very real potential trade and investment benefits are a crucial factor in any HRIA worthy of the name. In addition, decision-making bodies must be politically representative, and must incorporate expertise from outside the human rights field, serving to reduce risks of

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214 Rather than proclaiming new rights for instance, or applying the reasoning of human rights bodies out of context.
politicisation. Furthermore, they must themselves be completely transparent. For these reasons, a reliance on national human rights institutions, which would collate and assess information from other potentially less accountable bodies, is to be preferred.

The most intractable arguments against the approach taken here, based on the current absence of political will, the apparent satisfaction of the powerful with the status quo, and the clear aim of power redistribution inherent in the advocated procedures, will be addressed in the conclusion. Suffice to say here in prelude, however, that in meeting these last arguments head-on it must be first acknowledged that power, as with all else in this world, is transient. The only certainty of existence is change. The durability of a given distribution of power, history has proven, is in inverse relationship to its concentration, and the law is intended to outlast this flux in distribution, benefitting all equally; the currently powerful, the currently weak, and the potentially powerful and the potentially weak. States should construct international law from a standpoint of ignorance as to which they are, because, from a relative historical perspective, the future will most probably make them all at some point.

6.7 – Substantive Issues

A renegotiation of the investment regime will raise a great amount of substantive issues, old and new, which there is insufficient space to detail in any depth here. However, some general observations should be made. Negotiations in accord with international obligations to cooperate will necessitate
explicit substantive reference in operational clauses to the
domestic and extraterritorial human rights obligations of
States, and the human rights responsibilities of investors. As
argued above, this may involve the explicit nomination of the
integrated realisation of human rights as the ultimate purpose
of the agreement, to be served through the application of
sustainable development principles that, in turn, are
actualised through embedded investor protection.

Within the operative text of any agreement a number of
‘suggestions’ made by UNCTAD’s Policy Framework and the
IISD Model would seem to take on a mandatory character
under the legal framework of the present approach. Therefore,
explicit carve-outs for government regulatory and
administrative measures enacted with the purpose of human
rights protection or fulfilment would seem to be obligatory.215
The same could be said for requirements on investors to avoid
directly or indirectly compromising the human rights of people
in the host State.216 A failure to meet this requirement must
also be an express ground for denying the benefits of the
rights and protections conferred by the agreement on the
investor.

Beyond specific human rights requirements placed on the
investor a number of other possible requirements may be
mentioned.217 For example, for investment to contribute to the

215 Bartels proposes such a comprehensive clause in relation to EU trade
agreements, complete with directions for interpretation and the
establishment of a civil society complaint mechanism. Bartels, 2014, supra
note 13, pp. 36-38.
Specifically with regard to negotiations over an EU-China agreement, the
Parliament has stated that it “should also include investor duties, in
particular with regard to respect for trade unions and other labour rights”.
European Parliament Resolution, 2013, supra note 207, para K.
217 For a full discussion of such requirements see, Van Duizer (et al), 2013,
supra note 97, pp. 287-333.
human rights-based developmental purpose of the agreement it would clearly be desirable to expressly allow for the imposition of performance requirements, and to amend national treatment standards to allow for discrimination under certain circumstances. In this way fair competition between could be engineered in the interests of national development. There are further issues of market access and pre-establishment rights, capital controls, and incentive regimes, the handling of which bear significantly on expected development outcomes. These are complex issues and their impact on a standard of human rights respect may be difficult to gauge. The central concern will be the way in which these issues are settled, whereby they must be inclusive and employ participatory methodologies. However, this does not mean the irrelevance of substantive human rights law. To take a reformulation of national treatment standards, for example, this may have foreseeable impacts with respect to rights of association, rights to work and just remuneration, and substantive equality rights. To the extent that foreign investment potentially occurs in the provision of basic services or affects food security, a range of socio-economic rights will be directly relevant.

In the end, however, it must be realised that the viable negotiating positions on all of these issues will be highly determined by the degree to which each State party to the negotiations is dependent on FDI for development. This is

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218 The human rights understanding of non-discrimination as a substantive rather than formalised norm may be applied here, allowing for positive discrimination in favour of local companies to achieve substantive equality and, indeed, mandating it if necessary.

219 “[T]he current context of economic globalisation ... would in many cases make it impossible for the developing state to impose on the foreign investor the kinds of obligations mentioned above, even where this would be its intention. It is not the developing states seeking the arrival of foreign investors, but the industrialised countries from which those investors
not a naturally occurring variable. It is determined by a
State's susceptibility to a particular process of financing for
development. In a very real sense, the resolution of many of
these substantive issues will boil down to limitations inherent
in the structural problem of FDI dependence wired into the
current pressures of financing for development.

originating, and inter-governmental organisations, which have set the rules
of globalisation. It is they which have the power to modify them." Olivier De
Schutter, 'Transnational Corporations as Instruments of Human
Development', in Philip Alston and Mary Robinson (eds.), Human Rights
and Development: Towards Mutual Reinforcement (Oxford University Press,
7 - THE PROCESS OF FINANCING FOR DEVELOPMENT

There are a thousand hacking at the branches of evil to one who is striking at the root, and it may be that he who bestows the largest amount of money on the needy is doing the most by his mode of life to produce that misery which he strives in vain to relieve.¹

A thorough application of cooperative obligations to the process of financing for development is well beyond the scope of this chapter. Instead it has a modest aim; to demonstrate the relevance of cooperative obligations and the mode in which they would apply to this vast field. Crucial to that mode is their alignment with heterodox economic viewpoints and the resulting capacity for a union of these approaches to displace a deeply ingrained neo-liberal paradigm,² which, under pretence of charity, takes far more than it gives. In the long-run, should cooperative obligations be entrenched in the process of financing for development, they would act to prevent its return.³ Together they strike at the root. They

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2 Kennedy also proposes a similar alignment, because on “the field of rhetorical battle, it can often be useful to have your homolog from an adjacent discipline near at hand.” David Kennedy, ‘Law and Development Economics: Toward a New Alliance’, in David Kennedy and Joseph Stiglitz (eds.), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (Oxford University Press, Oxford, 2013), p. 22.
3 “[I]n historical terms ... the commitment by some rich countries to allocate 0.7% of GNP to alleviating poverty in the poorest parts of the world will be seen not as the high point of a global commitment to equality but
would also prevent the grip of any other extreme economic ideology from collapsing an open, informed and democratic international space for deliberating and implementing diverse visions of development and human well-being. This would mean an active and conscious subordination of economic theory to human rights principles. One of the fundamental points to make here is that the heterodox critique actually provides alternatives, and therefore real choices open to the development community, whereas the mainstream paradigm operates in an opposite, restrictive direction as described in chapter 2. In this way cooperative obligations could ensure that suffering is not institutionalised on a global scale and justified by dubious promises of an ephemeral future reward. More directly however, in opening and stabilising this space, they would also provide real financing options for developing countries, reducing a dependence on foreign capital and thereby relaxing the restrictive dynamics on a renegotiation of the investment regime.

instead as the low point of a system desperate to find policy bandaids to fix structural flaws.” Dhananjayan Sriskandarajah, ‘From Charity to Social Justice’, in Andy Sumner and Tom Kirk (eds.), The Donors’ Dilemma: Emergence, Convergence and the Future of Foreign Aid (Global Policy online publication, 2014).

7.1 – The Process of Financing for Development

Financing for development was briefly introduced in chapter 2 and is detailed a little further here. In its present form this process is relatively recent, beginning with a 1998 UN General Assembly resolution instigated by the Group of 77, which not only called for an international conference on financing for development but also set up the beginning of an administrative apparatus within the UN for global deliberation on this issue.\(^5\) This initiated a holistic consideration of the issue at the highest levels and situating it firmly within the democratic and multilateral setting of the UN.\(^6\) Early work seems to have been largely directed by the developing countries themselves with minimal involvement from Northern States, the IFIs, the WTO and the private sector.\(^7\) A formative document prepared by the developing countries stressed the “increasing polarization between the haves and have-nots [as]…


\(^6\) It is indicative that the first formal meeting between ambassadors from ECOSOC and the World Bank’s Executive Board (which, tellingly, occurred at the World Bank in Washington DC) only took place in May 1998, half a century after the creation of these institutions. Chronological History of the Financing for Development Process, at [http://www.un.org/esa/ffd/overview/chronology.htm](http://www.un.org/esa/ffd/overview/chronology.htm) (1-8-2014).

\(^7\) Some extremely bare inputs are recorded from certain Northern States and the World Bank. See, Note by the Secretary-General, Macroeconomic Policy Questions: Financing of Development, Including Net Transfer of Resources between Developing and Developed Countries, UN Doc. A/52/840, 24 March 1998. An initial survey by the Working Group found very low response rates from developed countries (9.1%), private sector financial institutions (2.9%) and business and industry (1.2%). See, Note by the Secretary-General, High-level International Intergovernmental Consideration of Financing for Development: Recurring Themes and Key Elements, UN Doc. A/53/470, 8 October 1998, tables 1 and 2.
the pre-eminent moral and humanitarian challenge of our age”, which Northern States in particular must significantly contribute to meeting because a “globalized economy must work for all of us or ultimately it will work for no one.”

Essential foundations of the process are measures “preventing national actions, particularly domestic economic decisions, from negatively affecting other nations”, actions ensuring “appropriate prevention measures that minimize the risks of financial crises”, and decisions “respecting the autonomy of national economic policy and development strategies.”

The hugely deleterious effects on developing countries due to reversing capital flows during international financial crises are referred to prominently, placing the onus primarily on powerful States to reform the international financial architecture accordingly.

While the eventual outcome document of the conference, held in Monterrey in 2002, retains a number of the concerns in this early text a great deal of the foundational ethos was lost. Monterrey makes no mention of systemically generated asymmetries and increasing polarization, and therefore places no particular onus on any States to address this basic characteristic of the system. The founding emphasis is instead on the inclusion of all States within the global economic system, presumably on the understanding that its basic nature will not change.

No reference is made to co-responsibility or solidarity, and no frameworks are addressed.

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8 “That is the inescapable corollary of our interdependence, for in this world, someone else’s poverty and despair very soon become one’s own problem.” Preparation of the Outcome of the International Conference on Financing for Development: Draft Outcome Prepared by the Facilitator, UN Doc. A/AC.257/25, 18 September 2001, para 2.
9 Ibid, para 4 (3), (4) and (6).
10 Ibid, para 17.
for ensuring national economic policy autonomy, or the avoidance of negative extraterritorial effects from domestic economic policies. In respect of international private capital flows, the Monterrey document reverses an emphasis placed by developing countries on international over domestic factors, adding lengthy statements on the traditional neoliberal justification for reliance on FDI for development and its presumed benefits,\(^\text{12}\) and what developing countries must do to attract it.\(^\text{13}\) Of particular note here, in the form of a reference to “leveraging aid resources” buried within a long list of other activities aimed at facilitating FDI,\(^\text{14}\) the Monterrey document planted a modest seed that was to grow well beyond advisable proportions by the time of the follow-up conference in Doha. The later 2008 Doha declaration builds on Monterrey and continues the same foundational approach, yet adds a focus on gender equality, climate change and Africa, and, given its timing, a special attention to international financial instability.\(^\text{15}\) In Doha the overall importance of private international flows in relation to domestic and public resources had by that stage grown dramatically, and the stress on domestic factors to attract these flows was duly enhanced.\(^\text{16}\)

Over the span of its existence the results of the process have been remarkably disappointing. In general, although there have been significant achievements by developing


\(^{13}\) Ibid, para 21.

\(^{14}\) Ibid, para 22 (see also para 43). The increased use of unconditional cash transfers directly to the poor represents the diametrically opposed heterodox alternative, and is gaining prominence due to evidence of its superior effectiveness in sustainable poverty reduction. See, Christopher Blattman and Paul Niehaus, ‘Show Them the Money: Why Giving Cash Helps Alleviate Poverty’ 93 *Foreign Affairs* 3 (May/June 2014).

\(^{15}\) Doha Declaration, 2009, supra note 11, paras 1-7.

\(^{16}\) Ibid, paras 23-25.
countries regarding their half of the bargain (mostly regarding the mobilisation of domestic resources and the creation of investor-friendly economies) Northern States have consistently failed to meet their commitments.\textsuperscript{17} The process may usefully be considered in terms of four main categories; trade, ODA, debt and systemic issues. Trade is perhaps the most obvious example of the general trend. Despite a wealth of words the only commitment made on trade in both outcome documents is to implement the WTO Doha development round. This round remains stalled after thirteen years of negotiations due to Northern intransigence on all of the issues of deepest concern to developing countries.\textsuperscript{18} The financial loss to developing countries is enormous. At the time of the Monterrey meeting, the Director-General of the WTO stated

\textsuperscript{17} “[A] number of developing countries have made significant progress in the implementation of development policies in key areas of their economic frameworks.” Ibid, para 8. On the other hand, “the Doha Development Round of Trade Negotiations had barely advanced; global financial markets remained volatile; and the outflow of highly trained and skilled persons from developing countries persisted, in part as many developed countries were systematically recruiting them while restricting the movement of the semi-skilled and unskilled workers. Policy space remained constrained and conditionalities remained strong despite the general view that they were counter productive.” Informal Summary of General Assembly Review Session 1, Chapter 1 of the Monterrey Consensus, Mobilizing Domestic Financial Resources for Development, UN, New York, 14 February 2008, para 29. On this imbalance in implementation see further, UNDP, \textit{Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World} (United Nations Development Programme, New York, 2005), p. 105.

\textsuperscript{18} According to the South Centre, “[t]he development agenda that was supposed to underpin the WTO negotiations remains for the large part at the level of political rhetoric, as developed countries continue to focus almost exclusively on obtaining increased market access in developing countries.” South Centre, ‘Financing for Development from Monterrey to Doha: A South Centre Input into the Preparatory Process Leading to the Doha Meeting’, Analytical Note, SC/GGDP/AN/GEN/7, South Centre, Geneva, July 2008, para 15. See also, South Centre, ‘Present Situation of the WTO Doha Talks and Comments on the 21 April Documents’, Analytical Note, South Centre, Geneva, April 2011, p. 1; Martin Khor, ‘Analysis of the Doha Negotiations and the Functioning of the World Trade Organisation’, South Centre Research Paper 30, Geneva, May 2010; Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System, United Nations, New York, 21 September 2009 (Stiglitz Report), p. 103.
that benefits from the complete liberalisation in agriculture, services and manufactures by the North, in contrast to its preferred regime of biased liberalisation, “would amount to about eight times ODA”.19

ODA has been covered earlier and the North’s failure in this regard is well known. Yet it remains to be mentioned that within the Paris process on aid effectiveness only one of the twelve indicators set by the Paris Declaration to improve delivery has shown an improvement.20 In fact, it would seem that, despite its rhetoric to the contrary, the Paris process has itself become simply another facet of aid conditionality.21 On debt, the main issues are those of debt sustainability and the creation of an international debt workout mechanism. Developing countries demand that definitions of debt sustainability should account for “each country’s capacity to raise the finance needed to achieve the multilaterally agreed development goals,”22 and that amounts of debt forgiven should be strictly additional to ODA, rather than counted towards it as is current practice.23 They also call for a debt workout mechanism that adequately provides for the

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21 South Centre, 2008, supra note 18, para 27.


participation of all stakeholders, notably the debtors themselves, and which takes full account of the debtor’s economic condition and the nature of the debt, through a rules-based and predictable paradigm.\textsuperscript{24}

Initially Northern States seemed relatively open to both these proposals even if they did not make any specific commitments. At Doha however the tone changed. The outcome document “acknowledge[s] the need to continue to address all relevant issues regarding external debt problems”, however it commits States only to “consider ways to explore enhanced approaches of sovereign debt restructuring mechanisms based on existing frameworks and principles”.\textsuperscript{25} The qualification implies that although definitions of debt sustainability may be redressed,\textsuperscript{26} the practice of counting debt forgiveness as ODA and the introduction of a rules-based international debt workout mechanism may well be outside the bounds of consideration. No significant movement by those States in a position to make these changes to the international system has occurred.\textsuperscript{27}

\textsuperscript{24} Preparation of the Outcome of the International Conference on Financing for Development, 2001, supra note 8, para 48. The G24 has proposed that the envisioned mechanism be aligned specifically with domestic laws governing debts of states and municipalities in the US, based on three principles; independent arbiters, disallowance of creditors deciding on their own claims, and the maintenance of economic viability. Intergovernmental Group of Twenty-Four, 2001, supra note 23, para 13.

\textsuperscript{25} Doha Declaration, 2009, supra note 11, para 67 (emphasis added).


\textsuperscript{27} Reportedly, the UK, US, France, Australia and Japan have blocked a group of UN experts from proposing the creation of a debt arbitration mechanism. See, Tim Jones, ‘UN Experts Blocked from Making Debt Proposals’, Jubilee Debt Campaign, 18 August 2014. Prima facie, these acts contravene obligations to cooperate. The same would hold for any action to block a present proposal by the G77 and China for a legally binding treaty on the matter initiated through the UN General Assembly,
With respect to systemic issues, there have only been very small advances from the viewpoint of developing countries. By the time of the Doha meeting, the inaction regarding reform of the international financial system could not be avoided given the onset of the greatest global economic crisis since the Great Depression, and little of structural value has been achieved since. Within such an environment, even the IMF is beginning to warn of the dangers of too much openness to FDI. With respect to developing countries it recently stated that “the size of direct participation of foreign investors in local markets needs to be monitored and balanced with broad financial system development policies.”

The other pressing issue is that of democratic governance of the IFIs. On IMF reform, changes to the quota system in 2006, 2008 and 2010 have resulted only in a very modest increase without good reason. See, ‘Towards the Establishment of a Multilateral Legal Framework for Sovereign Debt Restructuring Processes’, UN Doc. A/68/L.57/Rev.1, 28 August 2014. The adoption of this document was opposed by 11 countries, including the US, Japan, Germany and the UK. Bodo Ellmers, ‘Sovereign Debt Restructuring: UN Takes a Big Step Forward’, Eurodad, 10 September 2014. In the absence of sufficient justification these States must be understood to have thereby violated their obligation to cooperate.

in voting power to the developing countries as a block.\textsuperscript{31} The quota reforms and Executive Board re-alignments agreed in 2010 remain unimplemented, essentially due to delays in the domestic ratification process of certain Northern States, most notably the US.\textsuperscript{32} Another promised comprehensive quota review set for 2013 has yet to eventuate. The March 2008 adjustments to the voting quotas in the IMF resulted in an increase of 1.6% for developing countries as a whole. Developed countries retained 60% of the voting rights while constituting only 15% of IMF membership.\textsuperscript{33} Reform of the World Bank is even further behind. Very little change has taken place since the Monterrey Consensus, with Bank managers regularly repeating a mantra for ‘further consultations’ in order to reach a political ‘consensus.’\textsuperscript{34}

\textsuperscript{31} Even this modest overall shift was at the expense of certain developing countries’ voting shares, especially the poorest, with the highest cost shouldered by Sub-Saharan Africa. German Development Institute, Friedrich Ebert Stiftung, Intergovernmental Group of Twenty Four, and Bretton Woods Project, ‘The Future of Global Economic Governance and the IMF: Challenges and Opportunities for Europe, Emerging Economies and Developing Countries, Summary Report of the Seminar Held in Berlin, 4 December 2013’, Bretton Woods Project, London, March 2014, p. 5.

\textsuperscript{32} The US Congress has refused to ratify the relevant agreement, which includes an allowance for increased funding, leaving the IMF presently languishing financially with no prospect of governance reform before 2015. Oliver Stuenkel, ‘The Death of IMF Reform?’, The Diplomat, 22 February 2014.

\textsuperscript{33} South Centre, 2008, supra note 18, para 41.

\textsuperscript{34} Ibid, para 45.
7.2 – Core Concerns that are Marginalised

Under a neo-liberal paradigm the present process of financing for development, as repeatedly stressed, focuses very heavily on the benefits and superiority of foreign private sources. It therefore is preoccupied with financial flows from North to South, and neglects appropriate attention to domestic resources for development. An approach from heterodox theory and cooperative obligations reverses these characteristics of the process. It places both a concern over net flows from South to North and a preference for maximising domestic resources at the centre of the process, where they should be.

7.2.1 –Net Financial Flows from South to North

Overall financial transfers have been flowing from developing countries to the North since 1997, as noted in chapter 2. The trend since then has been one of increasing net annual flows of finances from the most in need, peaking in 2007 at $881 billion for the year, dropping to $557 billion in 2010, but

increasing again to $826.6 billion in 2011.\footnote{The most recent data suggests a relative stabilisation at slightly below this level. Flows to the North were $740 billion in 2012 and $622 billion in 2013. UN, World Economic Situation and Prospects 2014 (UN, New York, 2014), p. 67.} Overall, a net of roughly $7.3 trillion has been transferred from the poorer nations to the North between 1997 and 2011.

Yet, certain developing countries themselves also contribute directly to these net outflows. Some developing countries are using sizeable portions of their domestic savings to invest in the world’s strongest currencies, mostly investing in US government bonds. These developing countries are therefore directly subsidising the wealth of the North at an immediate expense to their own development and living standards. For some, such as China this may have a rebound benefit in providing liquidity for increased imports to the North, thus boosting their own export revenues. However, this strategy will benefit few other than China.

The most likely explanation for these large transfers is to provide a hedge against future financial crises. As developing countries do not have the power to directly stabilise the international financial system, and indeed are forced to contribute both to international and domestic instability through forced liberalisation, they are increasingly spending valuable domestic resources on insurance against the probable negative effects of a system that they are given no choice but to ‘integrate’ with. By amassing insurance in the form of foreign currency reserves these countries will be able to weather far better the balance of payments difficulties that will no doubt occur during future financial crises. This is also protection against having to return to the IMF in the event of a crisis. Finally, it offers a buffer to better maintain a healthy

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40 See for example, Follow-up to and Implementation of the Monterrey Consensus and Doha Declaration on Financing for Development, Report of the Secretary-General, UN Doc. A/68/357, 3 September 2013, para 70.

balance of payments should there be large destabilising foreign capital in-surges, and provides protection against speculative attacks on national currencies.\footnote{Ilene Grabel, ‘Financial Architectures and Development: Resilience, Policy Space, and Human Development in the Global South’, Political Economy Research Institute Working Paper No. 281, University of Massachusetts, June 2012, pp. 37-38.}

Most economists and human rights advocates would agree that on the surface this appears to be a very large waste of hard-earned funds, representing a substantial loss of capacity for human rights realisation, or in economic terms a huge ‘opportunity cost’. However, this ‘waste’ of domestic resources is a logical result of the system as designed and maintained by Northern States, that is, one inherently and increasingly prone to crisis with the widespread likelihood of contagion for innocent countries due to the driving policy of capital liberalisation and the inhibition of capital controls. Again, developing countries have little choice.\footnote{Molina and Ruiz, 2010, supra note 39.} To avoid the greater evil of devastated living standards due to ‘catching’ another country’s financial crisis they are diverting substantial domestic savings that could be directed to national development. A seminal UN publication emphasises the importance of reducing risks embedded in the international financial system in order to lessen the perceived need for self-insurance, and to free up reserves for productive investment. Such risk reduction can be achieved, in part, through better management of the risks associated with \textit{volatility of cross-border private capital flows, excessive leveraging in the financial system, too-big-to-fail institutions, shadow banking and sovereign debt distress.}\footnote{UN, 2014, supra note 36, p. 68 (emphasis added).}
These are all factors over which Northern States exercise decisive control.\textsuperscript{45}

It is an open question whether this practice of reserve accumulation may or may not violate developing countries’ obligations under the ICESCR to devote the maximum available domestic resources to the realisation of socio-economic rights.\textsuperscript{46} The answer would, empirically speaking, turn on the balance between the resources spent on the hedge and the size of the added losses that would have occurred without the insurance. This is an impossible calculation. Stiglitz, for one, estimates that “[w]hile the costs of maintaining reserves are very high, the benefits still exceed the costs.”\textsuperscript{47} In any event, it is a practice that is logical, proportional, and likely to be in the long-term interest of the people whose rights are at stake, given the failure of powerful States to stabilise the international financial system. It would therefore be well within any appropriate margin of appreciation. The real question is whether the failure to reform the system which provokes this heavily detrimental ‘solution’ is a breach of cooperative obligations on the part of those States in a position to enact such reform.

The failure of the North in the present process of financing for development and the ongoing wealth transfer from South to North has prompted the South Centre to suggest that developing countries attempt, as far as possible, to implement

\textsuperscript{45} For example, although these processes are allowed through ‘loopholes’ they are “deliberately created ‘loopholes’ in the global regulatory system to facilitate money laundering, tax evasion, regulatory evasion, and other illicit activities.” Joseph Stiglitz, Freefall: Free Markets and the Sinking of the Global Economy (Penguin, London, 2010), p. 160. “Wealthy Americans and Europeans – and the banks that represent them – wanted a safe haven, free from the kind of scrutiny that their activities would get at home, and the regulators and legislators allowed them what they wanted.” Ibid, p. 217.


their own solutions within the framework of South-South cooperation.\textsuperscript{48} This would involve enhancing collective cooperation in matters of trade and finance. In particular, they should focus on regional and developing country initiatives to manage their cross-border financing requirements, through reserve pooling mechanisms and ‘swap funds’, such as the Chang Mai initiative and the Bank of the South. This would reduce both reliance on the IMF and the need to build US dollar reserves as insurance against international financial instability. The new BRICS development bank is another prospective alternative to the policy templates and leveraging of the World Bank. In addition, a new approach to investment flows could arise from South-South cooperation, especially given the large resources of some developing countries’ sovereign wealth funds.

Within a well designed systemic framework of South-South cooperation a realistic exit strategy from Northern aid and investment dependence could be given effect. In short, the developing world could seek to somewhat ‘decouple’ from the North in terms of financing for development, allowing poor countries to expand their range of policy options, making it more likely that they might implement nationally determined development strategies. The South Centre believes that developing countries “would now be able to effectively decouple themselves from continued reliance on Northern markets and Northern capital with respect to their own development.”\textsuperscript{49} This may further be evident in the evolution of ALBA (the Bolivarian Alliance for the Peoples of Our America) and in the growing importance of the Bank of the South. It is also indicated in movements by India and China away from development cooperation fora dominated by the OECD and

\textsuperscript{48} South Centre, 2008, supra note 188, p. vi.
\textsuperscript{49} South Centre, 2008, supra note 35, p. 21.
Northern States, and in statements by BRIC nations that South-South development cooperation is qualitatively different and cannot be absorbed into the North-South paradigm.

7.2.2 – Domestic Resources

Since the Monterrey Declaration a marked developmental improvement in some sections of the South has been due essentially to two sets of factors. The first set is largely beyond the control of developing countries; a temporary boom in global commodity prices due to strong demand for natural resources and primary products, and increased investment flows due to the ‘easy’ money created in the US and other Northern States as a stimulus response to the financial crisis, much of which has been diverted to developing countries in search of higher profits.\textsuperscript{50} The price boom is at an end and investment flows are again dropping.\textsuperscript{51} A number of developing countries have been able to capitalise on these transient benefits. Yet not all developing countries that gained from the boom have been able to convert these financial gains into higher and equitable standards of living in the short-term, or into long-term productive assets. These are quite


\textsuperscript{51} Yılmaz Akyüz, ‘Waving or Drowning: Developing Countries after the Financial Crisis’, South Centre Research Paper No. 48, South Centre, Geneva, June 2013.
evidently not stable bases for sustained development planning.

Nevertheless, the second set of factors is telling. Some countries have been able to overcome the difficulties and have put an increase in domestic savings to productive use, reinvesting in their economies according to well designed and self-determined development policies. This suggests that where countries have been able to save over a certain amount necessary to provide a buffer against impending international financial crisis, to service and repay debt and to build internal capacity to lessen dependence on foreign investment, their use of domestic savings has been the key ingredient in improving their situation.

In actual fact, developing countries’ performance with respect to domestic resource mobilization was much better than foreseen at the time of the Monterrey meeting. This contrasts sharply with the excessive consumption in some of the major developed economies. Instead of relying on external resources, as in the past, developing countries are increasingly financing their infrastructure and other critical investments from domestic sources.

In 2011 the average savings rate in low and middle-income countries was nearly double, at 32 percent, that of high-income countries, at 18 percent. Domestic investment as a proportion of GDP in developing countries has grown from

52 “Using home-grown development approaches that are strategic and adapted to their own requirements, some developing countries are succeeding.” South Centre, ‘Reshaping the International Development Cooperation Architecture: Perspectives on a Strategic Development Role for the Development Cooperation Forum (DCF)’, Analytic Note, SC/GGDP/AN/GEG/9, South Centre, Geneva, September 2008, p. 1.

53 South Centre, 2008, supra note 18, para 75.

24.1% in 2000 to 32.3% in 2011, despite a system pitted against this trend.\footnote{Jessie Griffiths (et al), 2014, supra note 37, p. 4.} Ironically, efforts of insulation against the international financial system have been essential to this rise in domestic resource creation and mobilisation, highlighting the need for Northern State cooperation to reduce this ‘waste’ of domestic savings.

Those developing countries that have been able to maintain their autonomy during the crisis have used the resulting policy space to pursue a wide variety of counter-cyclical macroeconomic policies. These include inter alia programmes to ensure access to affordable credit to domestic firms; the pursuit of expansionary monetary and fiscal policies ..., and capital controls ... At the same time developing countries have expanded existing regional, sub-regional, bilateral and national financial institutions and arrangements and created new ones.\footnote{Ha-Joon Chang and Ilene Grabel, \textit{Reclaiming Development: An Alternative Economic Policy Manual} (Zed Books, London, 2014), p. xxx.}

This set of circumstances, together with the fact that those developing countries most negatively affected by the crisis were those most ‘outward’ looking, export-oriented, liberalised and entrenched in the process of globalisation, has led to a certain reinvigoration of development policies oriented towards ‘internally’ generated growth.\footnote{Neil McCulloch and Andy Sumner, ‘Will the Global Financial Crisis Change the Development Paradigm?’ \textit{IDS Bulletin} 5 (2009), p. 107. The director of UNCTAD’s division on Globalization and Development Strategies, has also called for developing countries to concentrate on the mobilisation of domestic resources, on “internal markets as drivers of demand”, and on “increasing wages as engines of growth”, singling out Latin American and African States in particular, which have “been heavily dependent on external flows”. As reported in, South Centre, ‘Four Scenarios on World Economy’, South Centre Bulletin, Issue 80, 30 June 2014, p. 14.} Some developing countries are re-learning an observance of Keynes’ old maxim; to judiciously...
trade in goods, but to, “above all, let finance be primarily national.”

In an important text published at an auspicious moment of rejuvenation regarding development concerns at the global level coinciding with the onset of the new millennium, Jacques Gelinas exhorted developing countries to realise their dependence and to seek a renewed self-reliance informed by long-forgotten heterodox tenets, which based “economic start-up on domestic voluntary savings.”

One of the most perverse effects of systematic reliance on foreign capital to finance development has been to downplay the role of domestic savings in achieving economic take-off. ...[I]n the absence of effective encouragement and adequate financial structures, savings in the underdeveloped countries have remained a negligible and neglected source of capitalization.

Within the North, it is arguable that the widespread assumption of a savings shortfall is perhaps due to a more or less unconscious and residual complex of cultural superiority,


where the focus is perpetually on the “extreme backwardness and enormous needs of underdeveloped countries to catch up with the developed world.” Yet, this assumes that the relevant goal is to catch up to a Northern standard of living, rather than more simply to break out of poverty and to achieve a measure of economic self-determination, and also ignores the simple fact that the North’s level of consumption is completely unsustainable in any case. Furthermore, this displays a sheer ignorance of the scale of remittances sent back to developing countries by millions who would defer communal and familial happiness to work far from home and to send back a sizeable proportion of their savings. In 2013, worldwide remittances were estimated at over $410 billion, or more than three times ODA. In further perspective, remittances to Tajikistan constitute half of its GDP, and India’s $71 billion of remittances in 2012 amounted to three times the inflow of FDI for that year.

Echoing the contrast to the received wisdom presented by these figures, Gelinas states that “[i]n underdeveloped countries, compulsory savings are relatively abundant”, yet “[c]olossal sums are ... channelled abroad”, due to capital flight, tied aid, debt repayment, military expenditure, and profit remittances. The productive benefits of these savings are therefore lost, not only due to domestic government mismanagement which is evidently sharply decreasing, but, crucially, because of Northern constructed and maintained international economic arrangements. Presaging further

61 Ibid, p. 83.
63 Ibid. Yet, the same release states that, although it has long been a G-20 pledge, very little has been done by Northern governments and international banks to lower transaction costs for remittances.
64 Gelinas, 1998, supra note 59, pp. 86 and 94.
discussion below, Gelinas, on behalf of an enlightened North, asks simply; “How can we take less? How can we stop the drain on the resources of underdeveloped countries?”

In the same vein, building on Keynes’ insights, heterodox economists point out that the original Monterrey document, and thus the entire current process of financing for development, is built upon a false premise; namely, the assumption that all developing countries suffer primarily from a domestic savings shortfall which must be filled by international private capital flows. Although this may have some truth for some countries from a certain point of view, it is becoming increasingly evident that it is not true for a significant majority (especially the most populated with the largest internal markets). Therefore, a process based on this assumption as true in all cases is bound to fail a great many people, and to fail them severely. As the South Centre points out, the huge ‘uphill’ flows of finance from South to North reveal one primary flaw at the heart of the neo-liberal development paradigm:


It calls into question the whole concept of the capital resource gap which is being used by developed countries as the basis for promoting the liberalization of foreign direct investment regimes in and the provision of conditionality-laden aid to developing countries.\textsuperscript{67}

This false premise leads inevitably to a systemic enforcement of dependence on foreign investment for development. In reality, domestic savings are not so much lacking as actively diverted away from productive developmental use by some systemic factors,\textsuperscript{68} and their ‘natural’ accumulation is actively thwarted by others.\textsuperscript{69} In the absence of adverse systemic factors in the global economic order, a far greater portion of these resources would be available for national development.\textsuperscript{70} Regardless of this clear state of affairs, “[t]he impact of [the] international environment on domestic resource mobilization is usually given little attention.”\textsuperscript{71}

Rodrik and Subramanian raise other issues of direct concern. From their point of view, in addition to the systemic problems already identified, the international response is further misled by confusing investment-constrained countries with savings-constrained countries and tarring all with the

\textsuperscript{67} South Centre, 2008, supra note 35, p. 21.

\textsuperscript{68} For example, debt repayments and service, hedging against financial crises, currency stabilisation.


\textsuperscript{70} “Unless the savings are retained within Africa for domestic capital accumulation, Africa will forever be seeking capital from outside and thus remain a permanent hostage to the conditions imposed by international capital.” Yash Tandon, “Fallacies about the Theory of FDI: Its Conceptual and Methodological Pitfalls’ 5 SEATINI Bulletin 2 (2002).

\textsuperscript{71} In addition to the factors already mentioned, “[t]erms of trade changes can make huge difference to savings and consumption in developing countries.” South Centre, 2008, supra note 18, para 79.
same savings-constrained brush. As they also observe, financial globalisation has operated on the presupposition that “poor nations need foreign finance in order to develop. To make sense of what is going on, we need a different mental model.”\textsuperscript{72} The misconception leads to investment policies that may easily backfire. Backfiring occurs because the foreign capital inflows cause the host State’s currency to appreciate, which discourages exports that could balance the inflows and therefore reduces the incentive to invest in export sectors. As a result, “although capital inflows definitely boost consumption, their effect on investment and growth is indeterminate, and could even be negative.”\textsuperscript{73} Furthermore, large inflows of private capital increase the potential for foreign investors to have a disproportionate influence over domestic policy-making and increase the tendency toward financial crisis. Crisis inevitably reinforces the need for governments to attract more foreign capital, thereby heightening investors’ influence over domestic policy and completing the vicious circle.\textsuperscript{74}

In an ‘investment-constrained economy’, which may account for the majority of developing countries, foreign capital will tend not be invested, due to the paucity of profit-making opportunities, and will be spent on consumption rather than saved, thereby lowering domestic savings rates. In addition, the foreign capital that is invested simply substitutes for domestic savings, crowding this resource out of the market, with no net effect on overall investment or growth.\textsuperscript{75}

\textsuperscript{73} Ibid, p. 115.
\textsuperscript{74} Chang and Grabel, 2014, supra note 56, p. 112.
\textsuperscript{75} Rodrik and Subramanian, 2009, supra note 72, p. 131.
displace domestic savings and resources. Empirical evidence demonstrates an inverse relationship between domestic savings and both foreign debt and foreign investment. The apparent success of China, India and some others, is explained in large part by the ubiquity of profitable investment opportunities and their use of capital controls to halt currency appreciation (and in China’s case a deliberately undervalued currency that boosts exports), in rejection of the neo-liberal dogma.

This makes it probable that disproportionate efforts to attract foreign are directly counter-productive. Prasad, Rajan and Subramanian conclude plainly that “a reduced reliance on foreign capital is associated with higher growth. ... [I]n no

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case do we find any evidence that an increase in foreign
capital inflows directly boosts growth.”

In chapter 2 a swathe of research was canvassed suggesting that FDI requires close
management and the creation of specific circumstances to live up to its developmental promise. However, the present authors invoke

[a] more pessimistic view [which] sees foreign capital as not just ineffective but actually damaging: when it flows in, it leads to real overvaluation of the currency, further reducing the profitability of investment beyond any constraints imposed by an inadequate financial system. Indeed, by stifling the growth of manufacturing exports, which have proved so crucial to facilitating the escape of many countries from underdevelopment, the real overvaluation induced by foreign inflows can be particularly pernicious.

This evidence directly contradicts the whole rationale of an FDI dependent development paradigm.

A similar set of considerations leads the UN Committee for Development Policy to pose the following rhetorical question:

Should domestic savings and investments have increased roles, as opposed to foreign savings? ... [E]ach country must ask if the benefits of economies of scale linked to specialization, technology transfer through imports and FDI, and access to world savings outweigh the risk of contagion,

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81 Prasad (et al), 2007, supra note 80, p. 6.
import instability, de-industrialization and a return to colonial patterns of growth.\textsuperscript{82}

The Committee instead advances a heterodox macro-economic recipe for developing countries concentrated on limiting foreign flows and foreign indebtedness, and maximising the amount and productive use of domestic savings.\textsuperscript{83}

It is crucial that the policies of Northern States support rather than negate domestic resource mobilisation through the provision of an appropriate international environment. Instead of disciplinary neo-liberalism what is required is a “move towards “embedded flexibility” which allows room for policy experimentation and heterodoxy.”\textsuperscript{84} An evidence-based and diverse approach is necessary, which allows for differential application to heterogeneous national situations in recognition of the fact that “true development is internally driven.”\textsuperscript{85} As the South Centre puts it,

\textit{[h]ere, as in other respects, the issue of policy space is central, i.e., whether countries would be allowed “heterodox” approaches to dealing with their problems. Major developed countries have been applauded for not following the IMF textbook but rather adopting pragmatic

\begin{footnotesize}
\begin{enumerate}
\item[82] Committee for Development Policy, 2012, supra note 79, p. 27.
\item[84] Committee for Development Policy, 2012, supra note 79, p. 44. Polterovich and Popov demonstrate conclusively that each country will develop in a different manner and at a different rate, and will accordingly need to be able to democratically arrive at and apply various economic policies at various stages. Victor Polterovich and Vladimir Popov, ‘Appropriate Economic Policies at Different Stages of Development’. MPRA Paper No. 20066, 2005; ‘Stages of Development, Economic Policies and a New World Economic Order’, MPRA Paper No. 20055, 2006.
\item[85] Committee for Development Policy, 2012, supra note 79, p. 44 (original emphasis).
\end{enumerate}
\end{footnotesize}
policies. Could the South be allowed similar latitude in policymaking?  

7.3 - Human Rights and Heterodox Convergence in Financing for Development

Within the major documents pertaining to the process of financing for development there are very few references to human rights. Yet three plain facts remain; State actions, omissions and negotiating positions within the process of financing for development “have significant impacts on the realization and enjoyment of human rights”;  

“all decisions to be made in the financing for development process are the responsibility of States”; and States “cannot disregard their human rights obligations in any forum.” Evidently there has

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86 South Centre, 2008, supra note 18, para 79. “The issue of “policy space” is fundamental ... It is also one that the North vehemently resists.” Ibid, para 134. See further, South Centre, 2008, supra note 52, p. 23.  


89 Stephen Marks, ‘Prospects for Human Rights in the Post-2015 Development Agenda’, in Julia Kozma, Anna Müller-Funk and Manfred Nowak (eds.), Vienna +20: Advancing the Protection of Human Rights Achievements, Challenges and Perspectives 20 Years After the World Conference (Ludwig Boltzmann Institute of Human Rights, Vienna, 2014), p. 294. Interestingly, Harry Dexter White, who first drafted the Articles of Agreement to establish the World Bank, suggested that it should include a provision detailing a bill of rights setting forth the ideals of the member States based on the UN Charter. White stated that, “the inclusion of that provision would make clear to peoples everywhere that these new instrumentalities which are being developed go far beyond usual
been some fledgling discussion of the connection between human rights and financing for development. In a report from the Summit Round Table at the Monterrey conference the delegates proposed that States’ “[h]uman rights commitments should guide the implementation of the draft Monterrey Consensus.”

At ECOSOC’s Development Cooperation Forum (DCF), set up by the UN World Summit to provide the international focal point for discussions on financing for development, it was noted that deliberations should be “rooted in the Universal Declaration on Human Rights and a human rights-based approach to development.”

In its vision of the Post-2015 development goals, the UN Committee for Development Policy stated that a crucial element in resetting a pro-market agenda within the MDGs is the need to design a new set of development goals that

- systematically draw on the human rights norms and principles codified in international legal instruments.
- Accordingly, they should reflect core economic and social rights: education, food, health, housing, decent work, standard of living and social security.

In addition, the Committee opined that the political commitment to international cooperation made in MDG 8 needs to be concretised into a discernable, measurable and enforceable set of quantitative, time-bound targets, in addition to those established for ODA flows, encompassing measures...
“setting up an enabling economic environment for development worldwide.”

When occasionally referred to within the process of development financing however, human rights obligations are exclusively framed in the domestic context, and cooperative obligations not mentioned. Nevertheless, as the reference to enforceability suggests, there is a widespread understanding of a need to reframe the whole process that evinces strong commonalities with an approach based on these obligations. Within discussions on the appropriate nature of the DCF, India has stated that the current Northern interpretation of development cooperation needs “to be extended” to incorporate “elements of enabling policies and disabling policies as adopted by various national governments”. India is here alluding to the fact that trade and investment policies of Northern States, as well as financial policies pursued through international institutions, should be understood as a core part of development cooperation.

South-South cooperation is understood as providing an alternative model to traditional Northern interpretations of development cooperation. According to the Indian position,

South-South cooperation should be viewed from the perspective of political solidarity of the South, utilisation of complementarities between developing countries and direct cooperation between larger developing countries and other countries in the South.

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93 Ibid, p. 18.
95 Ibid, p. 25.
South Africa stresses that “South-South co-operation is conceptually and ideologically different to North-South co-operation or North-South aid. South-South co-operation is driven by other principles, such as equality, solidarity, mutual development and complementarity.”

In the view of other developing countries, the DCF needs to be at the forefront in redefining and reshaping the conceptualisation of development cooperation. The DCF should move such conceptualisation away from current concepts and definitions that are overly donor-provided-aid focused to a conceptualisation that is broader and more inclusive of the wide range of development cooperation activities, including development financing (of which donor-provided aid is only a part).

This would suggest that the context of South-South cooperation may be particularly well suited to a conceptualisation based on cooperative obligations under international human rights law. It is perhaps here that these obligations might first be thoroughly applied to relations of diverse power differentials, which clearly also exist within a South-South context.

Nevertheless, such self-help in no way provides a pretext for the North to delegate its own responsibility. According to the South Centre, the DCF should drive the discourse towards addressing,

as a matter of priority, at the extent to which developed country ODA policies and practices undermine developing countries’ development prospects but also the extent to which developed countries’ other policies (e.g. on trade, investment, finance, national security) undermine the

96 Ibid, p. 25.
97 Ibid, p. 17. See further, South Centre, 2008, supra note 18, para 130.
development objectives that their own ODA may seek to promote.\footnote{South Centre, 2008, supra note 52, p. 41. See also, South Centre, 2008, supra note 18, para 131.}

It is evident however, that aside from establishing the right forum and the desired mandate, there is also a need for a coherent set of principles to guide the coordination of policies and the exercise of joint responsibility.\footnote{Commission on Growth and Development, \textit{The Growth Report: Strategies for Sustained Growth and Inclusive Development} (World Bank, Washington, DC, 2008), p. 103.} This study submits that obligations of international cooperation for the universal realisation of human rights, centred on ensuring respect for these rights at all times and in all circumstances, provide the best principled programme for coordination. They would establish the “thorough examination of the governance of international economic relations and the premises on which current policies have been built” that is called for by UNCTAD.\footnote{UNCTAD, ‘Development-Led Globalization: Toward Sustainable and Inclusive Development Paths’, Report of the Secretary-General of UNCTAD to UNCTAD XIII, UNCTAD, Geneva, 2011, para 189 (g).}

These obligations could be implemented through the approach of an expanded and empowered DCF, which could exercise an oversight role and may act to enforce the implementation of international commitments made in the process of financing for development.

In doing so it could measure the formulation and implementation of commitments according to the principles set out in chapter 6. The DCF would therefore test commitments themselves, and adherence to them, against standards of due diligence, foreseeability, and precaution in relation to the specific content of relevant human rights. The DCF could thereby provide “a strategic intergovernmental policy, operational oversight, and accountability mechanism that can link development cooperation to the broader
international economic and financial architecture”, doing so within a principled and coherent framework provided by cooperative obligations. The EU may even be opening the door towards this principled form of oversight by its admission that, “[w]e also have a responsibility to make sure that our own policies are coherent in support of domestic resource mobilization in partner countries.” Cooperative obligations provide a framework for the realisation of this responsibility.

In reaction to the 2008 financial crisis there has been some development in the literature analysing international finance from a human rights perspective. Yet, the fact is that the

101 South Centre, 2008, supra note 52, p. 2.
102 It has already been suggested that, “the DCF [could] request, through ECOSOC and UN-DESA, development cooperation/ODA policy reviews for various countries, making recommendations to ensure that countries do their best to meet their ODA commitments made in various declarations.” Ibid, pp. 30-31.
104 Only two years after the establishment of the Monterrey Consensus, a pair of authors, one a then current employee and the other a former Executive Director of the World Bank, explicitly tied the nascent process of financing for development to the cooperative human rights norms applied in this study. Inaamul Haque and Ruxandra Burdescu, ‘Monterrey Consensus on Financing for Development: Response Sought from International Economic Law’ 27 Boston College International and Comparative Law Review 1 (2004), pp. 238-239.
terrain of interaction between human rights and international finance is only very sparsely explored. Despite this fact there is growing recognition that this area is replete with issues that have significant implications under existing human rights law. The central implication is that certain economic policies, for which we now have far greater evidence of their effects on economic and social well-being and therefore on legal obligations, are not only incommensurate with a range of rights, but may well be disallowed by the existing legal framework; should it be taken seriously.

Immediately following the onset of the crisis, the Report of the Commission of Experts on Reforms of the International Monetary and Financial System stated that

> any approach to addressing the current economic crisis and preventing future episodes must be robust, in the sense that the conclusions and policy prescriptions cannot rely on economic doctrines in which there is, or should be, limited confidence. ... Strengthening the diversity of ideas may contribute both to global stability and to a strengthening of democracy.¹⁰⁶

Human rights analysis serves to strengthen and encourage this diverse plurality of ideas, and forces an attention to alternative theories and policy prescriptions that do not run a foreseeable risk of compromising certain standards of human dignity. It is here that human rights analysis and heterodox economics converge.

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The confluence of human rights and heterodox economic approaches may be most clearly evident in their broadly mutual attitudes towards the process of financing for development and the proper place of foreign investment in that process. Such a common attitude is highlighted by its contrast with that of neo-liberal economic theory. This theory bases financing for development on private sources distributed by market mechanisms and prioritises foreign investment. Although neither human rights nor heterodox economics discount the private sector, markets or foreign investment, they both place far greater weight on public sources, accountable State distribution and allocation, and domestic resource mobilisation. Allied with heterodox analysis, cooperative obligations, “can help complement the principles” of the process of financing for development and “help make them more operational”.\(^{107}\) They can “provide a focal point” to base discussion and resolve dispute, based on mutually acknowledged standards, without which decisions would be “less well informed, less sustainable in the long term, and whose legitimacy would be more easily contested”.\(^{108}\)

De Schutter enumerates three main features of human rights norms which make them well suited to employment as a global public standard to guide and reshape the international economic order, and with which to assess the normative legitimacy of its institutions and processes. Firstly, and perhaps most importantly, they are “relatively

\(^{107}\) Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, The Role of Development Cooperation and Food Aid in Realizing the Right to Adequate Food: Moving From Charity to Obligation, UN Doc. A/HRC/10/5, 11 February 2009, para 42.

\(^{108}\) Ibid, para 42.
incomplete”.109 Contrary to the common perception of economists, their prescriptive flexibility in certain contexts is a strength not a weakness. It allows them to be sufficiently precise to provide a focal point for deliberations as to how to build international regimes – how to regulate trade, how much to protect foreign investors, or how to allocate the responsibilities in combating climate change – yet they are vague enough not to pre-empt the result of these deliberations.110

Another way to put this is that they do not pretend to have all the answers, but they are indispensable in framing options. Rather than always determining precise policies, the benefit of human rights is often in opening spaces for contestation that were previously closed and in mandating the participation of actors who were previously excluded.

Secondly, human rights are both legal rules and ideals. They therefore confer a legitimacy based on the concept of legality, yet they also indicate a direction in which arrangements can almost always be improved. The progressive realisation of socio-economic rights is a good example, which, from this viewpoint, is again a strength, rather than a weakness as is commonly claimed. And third, they “correspond to the requirements of moral cosmopolitanism”,111 which trains attention not just to the minimalist international efforts at poverty alleviation directed at the bottom of humanity’s pyramid, but also to the maximised efforts at wealth accumulation at the top.112 The fact is that we live on a

110 Ibid, p. vi.
111 Ibid, p. vi.
bounded planet of finite resources, making the processes of poverty alleviation and wealth accumulation inextricably correlated and often mutually exclusive,\(^{113}\) despite their artificial separation at the level of international law and politics.\(^{114}\) Contrary to the delusions of much of some in the financial community, actual wealth cannot be created from nothing, least of all novel, arcane and imaginative accounting practices that simply mask a transfer of existing wealth and security. The process of financing for development is subject to the same logic. Human rights law offers the hope that these realities might be better illuminated and properly addressed, and provides modalities whereby the power and privilege of the ‘winners’ may be curbed rather than reinforced.\(^ {115}\)

Returning briefly to the first feature of importance, prescriptive flexibility, it is here that the openness of human rights law and the plurality of heterodox economics are very productively aligned. It is generally understood now that the failure of the neo-liberal paradigm is precisely due in large part to this very inflexibility, ideological simplification and exclusion of alternatives.\(^ {116}\) From this viewpoint, the search should not be for a new replacement paradigm offering a new master-plan, no matter how well intentioned.\(^ {117}\) The regular

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\(^{117}\) ‘The model we have relied on for the past several decades was never set up to alleviate poverty, it was constructed to create profit. Crucially, an institutional framework developed as part of any alternative global agenda
charge made by economists, to the effect that human rights law often provides no definitive, micro-detailed and strict policy mandates, is therefore fundamentally misplaced. In the present environment we need an expansion of space for experimentation and the implementation of broad alternatives.\textsuperscript{118} Human rights therefore may perform a crucial double movement. Because they are not forensically determinant or overly prescriptive they serve to open space for plurality, debate and democratic deliberation; and because they are not devoid of prescription, preference and process, they serve to bound, protect and maintain this space, such that extreme elements in the debate might not gain sufficient influence as to collapse it and impose another narrow uniform paradigm to the detriment of the vast majority of humankind.\textsuperscript{119}

and policy negatively affecting certain levels of human socio-economic wellbeing, and obligating States to intervene in market economies to ensure positive effects. A thorough application of these rights will always ultimately mark boundaries between more and less preferable economic policies and theories. That is the point. The fact is that obligations regarding socio-economic rights are phrased in language that necessitates judgements on the propriety and acceptability of economic policies implemented by governments.\textsuperscript{120} It also necessitates judgements on the process by which such policies are formulated, decided on and implemented. Moreover, it opens the probability that in contexts where the consequences and outcomes of certain economic policies are reasonably well known and sufficiently understood, there must be a judgement of their legality. The criteria for such judgements are now clear, sufficiently elaborated, and applicable.\textsuperscript{121}

Regarding a final methodological point, it is true, as stated by Tooze, that the causality between States’ policy stances and “any deterioration in [socio-economic] rights must be both proven and reasonably foreseeable before States parties to the ICESCR are found to be in violation of their obligation to


cooperate internationally.” Yet, as argued above, levels of required causality and ‘proof’ must not be overstated, especially in the present context where proving strict causality in any scientific sense is not possible. Economics is not a hard science; hence the existence of what is termed ‘physics envy’ in sections of the discipline. For these reasons the language of ‘violations’ is not stressed here. Instead, cooperative obligations are presented as rendering a reasonable framework for human rights compliant decision-making. States’ dismissal of the framework, however, may well be understood as a violation of their cooperative obligation to ‘take socio-economic rights into account’, and to take positive measures to ensure that their acts and omissions avoid a foreseeable risk of harming human rights abroad. The

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124 To rationally apply human rights in the present context “necessitates moving away from thinking about rights solely in the narrow terms of individual entitlements and direct causality or reasonably proximate complicity to examining the structural conditions that play a role in the ability of responsible agents to fulfill their human rights obligations.” Dowell-Jones and Kinley, 2011, supra note 105, p. 189.

125 A domestic equivalent is provided by the Constitutional Court of South Africa in the *Grootboom* case. Here the Court found that there is a duty on the State to furnish a coherent and coordinated programme designed to meet a constitutional obligation to provide socio-economic rights, presupposing a reasonable decision-making process that assesses the impacts of alternative policies on those rights before arriving at a specific programme. The Court reserved the right to decide on the issue of reasonableness. See, *Government of the Republic of South Africa and others v. Irene Grootboom and Others*, Constitutional Court of South Africa, CCT 11/00, 2001 (1) SA 46 (CC), Judgement, 4 October 2000. In *Soobramoney* the Court also referred to the criteria of rationality and good faith in relation to the standard of reasonableness. See, *Thiagraj Soobramoney v. Minister of Health (Kwazulu-Natal)*, Constitutional Court of South Africa, CCT 32/97, 1998 (1) SA 765 (CC), Judgement, 27 November 1997.
precautionary principle also acts here to mitigate an arguable absence of strict scientific causal proof. As such, the focus is on obligations of due diligence and conduct over obligations of result. From a certain perspective, this may be ‘softer’ than a violations approach, but in the present context it is more practical and efficacious, not least because, as Tooze admits, a ‘hard’ violations approach “will exclude liability in many cases” due to strict causal opacity.\(^\text{126}\)

### 7.3.1 – General Application of Cooperative Obligations

It is recalled that cooperative obligations apply to “acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory”,\(^\text{127}\) where there is a relationship of authority or effective control, where there are foreseeable extraterritorial effects on human rights, and where States or their agents are “in a position to exercise decisive influence or to take measures to realize” socio-economic rights in other countries.\(^\text{128}\) All States must take deliberate steps to establish an international economic environment conducive to the universal realisation of socio-economic rights, particularly with reference to matters of trade, investment and finance.\(^\text{129}\) This duty is to be discharged by the elaboration of appropriate

\(^{126}\) Tooze, 2002, supra note 122, p. 230.


\(^{128}\) Ibid, Principle 9.

\(^{129}\) Ibid, Principle 29.
international agreements, arrangements and standards, and by ensuring that all State measures and policies, particularly in foreign relations and within international organisations, at the very least, do not obstruct the achievement of socio-economic rights extraterritorially.\footnote{130}{Ibid, Principle 29 (a) and (b).}

The process by which these agreements and policies are arrived at must also be human rights compliant,\footnote{131}{Ibid, Principle 17.} and will necessitate the conduct of human rights impact assessments before, during and after the process of negotiations and policy formulation.\footnote{132}{Ibid, Principle 14.} The core standard of assessment is due diligence in the avoidance of a foreseeable risk of direct or indirect harm, informed by further standards; maximisation of available resources, progressive realisation with prioritisation of core minimum levels and disadvantaged groups, non-retrogression, non-discrimination, inclusive participation in decision-making, and the employment of the precautionary principle.\footnote{133}{Ibid, Principles 2, 7, 9, 13, 19, 32.} The conduct of impact assessments is a necessary requirement for States to discharge the minimum level of obligation to avoid causing harm. Finally, a greater burden is to be borne by those States with greater capacities.\footnote{134}{Ibid, Principle 31.}

Of particular relevance in the context of financing for development, cooperative obligations also extend to the acts and omissions of States within international organisations, and, to a certain extent, to international organisations themselves. As members of international organisations and deliberative bodies, States maintain liability for their conduct at all times in relation to their human rights obligations,
domestic and international. States may not ‘contract out’ of their human rights obligations through transferring competences to international organisations, and “must take all reasonable steps to ensure that the relevant organization acts consistently with the international human rights obligations of that State.” Furthermore, as subjects of international law, international organisations themselves will be bound to those human rights obligations which attach to them “under general rules of international law, under their constitutions or under international agreements to which they are parties.”

Given that international finance is substantially governed by international organisations such as the IMF, the World Bank and the Bank of International Settlements, and since the process of financing for development is deeply impacted by others such as the WTO, these obligations are central.

In the general application of cooperative obligations to the present context, it will help conceptually to separate procedural from substantive issues. Regarding procedure, the first issue of concern is transparency. In the interests of a more accurate assessment of State’s positions, causality and consequences, a human rights perspective will mandate far greater transparency in the process of financing for

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136 Maastricht Principles, 2010, supra note 127, Principle 31. “A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State’s international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.” Drafting Committee of the International Law Commission, Responsibility of International Organizations, UN Doc. A/CN.4/L.778, 30 May 2011, Article 61.
development. There is a primary need to better ascertain the manner in which actual decisions are made and to allow for the proper identification of State actions, omissions and policy positions. Specifically; (1) States should be required to present texts individually, detailing their positions on all issues of concern prior to international conferences and high-level meetings; (2) detailed records should be kept and publicised regarding argumentation in plenary, small group and committee meetings during these events; (3) outcome documents should be framed more like resolutions and serious consideration should be given to applying the same voting system as operates in the UN General Assembly; and (4) States should be required to report formally and regularly against commitments made in outcome documents. These requirements could be implemented in the procedures of the Development Cooperation Forum, for example.

Probable arguments from powerful States demanding secrecy and leeway for strategic negotiating tactics far from public view must be dismissed on the grounds that this is a process of public administration. It is unacceptable that citizens, whose taxes are spent in negotiations presumably for their benefit and in their name, should be prevented from knowing what their representatives are doing, and how, and why. In the same way as secrecy is not tolerated in domestic processes of public administration within liberal democracies there is no reason to tolerate it in analogous international processes. The positions and actions of States within international organisations, as well as the processes of such institutions themselves, must also be clear and visible to the public.

A second procedural consideration is the clear preference of cooperative obligations for the most inclusive forum
Deliberations should be housed in fully representative UN fora, as clearly demanded by developing countries. Any potential conflicts between mandates and deliberative outcomes of various fora must necessarily be resolved in favour of the most representative. This will have direct implications for relations between the DCF and the Global Partnership for Effective Development Cooperation (discussed further below in section 7.6.1), and between various Southern fora and the OECD. The principle of participation is already heavily relied on in debates over the democratisation of international economic institutions. Northern States are very slow to cede power to the operation of such a basic principle, which they themselves are the first to expound rhetorically. However, the fact remains that, if not reformed, these institutions will ultimately be relegated to the side-lines by ensuing developments. This is indicated by the fact that the World Bank and the IMF were clearly drifting into irrelevance before the onset of the last global financial crisis gave superficial and temporary cause for their resuscitation.

The third procedural issue is that of human rights impact assessments (HRIAs). They must be applied by States individually to the extraterritorial effects of their policies, acts and omissions in the process of financing for development. Recalling the discussion in section 6.6, HRIAs must be seen as a continuous obligation, rather than a once-off check-box exercise. The same four phases may be delineated in the case of negotiations and debates over financing for development as were applied to negotiations on investment agreements; pre-negotiation, during negotiation, post-negotiation and implementation. A pre-negotiating phase will require assessment of State policies to be pursued within

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138 See section 6.4.
international conferences on financing for development, within international organisations and within inter-governmental fora such as the DCF, the OECD and the Global Partnership for Effective Development Cooperation, and will operate as discussed in the previous chapter.

During negotiations, HRIAs could be applied more loosely by an oversight body, ideally the DCF. This function would merge with the post-negotiation phase and the implementation and monitoring of commitments made by all States in the process. The monitoring of commitments will be critical. The conduct of post-negotiation and implementation assessments of the human rights effects of these commitments and the process as a whole must be integrated into the evaluation function of an oversight body. As argued above, this is not such a far-fetched expectation.

The substantive issues involved in the process of financing for development are too numerous to address individually in any great detail here. For present purposes it is more useful to approach this complex of issues from the broad point of view of selected themes. Some themes that would be worth pursuing as rubrics for analysing the complexity of issues are those of the right of developing countries to equal participation in the process, the requirement of policy space for development,\textsuperscript{139} and the provision of global public goods. In the present context, the theme of most relevance, to counter a detrimental systemic enforcement of dependence on foreign investment, is that of maximising the available domestic resources of developing countries for the purpose of development. This is in fact a primary commitment undertaken by the developing countries in the process of

\textsuperscript{139} A starting point on policy space is provided by Montes; Manuel Montes, ‘Obstacles to Development in the Global Economic System’, South Centre Research Paper No. 51, South Centre, Geneva, July 2014, pp. 15-18.
financing for development, one which they have generally done their utmost to fulfil, as noted above. Under the ICESCR these countries are further obliged to devote the maximum of their available resources to the realisation of socio-economic rights. This obligation includes maximising the amount of resources available in total, and also obliges governments to actively seek international assistance and cooperation towards this end.

Under the law of cooperative obligations powerful States must not obstruct, directly or indirectly, the efforts of developing countries to maximise their resources through internal and external means and to prevent the undue loss of the resources they do possess, without sufficient justification. It bears repeating that the EU’s Permanent Representative to the UN has stated that, “[w]e also have a responsibility to make sure that our own policies are coherent in support of domestic resource mobilization in partner countries.”¹⁴⁰ There may be good reasons to qualify this obligation in particular circumstances. The unrestricted right of a State, even a very poor one, to maximise its resources without limit, even if done in good faith and in accordance with law, makes little sense. The right (indeed the duty) of poor States to maximise their resources must be balanced with the needs, rights and obligations of other States. Other States may, for instance, claim that to ensure respect and refrain from doing harm in certain contexts would endanger their national security or the public order, would unduly constrain their sovereign rights, would risk their own ability to realise the rights of their own people, or would otherwise conflict directly with the observation of another comparably basic rule of international law. Nevertheless, one crucial point to make is that the

¹⁴⁰ Statement on behalf of the European Union by H.E. Ambassador Sanja Štiglic, 2008, supra note 103.
burden weighs on that State to first sufficiently justify its failure to respect socio-economic rights extraterritorially; the initial presumption is of a duty to ensure no harm.

However, such mitigating claims are highly unlikely to apply in relation to most substantive issues of concern here, particularly where the least developed countries are involved. For present purposes we can safely assume that; by a developing country we mean a country which does not possess sufficient resources to realise the socio-economic rights of its citizens, even if they were equitably distributed; and by a Northern State we mean a country that, if its resources were equitably distributed, would be capable of realising the rights of its citizens a number of times over. Mitigating claims are even less likely to apply when developed and developing countries operate in distinct blocs, as is often the case in the process of financing for development.

On the basis of a general rule that Northern States must ensure that they do not frustrate the maximisation and mobilisation of a developing country's domestic resources, we can then revisit the discussion above. It is immediately clear that this general rule aligns well with a heterodox viewpoint that emphasises the superior benefits of domestic resources for development, over a neo-liberal stance that posits foreign investment and external resources as superior. It will force attention to evidence presented by heterodox economists; that foreign bank loans and foreign investment are not purely additional resources; that they can crowd out domestic investment, deplete domestic tax revenue and lower domestic rates of saving; that in the absence of sufficient regulation they can result in a net resource outflow; that they cause currency appreciation reducing the competitiveness of exports; and that those countries that have relied less on
foreign resources have developed faster, among other factors mentioned above. This will require powerful States and particularly blocs such as the EU, in the interests and process of adhering to their international obligations, to re-think a current overarching policy that bases development cooperation and financing on the foreign private sector, and increasingly forces a structural dependence on this source of capital.

Heterodox economics indicates that a false premise of universally savings-constrained developing countries in need of foreign investment should be discarded in the interests of the proclaimed goal of financing for development, and policies based on its acceptance should be discontinued, necessitating the formulation of alternative policies. Cooperative obligations will then convert the ‘should’ to a ‘must’. Northern States are thereby obliged to reject the premise and adopt a different approach to the process of financing for development in order to comply with international law. Alternatively they bear the onus of disproving its falsehood, or of demonstrating that a refusal to change the present course is otherwise justified.

An application of this general rule will also make it clear that maximising domestic resources and minimising their active depletion are two sides of the same coin. A great deal of writing is dedicated to the debate over whether there exists a positive cooperative duty for Northern States to give a certain amount of resources to developing countries. This preoccupation trains inordinate attention to only one of the many components in the process of financing for development, ODA. Yet, in the broader scheme of development financing even the aim of 0.7% of Northern GDP pales in comparison with the amounts that developing countries lose due to Northern acts and omissions in regard to all of the other
components, which is on average $600-700 billion per year.\footnote{See section 8.3.1.} There can be no question that such a net financial outflow is a human rights issue best encompassed by the concept of domestic resource mobilisation.

Instead, the present focus on a core obligation to respect socio-economic rights extraterritorially broadens the field of vision and highlights the mechanisms by which these vastly greater sums are extracted from developing countries, both directly and indirectly. Heterodox economists exhibit the same focus. Together they force attention to the injustices of wealth accumulation at the top of the pyramid as well as the processes of poverty alleviation at the bottom. We must dedicate far more effort to implementing a cooperative norm obliging powerful States to stop taking many times over the amount they only talk about giving.

To comply with the general rule, powerful States must give primary consideration to their acts and omissions creating and sustaining specific international arrangements that negatively affect domestic resource mobilisation. On the surface the rule is to ensure no harm, and therefore may be seen not to obligate powerful States to take any specific actions to mitigate or reverse the damage already being done. Yet this is an untenably simplistic understanding of the respect obligation. Truly \textit{ensuring} no harm will require a number of procedural measures, at the least the conduct of HRIAs and the democratisation of international financial institutions. It will also mandate that powerful States do not obstruct the efforts of developing countries or others to reform specific arrangements in the system, or to create effective alternatives to existing arrangements. It will furthermore entail that they desist from acts or omissions which sustain
certain arrangements that are demonstrably prejudicial to the domestic resource mobilisation of developing countries, unless they can show sufficient justification.

To illustrate by reference to the problem of external debt, it is obvious that extensive resources are lost through unsustainable debt repayments and service. Our rule will not be insensitive to the importance of repaying debts and the value of an international system of lending fundamentally based on an obligation to repay. This system would not exist if there was a blanket right for developing countries to default at will by claiming the need to maximise domestic resources for socio-economic rights. The possible developmental benefits in the judicious contracting of international loans, and their responsible disbursement, would be lost. Our rule will not lead to the unjustified release from contractual obligation that underpins the system. However, it will lead to a conclusion supported by heterodox economics, that international arrangements for sovereign debt management should balance the rights of creditors with the obligations of debtor governments, crucially including their duty to devote the maximum available resources to the realisation of socio-economic rights.

Current arrangements regarding sovereign debt are ad-hoc and controlled by creditors. As addressed above, these current arrangements do not satisfy the conclusion drawn from the application of our rule. It could be satisfied by the establishment of a rules-based approach to sovereign debt workouts that parallels the law governing the debts of states and municipalities in the US, whereby debtors have an increased voice in the process, and where a baseline of financial and economic integrity for the debtor must be
maintained. At the least, our rule would clearly prefer this eventuality. A policy stance that obstructed the creation of such an approach and a mechanism to enforce it, would arguably be considered a failure to observe the rule, in the absence of any adequate justification. The change in tone at the Doha meeting, therefore, which reversed an initial openness to a debt workout mechanism, is highly suspect. Under an obligation not to obstruct the evolution of arrangements maximising the domestic resources of developing countries, any State that could be shown to have conducted itself prior to or during the negotiations at Doha in such a way as to advocate or initiate this change of language, would be said to have contravened its human rights obligations.

An interesting case is presented by the short-lived initiative within the IMF to develop and implement a ‘new approach to sovereign debt restructuring’. In 2002, a Sovereign Debt Restructuring Mechanism was designed by staff of the IMF and proposed by then First Deputy Managing Director, Anne Krueger. This proposed mechanism had a number of features that would have improved the ability of developing countries to maximise their domestic resources, at little relative loss to creditors, yet was opposed by a powerful financial lobby. Subsequently, the evolution of the mechanism “was defeated by a combination of developed country states and private financial organizations at the IMF meetings of March 2003.” Without appropriate justification, the acts of

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143 Anne Krueger, A New Approach to Sovereign Debt Restructuring (International Monetary Fund, Washington DC, 2002).
144 Robert Wade, ‘From “Liberalize the Market” to “Standardize the Market”: The Standards-Surveillance-Compliance System of Global Financial
the Executive Directors of the relevant Northern States which voted against the initiative would be seen as a breach of our rule.\textsuperscript{145}

Very similar analysis will apply to a number of other issues impacting on the ability of developing countries to maximise and mobilise their domestic resources, such as the stabilisation of international prices for key commodities, arrangements within the WTO (specifically tariff escalation and subsidies), measures to mitigate the risk and severity of financial crises, freedom for industrial policy (for example, the imposition of performance requirements on foreign investors mandating the domestic reinvestment of a certain portion of profits), and international measures to mitigate corporate tax avoidance, transfer pricing and illicit financial transfers. Such analysis will be nuanced and will not presume a simplistic and unqualified implementation of all measures deemed in the interests of developing countries, superficially construed. Balances will need to be found with countervailing factors, however, the analysis based on our thematic rule will nevertheless catalyse a significant shift in the debates in some areas, a reorientation in others, and a definitive rejection of specific policy stances in certain clear cases.

Yet, in addition to their significance for a discussion at this broad level, cooperative obligations also apply at a lower level, to a more detailed set of policy choices, the aggregation of which constitutes the broader ‘meta’ policies indicated here.

\textsuperscript{145} Further to the issue of debt, on the basis of evidence presented above the rule will also argue strongly for the following; the increased use of grants and cash transfers in development financing rather than loans; that any debt forgiveness that is negotiated should not be confused with official development assistance; and that any definition of debt sustainability must include an assessment of the debtor-State’s capacity to observe the minimum core levels of socio-economic rights.
This lower level might be termed a ‘mezzo’, or middle level (e.g., where decisions on the specific design of a debt workout mechanism are made). It is at this level that human rights norms also need to demonstrate their relevance, necessitating a more fine-grained engagement with economics. Below this is a ‘micro’ level involving a plethora of very specific choices (as to the exact definition of debt sustainability, for example), which are highly dependent on forensic economic research and analysis. At this lower level it may not be feasible or appropriate for human rights analysis to determine specific preferences. Yet it will be imperative for those trained in human rights law to be conversant in the detailed economic discussion at this level in order to properly monitor it. As always, the devil is in the details.

On this understanding, analysis is trained here specifically on one of many issue areas operating at the middle level; the policy of leveraging. This issue has been chosen because it has drawn little human rights attention to date, and it is crucial to an enforced dependence on foreign investment. It is also particularly emblematic of a neo-liberal approach to financing for development.146

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7.4 – Leveraging

The question arises whether cooperative obligations hold any relevance regarding State positions on the specific issue of leveraging. The short answer is that they hold a great deal of relevance. Human rights analysis brings an important perspective that illuminates a given set of desirable policy options. In the wider sense, if this analysis were to be replicated over the full range of issues inherent in a holistic process of financing for development, cooperative obligations could inform a principled approach to the position of foreign investment in a productive and necessarily open and plural international development strategy buttressed by evidence and heterodox analysis.

While the general application of the cooperative norm above on maximising the amounts and benefits of domestic resources, the analysis here focusses on minimising the dependence on and costs of foreign investment. Cooperative obligations are demonstrably applicable both to the specific as well as the general concerns of the current process, although the extensive ramifications are a long way from being fully charted. This is only a brief exploratory incursion into a vast and crucial field.

7.4.1 – Heterodox Analysis

The EU and the OECD are increasingly concentrating their approach to development cooperation on the private sector.147 The privatisation of development cooperation has led to a number of European countries establishing national Development Finance Institutions (DFIs) funded from public monies marked as ODA. These DFIs aim to expand the private sector in developing countries through funding for developing country enterprises148 and through direct facilitation and

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148 This is usually accomplished through financial intermediaries, which is also a problematic process. See, Peter Chowla and Dario Kenner, 'Follow the Money: The World Bank Group and the Use of Financial Intermediaries', Bretton Woods Project, London, April 2014. The IFC channels 62% of its funding through financial intermediaries. In this respect a review by the World Bank’s Office of the Compliance Advisor/Ombudsman (CAO) has concluded the following: “IFC does not have a systematic methodology for determining whether the implementation of a SEMS [Social and Environmental Management System] actually achieves the objective of doing no harm or the objective of improving E&S [environmental and social] outcomes at the subclient level.” Office of the Compliance Advisor/Ombudsman, ‘CAO Audit of a Sample of IFC Investments in Third-Party Intermediaries’, Audit Report, CAO Audit of IFC, CAO Compliance, C-1-R9-Y10-F135, 10 October 2012, p. 41. The IFC therefore “has, through its banking investments, an unanalyzed and unquantified exposure to projects with potential significant adverse
support for foreign investment from the North. DFIs have been strongly criticised for losing sight of actual development outcomes in favour of financial outcomes. In other words, they tend to operate more like ordinary commercial institutions seeking profits rather than development institutions oriented towards positive and discernible development benefits. One of the major concerns is the use of tax havens by DFIs to maximise profits, with the consequent negative effects on developing country revenue generation.

Leveraging is an extension of the rationale for DFIs. Ironically, the current push for leveraging opposes the clear recognition by the powerful States at the beginning of the post-War development enterprise that private financing would


150 To take the World Bank over the period 2010-2014, for example, while its public arms (IBRD and IDA) directly devoted $22.1 billion to health and $12.4 billion to education, its private arm (IFC) invested $36 billion in financial intermediaries with little evidence of actual development impact. See, Chowla and Kenner, 2014, supra note 148. DFIs have also been reliably assessed as highly opaque and unaccountable institutions that have great difficulty in demonstrating clear development outcomes, or any ‘additionality’ in their use of public funds, and which display very little to no developing country ownership in their operations. See, Maria Romero, ‘A Private Affair: Shining a Light on the Shadowy Institutions Giving Public Support to Private Companies and Taking Over the Development Agenda’, Eurodad, Brussels, July 2014.
not bring the desired outcome. In addition to doubting the willingness of private investors to engage in large-scale lending after the war, US officials did not think profit-driven lending and investment would effectively serve development goals.\(^\text{153}\)

In short, this is because “[g]lobal public finance cannot be directly substituted by private finance, as it pays for public goods, is more predictable and counter-cyclical, and can be targeted at the poorest countries.”\(^\text{154}\) The inescapable problem with leveraging, as with the private sector in general, is that, in the short-term, the delivery of developmental benefits has never been a financially profitable endeavour.\(^\text{155}\) In fact the desired profit-levels have often required the exclusion of these benefits. Given that it will not instil a long-term vision in private international capital markets and financial intermediaries, to achieve the goal of delivering actual benefits leveraging must ultimately meet the shortfall in expected profits. Otherwise there is no incentive for the redirection of private investment.

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\(^{153}\) Helleiner, 2009, supra note 89, p. 5.

\(^{154}\) Griffiths (et al), 2014, supra note 37, p. 4. “Public policies and sources of revenue are critical both to address market failures and to raise resources for financing long-term investments in infrastructure, high risk investment such as innovation and new technologies, global public goods, the development of small and medium enterprises.” Statement on Behalf of the Group of 77 and China by Mr. Peter Thomson, Ambassador, Permanent Representative of Fiji to the United Nations, Chairman of the Group of 77, at the 6th session of the Open Working Group on Sustainable Development Goals (New York, 9 December 2013), Published in the South Bulletin, South Centre, Geneva, 4 March 2014. See further, Jonathan Glennie, ‘A Manifesto for International Public Finance in the 21st Century’, in Sumner and Kirk (eds.), 2014, supra note 3. “Few countries have sustained rapid growth without impressive levels of public investment.”


\(^{155}\) The private sector will “invest only if there was a favourable risk-return profile. Consequently, the private sector cannot be looked towards to replace many forms of public spending”. Summary by the President of the General Assembly, 2013, supra note 29, paras 37-38.
How leveraging will in fact do this is very unclear, but seems to be based largely on a public assumption of private risk. To the extent that a leveraged venture fails the risk-burden arrives at the taxpayer’s doorstep. It potentially places the Northern taxpayer in the position of direct debtor to (mostly) Northern corporations, for an amount that could far exceed the original ‘aid’ spent. To the extent that it draws Southern governments into insufficiently safeguarded public-private partnerships, it potentially places the supposed beneficiaries of the process in the same position. In addition, evidence demonstrates that, for any given investment, the more that is financed domestically rather than through foreign sources, the greater is the long-term development benefit to the country where the investment occurs.\textsuperscript{156}

The empirical evidence on the ‘additionality’ of leveraging to date is far from promising. Patterns of investing in developing countries have not changed and seem set to continue to follow the profit motive.\textsuperscript{157} This is evident in the IFC’s practice of leveraging, where “[v]ery little IFC investment flows to low-income countries” in common with un-leveraged private investment generally, and “the sectors favoured have tended to be ones where investors – particularly foreign investors – are already investing in developing countries”.\textsuperscript{158}

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\textsuperscript{156} Prasad (et al), 2007, supra note 80.

\textsuperscript{157} With respect to Sweden’s aid leveraging programme operating through the national development finance institution, Swedfund, “a majority of the companies who answered the questionnaire stated that their particular project would have gone ahead without Swedfund.” Bo Sjö and Sara Ulväng Flygare, ‘Evaluation of Swedfund International: An Analysis of Private Sector Development Impacts’, SADDEV REPORT 2008:3, SAVDEV, Karlstad, 2008, p. 34. In a study of a number of Multilateral Development Banks and Development Finance Institutions, 55% of projects would have been realised irrespective of the additional windfall of public funding. Griffiths (et al), 2014, supra note 37, p. 25.

\textsuperscript{158} Jesse Griffiths, “‘Leveraging’ Private Sector Finance: How Does it Work and What are the Risks?”, Bretton Woods Project, April 2012, pp. 5, 9. “While the IFC is scaling up its support for investment in poor countries, the persistent bias towards FDI rather than domestic investment demonstrates that the IFC continues to dismiss the importance of
World Bank evaluation of IFC practice similarly concluded that a focus on foreign investment “seems to be in direct contravention to the logic of using resources to redress poorly developed capital markets” in developing countries.\textsuperscript{159} In this situation the most salient question is whether public funds are leveraging greater private investment or whether projects following the profit motive are in fact leveraging additional public funds to increase profit margins and further reduce the risk on ventures that would have gone ahead in any case. Leveraging then becomes the facilitation of basic rent-seeking.\textsuperscript{160}

As a Northern priority leveraging would seem contradict donor pledges in the Paris Declaration on Aid Effectiveness to align aid with recipient’s priorities, enhancing country ownership.\textsuperscript{161} It is difficult to see how a programmatic dependence on unaccountable foreign investors charged with maximising shareholder returns equates with any country’s ownership of the development process, donor or recipient. Leveraging would also seem to negate commitments to enhance “donors’ and partner countries’ respective accountability to their citizens and parliaments for their development policies, strategies and performance.”\textsuperscript{162} The

\begin{itemize}
  \item World Bank evaluation of IFC practice similarly concluded that a focus on foreign investment “seems to be in direct contravention to the logic of using resources to redress poorly developed capital markets” in developing countries.\textsuperscript{159}
  \item Rent-seeking is the extraction of uncompensated financial gain from others, usually governments, without additional productivity. See further, Jeroen Kwakkenbos, ‘Private Profit for Public Good? Can Investing in Private Companies Deliver for the Poor?’, Eurodad, May 2012, pp. 4-5.
  \item Paris Declaration on Aid Effectiveness, para 3(ii).
  \item Paris Declaration on Aid Effectiveness, para 3(iii). Ringing “serious alarm bells on whether donor governments are breaching their contract with taxpayers.” Kwakkenbos, 2012, supra note 160, p. 7. This risks the “obvious dangers of "capture” of tax-funded support by special interests, with little to show by way of net development gains.” Andrew Rogerson, The Evolving Development Finance Architecture: A Shortlist of Problems supporting a strong domestic private sector in low-income countries.” Eurodad, 2010, supra note 147, p. 4.
\end{itemize}
internal contradiction is inescapable. By Northern States’ own standards set in the Paris process leveraging should be barred unless accompanied by a very strict set of checks and balances and a detailed system of accountability. 163

It must be plainly stated that the core driver of leveraging is a simple refusal to increase overall amounts of ODA, unconditional public lending and grants. 164 The persistent and manifest insufficiency of ODA has led to the call to gamble what is there in the hope of multiplying the quantifiable dividend, with little regard to either its quality in terms of concrete development outcomes or the completely changed nature of the funds leveraged if the bet is won. As with all gambles, it could simply be lost, wasting what precious resources there are. 165 If it is won the basic nature of the funds changes from development-seeking to profit-seeking, necessarily raising tensions with the entire purpose of development assistance and cooperation.

A reference in the Doha document to the fact that ODA is “still” essential for a number of developing countries 166 suggests that leveraging foreign investment, with the goal of eventual outright replacement by this source, may be the

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164 There is no suggestion in any of the relevant documents that funds intended for leveraging will be raised in addition to existing, and declining, levels of ODA.


166 Doha Declaration, 2009, supra note 11, para 45.
nature of the aid exit strategy foreseen by Northern States. This would epitomise the logic of the current development paradigm and neatly mark the endpoint and culmination of development privatisation. Such an exit strategy is the stated aim of a publication by the World Economic Forum. The document perceives an “enormous untapped potential for greater involvement of private markets ... in meeting needs for development-oriented investments in infrastructure and other areas.”\textsuperscript{167} The document observes a consensus among some 200 business executives, who were participants in the project giving rise to the text, that

development finance institutions ... and bilateral aid agencies have the power to do much more to help unlock that potential [through the development of] user-friendly risk mitigation products, especially in the areas of regulatory and contractual risk mitigation.\textsuperscript{168}

Therefore, “the weight of [their] activities should shift over time from direct lending to facilitating the mobilization of resources from the world’s large private savings pools” and “capacity building to strengthen the enabling environment for investment”, with a view to eventually “render themselves obsolete.”\textsuperscript{169} To this end these institutions are advised, “as a matter of priority and urgency”, to overcome “the obstacles that stand in the way of a fundamental shift in their modus operandi, towards a model that sees the promotion of private investment in development as central to their mission.”\textsuperscript{170} The publication specifically recommends that the World Bank should shift capital from its public lending arms to the

\textsuperscript{168} Ibid, p. 5.
\textsuperscript{169} Ibid, pp. 9-10.
\textsuperscript{170} Ibid, p. 10.
International Finance Corporation, tasked with lending to the private sector. This has in fact occurred.\(^{171}\) A very short nod is given to the serious problem of moral hazard generated by this degree of systemic risk mitigation for investors.\(^{172}\) However, incredibly, the only response is a single line stating that “[m]ost expert participants believed that these challenges ... do not represent an insurmountable problem.”\(^{173}\) This was written before the 2008 collapse of the US and global financial systems. It can only be hoped that a more cogent response could now be expected.

Should it in fact be the intent, such an aid exit strategy, together with leveraging in general, sits very uncomfortably beside acknowledgements that ODA is “a crucial instrument” for the support of public services forming the basis of socio-economic rights realisation in developing countries and “critical to the achievement of ... internationally agreed development targets.”\(^{174}\) Leveraging then runs a very high risk of becoming a simple reallocation of publically accountable funds from disadvantaged people to foreign investors. An aim of direct and accountable provision is replaced with an intention to (hopefully) spur vague and undefined ‘development-oriented investments’. As an aid exit strategy this is, at the very least, a

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\(^{171}\) See section 2.2. “The past decade has witnessed a general trend among all [Multilateral Development Banks] which have nearly trebled their combined private sector portfolio, from €7.3 billion to €21.24 billion.” Kwakkenbos, 2012, supra note 160, p. 11.

\(^{172}\) Concerns were expressed “related to the fact that financial crises and failed privatisations have soured enthusiasm for engaging the private sector, and the long history of “bailouts” have made policymakers wary of any type of guarantee arrangement that might serve to encourage reckless private sector risk-taking at taxpayer expense.” World Economic Forum, 2006, supra note 167, p. 15.

\(^{173}\) Ibid, p. 15.

\(^{174}\) Monterrey Consensus, 2003, supra note 12, para 39 (emphasis added). In 2013, “ODA continued to be the primary source of revenue of least developed countries ... ahead of foreign direct investment and remittances. The recent fall in ODA to least developed countries was a matter of great concern and needed to be reversed.” Summary by the President of the General Assembly, 2013, supra note 29, para 75.
highly insecure and extremely irresponsible one. The dissipation of accountability in the displacement of ODA by FDI becomes another facet of an unacceptable derogation of public authority to private power.\textsuperscript{175}

Ironically, given the tensions with the process already noted, the leveraging agenda has been advanced most significantly within the Paris process on aid effectiveness itself. The 2011 outcome document from the Busan meeting goes well beyond its aid effectiveness mandate to propose a ‘new’ development model heavily dependent on leveraging private finance, and “building stronger relationships between development co-operation and the private sector, by supporting the creation of a favourable environment for the different partners and fostering public-private partnerships.”\textsuperscript{176} The “central role” of the private sector is repeatedly stressed, and its enhancement is simplistically equated with jobs, wealth creation and poverty reduction.\textsuperscript{177} Commitments are made to “engage” with business associations “to improve the legal regulatory and administrative environment” and “ensure” that it is “sound” from their point of view.\textsuperscript{178} Of greatest concern, pledges are made to actively “[e]nable the participation of the private sector in the design and implementation of development

\textsuperscript{175} As discussed in section 7.3.4 above.
\textsuperscript{177} Busan Partnership for Effective Development Cooperation, Outcome Document of the Fourth High Level Forum on Aid Effectiveness, Busan, Republic of Korea, 29 November – 1 December 2011, para 32. An increase in the size of the private financial sector is not reliably linked with long-term job or domestic wealth creation and may have no effect whatsoever on poverty reduction, but instead may create significant systemic risk that jeopardises economic stability, effectively destroying jobs and real wealth, and increasing poverty. The latest global financial crisis is only one of a long list of examples in this regard.
\textsuperscript{178} Ibid, para 32(a).
policies and strategies”, opening the door to direct and mandatory foreign investor influence over domestic public policy.\footnote{179}

The significant dangers here cannot be over-emphasised. This makes FDI facilitation and penetration a measurable and enforceable international development target. Such commitments are set within a perceived need to “modernise, deepen and broaden” development cooperation to involve “non-state actors that wish to shape an agenda that has until recently been dominated by a narrower group of development actors.”\footnote{180} These ‘new development actors’ are invited to help “rethink what aid should be spent on and how.”\footnote{181} This is an agenda that will clearly intensify opposition from the NGO sector to increased corporate involvement in development subsidised by ODA.\footnote{182} Evidence demonstrates that instead of improving development outcomes, this policy results in greater control by multinational corporations of resources, production and markets in developing countries, to the detriment of local economies and small producers and businesses.\footnote{183}

\footnote{179} Ibid, para 32(b).
\footnote{180} Ibid, para 7.
\footnote{181} Ibid, para 28. The EU considers “the private sector as a financing partner, implementing agent, advisor or intermediary”. European Commission, 2014, supra note 147.
The Busan document also sets up a new ad-hoc institution, a Global Partnership for Effective Development Co-operation, to “support and ensure accountability for the implementation of commitments at the political level”, including commitments to leveraging, and to exchange knowledge and review progress.\textsuperscript{184} This new institution is supported by the OECD and the UNDP. The Global Partnership is still in its formative stage, and the methodology of its monitoring is nascent. It is currently working on a number of indicators to measure and track progress in its goals, including progress on private sector inclusion in developing country decision-making on crucial issues of development policy.\textsuperscript{185}

The relevant indicator currently proposed specifies that a developing country will be judged on “the degree of inclusion of private sector stakeholders in country level dialogue around policy strategies and reforms of the enabling environment for private sector investment and development.”\textsuperscript{186} The ‘private sector’ is defined to necessarily include local and foreign enterprises, which are to participate “in the design and implementation of the most important reforms of interest for private sector development (including those related to the improvement of the legal, regulatory and administrative

\textsuperscript{184} Busan Partnership, 2011, supra note 177, para 36. See further, Proposed Mandate for the Global Partnership for Effective Development Co-operation, available from the associated website, \url{http://effectivecooperation.org/about.html} (1-8-2014). Notably, participation is only open to States and organisations who endorse the Busan Partnership agreement, thereby endorsing the programme of leveraging. This would exclude a number of well-informed civil society organisations at the very least, and may also exclude a number of the more justifiably cautious developing countries that can afford to seek a more independent development path.

\textsuperscript{185} Proposed Indicators, Targets and Process for Global Monitoring, available from the associated website, \url{http://effectivecooperation.org/about.html} (1-8-2014), p. 18.

\textsuperscript{186} Ibid, p. 18.
environment for private sector investment). The proposed target is “[c]ontinued progress over time.”

The requirement of continuous progress creates a ratchet mechanism for foreign investors to directly and ever increasingly influence developing country policy in the areas of greatest relevance to their interest of profit maximisation, sanctioned by no lesser authority and value than ‘effective development cooperation’. Should such a proposal actually be adopted and pursued it represents a very serious incursion on the sovereignty of developing countries and fundamental notions of democratic governance. Although this would not result in any binding legal obligation under international law for these countries to open up the exercise of their right to economic self-determination so explicitly to the influence of foreign investors, there is nonetheless an extraordinarily clear expectation. Should they refuse to allow such direct ‘participation’ there could potentially be heavy consequences. A failure to demonstrate ‘progress’ in this regard would equate to ‘ineffective’ development cooperation and a disregard of ‘commitments’ made under the Busan initiative. It must be presumed that a developing country behaving in this manner would be ‘legitimately’ punished by donor States, multilateral development institutions and international financial markets. In the potential operation of this proposed indicator, development ‘effectiveness’ becomes an advanced technology of FDI facilitation and dependence. At another conceptual level, the empowerment of foreign investors becomes development itself.

Furthermore, it is unclear how the activities of the OECD driven Global Partnership will interact with the work of the

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187 Ibid.
188 Ibid.
DCF set up six years earlier within ECOSOC by the fully representative UN World Summit.\textsuperscript{189} The mandate of the DCF already covered the self-imposed workload of the Global Partnership.\textsuperscript{190} However the DCF is not guided by a programme of leverage and is not expressly aligned in its ideology towards a systematic increase in dependence on the private sector.\textsuperscript{191} The need for the new Busan institution is then somewhat obscure, and certain developing countries have sought to distance themselves from it.\textsuperscript{192} There is good reason to believe that within the process of financing for development the DCF will better reflect the interests of developing countries themselves (in line with the stated goals of Northern States in the Paris process),\textsuperscript{193} and, as a product of the UN World Summit operating under the umbrella of ECOSOC, it should be regarded as the authoritative forum in

\textsuperscript{189} 2005 World Summit Outcome, Resolution adopted by the General Assembly on 16 September 2005, UN General Assembly Resolution 60/1, UN Doc. A/RES/60/1, 24 October 2005, para 155(b).


\textsuperscript{191} On the transformative possibilities of the DCF see, South Centre, 2008, supra note 52. This body would seem best suited to perform the work of a “Global Economic Coordination Council”, recommended by the Stiglitz Report. Report of the Commission of Experts, 2009, supra note 18, pp. 90-91. However, the Report suggests that this body have a higher standing, as equivalent to the UN General Assembly and the Security Council. The DCF could be accordingly elevated from its position as a subsidiary body of ECOSOC.

\textsuperscript{192} India and China did not send delegations to the Partnership’s first High Level Ministerial Meeting in April 2014, citing concerns about the Partnership’s approach to South-South cooperation. Jeroen Kwakkenbos, ‘The Global Partnership for Effective Development Cooperation Struggles to Find Relevance’, EURODAD, 8 May 2014. This stance is reflected in statements by officials from South Africa, China, India and Brazil viewing South-South cooperation as a conceptually distinct phenomenon from Northern aid and therefore ill-disposed to consideration in a forum based on an OECD aid initiative. South Centre, 2008, supra note 94.

\textsuperscript{193} “Developing countries in general have emphasized the DCF’s responsibility to help ensure that developing countries control their own development agendas and that development cooperation through ODA must be supportive of these.” South Centre, 2008, supra note 52, p. 25.
the event of any divergence. The Busan institution is a product of an OECD initiative that was initially limited to the issue of aid effectiveness. It is to be hoped that it will avoid any duplication or dissonance, and will adopt an appropriately deferential attitude toward the DCF and the overall heightened legitimacy of the UN process.

The fundamental question is one of who will control development, and through what institution. The situation is reminiscent of earlier ‘turf wars’ over development. The International Development Association (IDA, a part of the World Bank), which now plays a central role in development, was proposed in 1959 by US Secretary of State Robert Anderson, and duly created in 1960 to provide low interest development loans to poor countries and to coordinate a multilateral approach to development policy. This was done despite the fact that a coordinating body had already been created ten years earlier tasked with the same role within the UN Economic and Social Council (ECOSOC), the Expanded Technical Assistance Program (ETAP). In addition, the Special UN Fund for Economic Development (SUNFED), also operating under ECOSOC, was already providing low interest development loans. The US and other major powers at the time could not effectively control ETAP or SUNFED, leading to the creation of the IDA. Subsequently, ETAP and SUNFED languished due to a lack of resources and were merged to

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194 All States at Doha endorsed this perspective: “We re-emphasize the importance of the Development Cooperation Forum of the Economic and Social Council as the focal point within the United Nations system for holistic consideration of issues of international development cooperation, with participation by all relevant stakeholders.” Doha Declaration, 2009, supra note 11, para 47.

195 South African officials have expressed deep misgivings regarding the entire discourse on aid effectiveness initiated by the OECD and the World Bank. South Centre, 2008, supra note 94, para 16.

196 For example, the South Centre suggests that “existing initiatives such as the implementation of the OECD’s Paris Declaration on Aid Effectiveness should be reported to the DCF”, an arrangement that would formalise the hierarchy of these two institutions. Ibid, p. 39.
become the UN Development Programme. Pahuja marks this as the point where international development was taken out of the hands of the UN and placed in those of institutions controlled by the powerful States.197

To summarise, in responding to the policy of levera ging, a heterodox approach will emphasise at least seven issues.198 First, public funds should be used to support democratically decided development paths set by national governments, focussed on poverty reduction and concrete development benefits. Public financing for development is to be preferred over private sources, as it is more predictable, stable and counter-cyclical, is better able to be directed to the poorest countries and the most needed economic sectors, and for these reasons is superior in the provision of universal access to basic goods and services.

Secondly, if public funds are used to directly benefit the private sector, it is crucial that they should encourage and augment the national private sector rather than prioritising foreign capital. Efforts must be focussed on small and medium sized enterprises in the developing countries themselves. In other words, the practice of prioritising foreign investment over domestic enterprises, exemplified by the World Bank’s IFC, must be reversed.199 Furthermore, any such policy must be accompanied by a legalised, rather than simply a rhetorical, commitment to responsible investment. Both donor and recipient governments should impose obligations on investors and financial intermediaries, which

197 See further, Pahuja, 2011, supra note 119, pp. 68-69.
199 This is even recommended by the Bank’s own Independent Evaluation Group. See, Independent Evaluation Group, 2014, supra note 159.
could be modelled on a Responsible Finance Charter developed by Eurodad.\textsuperscript{200}

Third, partnerships and alliances with the private sector should be conditioned on maximising direct, tangible and programmatically identified benefits to the poor. The fundamental purpose of realising concrete development outcomes must be facilitated by their prior clear identification, transparent pursuit and continuous evaluation throughout the life of any leveraged project. Therefore, there is a clear necessity for “timely and independent ex-ante impact assessments for private sector investments that [any State] supports or guarantees to ensure that they can deliver positive development outcomes.”\textsuperscript{201} Fourth, leveraged private sector involvement should focus on areas where it is currently weak and where the prospects of development benefits, rather than lower risks or higher returns, are clearly realisable. Investment decisions therefore need to be fundamentally assessed in relation to social, rather than financial returns.

Fifth, where financial intermediaries are utilised the transparency of the flow of funds must be maintained. Intermediaries must therefore have strong development mandates and be highly transparent in their operations. Sixth, any public funds earmarked for leveraging must be strictly additional to existing commitments to development assistance. This would logically, if ideally, mean that States would only be able to begin a programme of leveraging after delivering 0.7% of their GDP through development assistance programmes compliant with the Paris Principles on Aid Effectiveness.

\textsuperscript{200} Molina, 2012, supra note 163. These principles should also apply to public investment bodies.

\textsuperscript{201} Eurodad, 2010, supra note 147, p. 2.
Finally, donor governments should subject the policy, practice and rationale of leveraging to fundamental theoretical revision and empirical investigation. They should conduct a full assessment of the impacts of the policy itself, as well as the side-effects and ‘opportunity costs’ of the diversion of significant amounts of aid. The practice of leveraging should be discontinued until these conditions are met, and resumed only if the subsequent evidence indicates a clear likelihood of better development outcomes than direct utilisation of public funds and processes.

7.4.2 – Human Rights

Leveraging is most obviously conceptualised, from the viewpoint of cooperative obligations, as primarily an effort to maximise the externally available resources for socio-economic rights realisation, without reducing the amount of domestic resources available. Net additional resources will then naturally convert into faster progressive realisation of rights. If this superficial and simplistic logic held up to scrutiny there would be nothing of which to complain. Indeed, this would be a highly desirable policy for Northern States to implement and a clear observance of their cooperative obligations. Under a neo-liberal paradigm, viewing private resources as always superior to public, it will be especially laudable as it not only increases quantity of funds but also their quality.

202 Griffiths (et al), 2014, supra note 37, p. 34.
Yet, the simplistic logic does not bear heterodox scrutiny. From this point of view there is a fundamental question mark over whether leveraging in fact works to increase the total amount of resources.\textsuperscript{203} Furthermore, even if it does it is probable that the utility and quality of those resources will be changed dramatically such that, in relation to a long-term scenario where leveraging was not implemented, a net loss of identifiable development benefits may very likely be the result. Simply stated, overall there is a high probability that leveraging will retard rather than accelerate positive development outcomes, especially for the poor and marginalised. The same conclusions may be drawn in terms of socio-economic rights realisation. There is, in balance, a distinct likelihood that leveraging will decrease the amount of resources available specifically for socio-economic rights, without any return. Admittedly there is a need for more empirical evidence on the issue of leveraging, so these conclusions are duly couched in the qualified terms of probability. However, even the World Bank’s own internal evaluation of the IFC’s practice of leveraging found that the results are in direct contravention of its purported benefits. Ultimately this is a good case of a context in which the precautionary principle will play an important role.

As detailed above, the possible dangers and downsides of leveraging are deep and extensive. The downsides apply as equally to socio-economic rights realisation as they do to the pursuit of developmental benefits. The key link here is the provision of public goods and services, which is severely

\textsuperscript{203} These ‘additional’ resources may even crowd-out domestic financial resources and stall the development of endogenous financial markets and capital accumulation, which in theory could lead to a negative net result. See, Rodrik and Subramanian, 2009, supra note 72, p. 131; Ffrench-Davis and Griffith-Jones, 2011, supra note 76, p. 579; Okafor and Tyrowicz, 2009, supra note 77; Dhar and Roy, 1996, supra note 77. However, this point is not pursued here.
endangered by a policy of leveraging. However, when we speak of cooperative obligations we are adding another very important consequence to a possible scenario where the economic negatives of leveraging outweigh the positives; the contravention of an international legal obligation, drawing State responsibility. This greatly elevates the stakes of what is ultimately a gamble of taxpayers’ money.

In regard to the criteria of authority, effective control and decisive influence, it is clear that Northern States meet all three in the present context. The policy of leveraging applies directly to public funds disbursed bilaterally and through development finance institutions over which they clearly have effective control. Yet it also applies when the policy is employed within multilateral development banks, as they collectively control these institutions. Developing country ownership of the development and aid delivery process, although an increasingly visible concept, remains largely at the level of rhetoric. The failure of the Northern States to meet their commitments in the Paris Declaration testifies to this fact. Northern States therefore incur full responsibility for any harm resulting from the practice of leveraging.

Applying the critical criteria of foreseeability, although the arguments and evidence presented above may be regarded as highly persuasive, it nevertheless does not lead to a definitive conclusion that leveraging will result in a human rights deficit in all respects and in every instance. Leveraging is a relatively recent phenomenon, and few have studied it in detail, least of all those governments practicing it. Although many are convinced that the evidence is sufficient to meet the standard of a real and foreseeable risk to the socio-economic rights of peoples in developing countries, it is conceded that the evidence could be stronger.
Those who have given the most time to the study of leveraging themselves acknowledge the difficulty of gathering data, methodological problems and the dearth of comparative studies, and usually end in a call for further inquiry. However, in an environment of less than desirable empirical evidence, an application of coherent logic leads to an abundance of deep concerns. In this situation, it is imperative to apply the precautionary principle. As such, the practice of leveraging should be discontinued while further study and debate is conducted, and only resumed in a possible future environment where this abundance of deep concerns has been revealed as groundless. Crucially, human rights impact assessments of the practice and theory of leveraging will be essential to dispelling these concerns.

It is likely that a number of the heterodox conclusions summarised at the end of the previous section will translate into similar conditions on any practice of leveraging that is to satisfy Northern States cooperative obligations. It is probable that only a minor portion of public funds could be dedicated to the practice of leveraging due to the unsuitability of private sources of capital for public goods provision, their instability and cyclicality, and the difficulties on directing them to those countries and communities most in need. A mechanism will be essential to ensure that private investors, institutions and projects leveraged with public resources maintain the required levels of transparency, accountability and human rights respect, both to recipient communities and to donor taxpayers. These private actors will have to be held to pre-decided and clearly specified developmental outcomes and goals expressed in human rights terms, rather than evaluated by financial criteria. A final condition to ensure no harm to human rights in comparison to a scenario without leveraging,
will demand that it should only be practiced once existing commitments to the public delivery of 0.7% of GDP have been met.

With regard to another issue touched on above, it is important to note that the process of financing for development has perhaps begun to fork into two paths, each with their own institutional home and separate, though related, textual mandates. With the significant evolution of the relatively narrow OECD-led Paris process on aid effectiveness into an expansive Global Partnership on Development Cooperation broadly construed, the Busan conference produced an outcome document that differs in important respects from those of Monterrey, Doha, and the World Summit, which have given rise to the DCF within the UN. It remains to be seen how complementary these two institutions and development paths prove to be. One critical difference is in the relative weight given to leveraging in each path. Although leveraging is prominent in the document from Doha on which the DCF is most likely to base its orientation, it is far more prevalent in the Busan document informing the Global Partnership.

In this regard, the assessment criterion of ensuring participation in the process of decision-making, as part of an obligation to ensure respect for socio-economic rights extraterritorially, will indicate a specific preference. It is clear, as noted above, that developing countries as a whole are better represented in the DCF, and various influential countries have announced a clear antipathy towards the Global Partnership, some have simply chosen not to participate. There is no accusation that Northern States have actively excluded any developing countries from the Global Partnership. However, there would be a presumption, on the
basis of the principles of participation and country ownership, that guidance on development practice emanating from the DCF should displace any conflicting initiatives born from the Global Partnership. An obligation to ensure respect will mandate that Northern States observe this presumption.

Finally, the substantial tension between leveraging and certain other aims within the project of reforming aid delivery is of special concern when public goods and service provision are taken as rights issues. Relative to a scenario where amounts of ODA are substantially increased under a reformed framework of delivery through mechanisms of public accountability, ensuring country ownership and the enhancement of quantitatively identifiable development outcomes in terms of public goods and service provision, a scenario of leveraging and dwindling amounts of ODA will almost certainly result in lower levels of socio-economic rights realisation. At the least, it will result in a deterioration of accountability, a fundamental principle of cooperative obligations. The dramatic change in the nature of resources will also result in the realignment of development priorities with profit-making opportunities, a result deeply at odds with the provision of certain levels of human wellbeing as universal rights.

These concerns are vastly magnified if the tensions within the aid reform process are foreseen as heralding the evolution of an exit strategy based on the logical endpoint and ‘triumph’ of leveraging. This is, perforce, speculative reasoning, however, as argued above it is based on some solid indications. Such an exit strategy could only result in the increasing precariousness of socio-economic rights, claimable only against governments, domestic or foreign. As such, the leveraging of ODA to facilitate FDI and the possible
employment of this programme as an aid exit strategy runs a very foreseeable risk of negatively affecting the human rights of people in developing countries. In fact it is all but inevitable. It would clearly be a breach of Northern States’ cooperative obligations. This conclusion is only sharpened by the paradoxical observation that while financing for development is increasingly defined by foreign capital in such a manner as to place socio-economic rights in ever greater jeopardy, ‘development cooperation’, of which financing is only a part, is increasingly defined by the rhetoric of human rights realisation.

Such an aid exit strategy is, of course, an extreme scenario. Yet, it clearly illustrates the inherent risk to socio-economic rights in the logic of leveraging. Another scenario, which is almost equally extreme yet is far closer to realisation, is one wherein the Global Partnership for Effective Development Cooperation may soon be enforcing a soft-law norm mandating an ever increasing degree of direct influence to be exercised by foreign investors over the development policies and the domestic economies of developing countries. Under the aegis of ‘effective development cooperation’, foreign investors, with no direct legal obligation to take account of human rights, may be further empowered by another international mechanism to increasingly displace the administrative and legal functions of elected governments, bound under international law to fulfil human rights. Under a cooperative obligation to desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of socio-economic rights extraterritorially, any even remotely influential member State of the Global Partnership must immediately drop any current support and instead actively oppose the development of the proposed indicator specified
above, and should act to limit the scope of the relevant clause in the Busan outcome document on which it is based (if not eliminate it altogether). States within the DCF should act swiftly to denounce this development towards such mandatory and progressive participatory rights for foreign investors, and ensure that no such development is duplicated in that institution.

In sum, cooperative obligations serve to complement and reinforce a heterodox approach to financing for development. They act to lend weight to this approach, which moves the underlying paradigm away from policies and practices that entrench a dependence on foreign investment towards a focus on policies that foster self-sufficiency and domestic revenue generation and mobilisation. The focus would shift from trying to ‘help’ more, for example through multiplying private capital flows to developing countries that have, at best, a dubious development outcome, to trying to harm less. As one study published by the European Parliament observes,

A far better contribution for the EU, and other developed economies, would be to alter their policies and practices that can hinder domestic investment in developing countries, including by having a strong development dimension to investment treaties, tackling illicit financial flows, supporting debt workout mechanisms and debt audits and showing leadership on responsible financing standards.204

These countries should concentrate efforts on systemic reforms to the international financial architecture to make it function appropriately in service of nationally determined development priorities. They should focus on increasing amounts of ODA and other forms of public finance for

204 Griffiths (et al), 2014, supra note 37, p. 34.
development, and enhancing the effectiveness of delivery. Where the private sector is concerned, they should concentrate on the needs of the domestic private sector, and the varied requirements of each developing country in accord with local specificities and priorities, rather than forcing a uniform approach geared towards the attraction of foreign capital.

Numerous other issues, which could not be addressed in detail here, also bear heavily on the creation of a dependence on foreign investment and have huge human rights significance, such as international tax cooperation and the abolition of tax havens, governance of the international financial institutions, trade negotiations, and the establishment of international financial stability. These issues are already subject to extensive political and economic debate in the field of financing for development, even if they are very rarely addressed through the lens of human rights obligations. However, their detailed consideration must be left for another day. The aim here is not comprehensive, but is only illustrative; to demonstrate the relevance, importance and operative value of cooperative obligations, at both an overarching and a more granular level, and the fact that, if applied in alliance with heterodox analysis to the process of financing for development, they would ease the pressure on developing countries within negotiations on investment agreements to a very significant extent. This could provide for the creation of an investment regime governed by concern for development and human rights realisation.

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205 This chapter has also demonstrated in more specific, if still rudimentary, terms the mode by which cooperative obligations would be applied in the detailed process of human rights impact assessment before, during and after negotiations on investment agreements, as outlined in section 6.6.
That should be the goal. The next replacement for the neoliberal paradigm is yet to take shape, but on a broad reading of history it is reasonable to expect the pendulum to swing back towards a Polanyian re-embedding of the economy in social values. With the new international focus on business and human rights, and an increased emphasis on socio-economic rights within that frame, human rights law is making headway into the realms of investment and development financing. The current investment regime is undergoing substantial pressure for deep reform, and in time may provide far less of a restrictive backdrop to multilateral negotiations, to the benefit of the bargaining position of developing countries. In short, circumstances may be viewed as changing relatively quickly, and perhaps not for the worse. It is to these changes that we now turn as a focus for the conclusion.
8 - CONCLUSION

First they ignore you, then they make fun of you, then they fight you, then you win.\(^1\)

This study has outlined a holistic human rights critique of the current approach to foreign investment and its role in global development. It argues that the major focus of the existing literature on foreign investment and human rights has been counterproductively narrow. Among those generally seeking to preserve the integrity of human rights, this has led to an identification of the problem as either the process of arbitration or the technical configuration of certain substantive rules of the investment regime, or a combination of both. There is no doubting that, from a human rights perspective, investment arbitration and the rules of the regime are a significant and very urgent problem. As such, the technical details of the regime as currently formulated form a significant focus of this study.

Yet, the founding logic of the regime and the broader context of international development, in which it is set and from which it draws its raison d’être, attract little attention within the extant human rights critique. When they are brought properly into perspective the full purpose of the regime becomes visible, *which is not only to protect investors*

but also to facilitate and enforce the expansion and intensification of foreign investment as the development solution. From this standpoint, the resolutions proposed by the extant critique appear naïve and unsatisfactory. Ultimately, the fate of human rights is then left perilously subject to the interpretational vagaries of arbitrators tasked with safeguarding the fundamental purpose of the regime as identified.

In contrast, this study has sought to highlight the crucial relationship between the regime and this wider set of international arrangements, presenting the investment regime as a logical symptom of a deeper problem inherent in this broader context. The core problem is the operation of a fundamental development paradigm structurally and increasingly oriented towards intensified dependence on foreign investment, and the nature, operation and prospects of the investment regime are not dissociable from it. Such a reorientation of the problematic illuminates the reasons why the majority of human rights solutions proposed to date are somewhat dissatisfying. There is no doubt that to properly safeguard human rights the current investment regime needs to be changed, yet the fundamental degree of necessary change, and the overwhelming importance of contextual factors in the process of such change, only becomes visible once the analytic lens is broadened. The study points out that there have been certain responses to the legitimacy crisis of the investment regime and its exclusion of human rights concerns. However, overall, these shifts have been insufficient from the holistic human rights viewpoint expressed here, just as they have also fallen short from a number of other related viewpoints.
The deeper human rights analysis of this study has demonstrated a clear affinity with these other viewpoints, broadly described within the ‘storm-brewing school’, providing structural critiques and advocating a fundamental revision of the investment regime. Yet going further, and arguably encompassing all of these other viewpoints, a human rights analysis possesses an organising normative principle of international cooperation, which has the potential to inform a rule-based and consistent approach to both the revision of the investment regime and the determining contextual factors giving rise to it. A full human rights analysis therefore offers a principled and conceptually unified solution to the core problem and one of its present symptoms, through the rubric of adherence to an existing set of obligations to cooperate for the universal respect of human rights. At a minimum, they were intended to prevent the creation of international legal and economic arrangements between States, which negate their efforts at the domestic level to create the necessary conditions for the realisation of socio-economic rights. In other words, the obligations were created precisely to deal with scenarios such as the problematic presented here.

It is not surprising therefore, that their functional utility in mapping a coherent solution is readily demonstrable, providing principled modalities for the renegotiation of the investment regime and a reappraisal of the process of financing for development. This is essentially a matter of giving material content and body to a form long neglected. The obligations are nothing new. Until recently, their systematic occlusion from view in the human rights panorama has been a natural function of the influence of the powerful over this terrain, reflecting satisfaction with present arrangements and current practices of State agency. However, the increasingly
blatant failures of global governance and the international economic order have greatly undermined the credibility of the powerful, and have loosened their grip on both the dominant human rights discourse and transnational power itself. To a large extent, events have overtaken the traditionally dominant States who once had the strongest interest in suppressing the evolution of cooperative obligations. This fact has only underscored the nature of these obligations as necessary criteria for future global organisation.

This is nowhere more evident than in the causes and consequences of the last global financial crisis. Due entirely to their own domestic and international policies the traditionally powerful economies of North America and Europe respectively imploded and sank, dragging the whole world with them. This has led to unprecedented levels of negative human rights and economic externalities where both the poor economies and the poor within the wealthy economies have paid heavily for the mistakes of the rich. And they have paid literally, with hard cash. The same States that caused so much damage were so depleted themselves that they held out cupped hands to the leading developing countries and asked for help. They had no right to do so. Through past practice they have sought to negate such a right, establishing an order of supposed international ‘charity’ according no rights to those in need. Of course, the order did give these leading developing countries the clear right to refuse help to the traditionally powerful and wealthy; a legal right in international law and an obvious moral right given their historical treatment. Yet, if not through altruism then through a clear appreciation of their enlightened self-interest, these countries complied with the request for help, contributing $165 billion to the IMF account
in order to help bail out a range of developed economies, mostly in Europe.²

There are now significant cracks in both the previous mould of international relations and the mainstream human rights discourse through which cooperative obligations are currently breaking through. The time has now come for States themselves to elevate their practice of international cooperation to the next level, recognising obligation where many persist in the dangerous ‘comfort’ of empty rhetoric. As the failure of a ‘political commitment’ to MDG 8 amply demonstrates, this rhetoric ever more thinly veils the shame of a regular abuse of power in relation to international economic mismanagement. The necessity of implementing a cooperative norm providing a minimum level of obligation to ensure respect for human rights at all times and in all contexts, long ago obvious to the drafters of the ICESR, should now be obvious to all.

It would seem to have been obvious to the drafters of the Lisbon Treaty, which now binds the European Union to “respect the principles” of “universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, ... and solidarity” in the “development and implementation of the different areas of the Union’s external action ..., and of the external aspects of its other policies.”³ This recent regional consolidation of the minimal cooperative obligation, to ensure respect for human rights in all contexts and circumstances, is arguably indicative of a trend towards greater recognition of cooperative obligations by States. It may

³ Treaty on the Functioning of the European Union, Articles 21(1), 21(3)(1).
be that powerful States are beginning to recognise the
necessity of so binding themselves.⁴

By grounding this brief sketch in significant detail, the
study has demonstrated the potential of cooperative
obligations to resolve the given problematic; to shift the core
development paradigm, and to effect the consequent
ramifications in financing for development and the structure
of the investment regime. This provides a thorough and
principled human rights approach to foreign investment and
its place in global development. Aside from the utility of this
approach, a human rights critique of the present problematic
that omits cooperative obligations would be fundamentally
incomplete. As such, this study begins to fill a significant
gap in the previous literature on the intersection between foreign
investment and human rights.

However, some States continue to dispute the existence and
increasing practical necessity of the cooperative norm,

⁴ Langford Coomans and Isa point out that although “[a]uthoritative
practice concerning extraterritorial ESC rights obligations is clearly at a
nascent stage in international law and relations … it is possible to point to
the application of the rights in various arenas”, including State practice.
See, Malcolm Langford, Fons Coomans and Felipe Gomez Isa,
‘Extraterritorial Duties in International Law’, in Malcolm Langford (et al
eds.), Global Justice, State Duties: The Extraterritorial Scope of Economic,
Social and Cultural Rights in International Law (Cambridge University Press,
Cambridge, 2013), pp. 92-94. However, although the EU has bound itself
to the minimal cooperative norm it is yet to develop a full awareness of its
broad ramifications or an appreciation of the procedural modalities
required to ensure that it abides by the law it has made. This is evidenced
in the fact that EU obligations under TFEU Article 21 are not mentioned at
all in the current process of formulating an EU-wide investment policy.
However in relation to the right to water the EU has begun to implement at
least a verbal recognition of the connection to cooperative obligations. See,
European Parliament Report on the Commission Communication on Water
Management in Developing Countries and Priorities for EU Development
Cooperation (Committee on Development Cooperation), COM (2002) 132-
C5-0335/2002-2002/2179 (COS), 4 September 2003. Belgium, Norway and
the UK, have linked their “official recognition of the right to water with
extraterritorial commitments of both action and restraint.” Langford (et al),
Ibid, p. 93.
sometimes in strong terms. Beyond the worth of this study as an academic endeavour, this may be seen to compromise the viability of the present proposal as a practical solution. The argument of this study is based on certain basic premises: firstly, that the cooperative obligations identified here are in fact enveloped in the current list of obligations arising from international human rights law; secondly, that they are capable of having a practical impact providing a meaningful balance between human rights and investment interests; third, that they might at least be amenable to the parameters of a realistic political solution; and fourth, that there is no better available framework to resolve our problematic, and that the solution proposed will not, at the least, make matters worse. This study has focussed on grounding the first two assumptions, and in particular on demonstrating the potential practicality of the cooperative norm. That is, it has spoken at length to its existence and functionality. Yet it is necessary to attend also to the feasibility and the desirability of this specific solution. The remainder of the conclusion addresses these two points.

In doing so, it seeks to rebut two core arguments. First, it may be argued that this norm is too radical a solution, too dangerous to the present power-structure of the global economy, and therefore will of necessity be rejected by the currently powerful States as overly constraining of their sovereign right to defend and pursue their respective interests in international relations. The gap between present reality and the human rights-compliant processes described here may be seen as too large to warrant the expenditure of energy aimed at narrowing it. Cooperative obligations drawn from human rights law are therefore unfeasible, scant resources would
thereby be wasted and a more achievable goal should be pursued. This is the political realist argument in essence.\(^5\)

Secondly, it has been argued that human rights are inherently a part of the problem of unjust global governance, utilised selectively by the powerful to justify the processes and structures that are designed to their benefit, and to de-legitimise opposition and resistance. As part of the problem they cannot be a solution, and to employ them in hopes of engendering a shift of power and a practical outcome in just terms is folly. Cooperative obligations to respect human rights are therefore undesirable and likely to result in disappointment, and worse, disillusion with the promise of our ‘last utopia’.\(^6\) This may be termed the human rights realist argument.

These are perhaps the most prevalent and seemingly powerful arguments undermining the existential and functional cases for cooperative obligations made so far. Nevertheless, on closer examination they do not possess the ‘obvious’ power with which they superficially may seem to cut through the ‘misplaced hopes’ and ‘dreams’ of the proposed solution. In fact, their rebuttal may be seen to enhance its

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\(^5\) An immediate response that attacks one of the essential background assumptions of the political realist argument is provided by Frank in answering the fundamental question underpinning the argument: “In practice, don’t states flout international law whenever it suits their interest? Well, actually, no. The real "reality" of state conduct is not that states habitually disobey the rules when they do not serve their immediate interests, but, to the contrary, that there is a demonstrable historical pattern of prevalent state compliance. ... Unfortunately, the facts of state behavior are less important than the perceptions. It is the perception of habitual noncompliance that determines the toll unlawful behavior actually takes on law’s capacity to maintain social order.” Thomas Frank, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium* 100 *American Journal of International Law* 1 (2006), p. 92 (original emphasis).

hard-nosed likelihood, presenting interesting avenues by which to point to lesser observed realities that are sure to be increasingly weighty and relevant to a future world.\textsuperscript{7}

8.1 – Power and Change

Some political realists will stress the fact, as noted in section 5.3.3 above, that within negotiations on the Optional Protocol to the ICESCR some Northern States persisted in viewing the cooperative clause in the Covenant as moral instead of legal in character. They will surmise that these States are unlikely to change course. They may also suggest that the power of multinational corporations will not allow them to change course even if they wished to.

Aside from an entirely valid if simple response, that ideals remain inherently worthy of pursuit without regard to subjective judgements of their likely short-term attainment,\textsuperscript{8} a number of further responses are available. To begin with, despite the obvious relevance of realist theory to an explanation of international law it is now beyond doubt that it is far from capable of offering a full explanation, for which we also need theories of cosmopolitanism and the socialisation of States.\textsuperscript{9} These theories provide necessary perspectives to

\textsuperscript{7} The following discussion is heavily inspired by the work of Thomas Frank, who takes a similar approach, observing that advocating the adherence of States to what some may term ‘idealistic rules’ is “not a form of moral philosophy but a hard-headed realization of the limits of power and of law’s potential for serving everyone’s long-term self-interest.” Frank, 2006, supra note 5, p. 106.

\textsuperscript{8} “In the long run men hit only what they aim at. Therefore, though they should fail immediately, they had better aim at something high.” Thoreau, 2004, supra note 1, p. 26.

\textsuperscript{9} See for example, Immanuel Kant, \textit{Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant}, edited and translated by Mary
make adequate sense of the observed behaviour of States and the current structure and content of international law, counselling a distinct level of hope and expectation in the present endeavour.\textsuperscript{10} However, it is not the intent to fully enter the realist/idealist/in-between debate here, but to provide responses to the political realist argument that realists themselves should find practically rather than theoretically convincing, more or less adopting their own assumptions.

Therefore it must be noted, as was also made clear in section 5.3.3, that Northern States are far from homogenous in their views on cooperative obligations.\textsuperscript{11} Some display more openness and recognition of their legal character than others. Certain Northern States, for example Finland, Germany and Belgium, adopted a positive attitude more in line with the position of developing countries. Furthermore, participants report that there were significant shifts in some Northern States’ attitudes over the course of the negotiations,

\begin{footnotesize}
\footnote{\textsuperscript{10} “To be sure, organizational mechanisms and the dynamics of power are of critical import to the work of making sense of the social world. But they should not crowd out attention to the more normatively driven powers of justice and rights. In a pluralist knowledge culture, the empirical and the normative are mutually interdependent.” Margaret Somers, \textit{Genealogies of Citizenship: Markets, Statelessness and the Right to Have Rights} (Cambridge University Press, Cambridge, 2008), p. xiii.}
\footnote{\textsuperscript{11} On Norway’s recognition of “a shared responsibility for the debts” of certain developing countries, as an irresponsible lender, and its subsequent unilateral cancellation of those debts see, Kjetil Abildsnes, \textit{Why Norway Took Creditor Responsibility: The Case of the Ship Export Campaign’}, Norwegian Debt Campaign, Oslo, 2007; ‘Norway Makes Ground-breaking Decision to Cancel Illegitimate Debt’, Eurodad, 27 March 2007.}
\end{footnotesize}
demonstrating the potential of further dialogue, diplomacy and education. These considerations indicate a clear trend towards greater acceptance of binding cooperative obligations by the more powerful States. Vandenhole observes that “Northern countries, and in particular the EU, have gradually adopted a more constructive approach to the issue”.12

In addition, as already observed, these obligations remain persistently identified in a narrow sense as mandating specific amounts of development aid. The debate on cooperative obligations will inevitably broaden to foreground obligations of conduct and modes of ensuring respect for rights in other countries, thereby encompassing the systemic forms of cooperation at the centre of this study. As it does, and as the more easily disposable straw man of development aid recedes, the binding nature of cooperative obligations will be far harder to deny.

In general it is also true that all States are already under a number of international obligations directly constricting their sovereign freedom of action in the interests of other States and the people therein. The concept of legal obligation in this regard is far from new.13 Even if their exact parameters remain obscure, the vast majority of States do not question the existence of obligations to sometimes act not in their own interest but in the interest of others. This trend towards an increasingly integrated ‘international law of cooperation’ was discussed above in sections 5.1 and 5.2.

13 See for example, Christian Tams, Enforcing Obligations Erga Omnes in International Law (Cambridge University Press, Cambridge, 2010).
It is therefore important to stress the simple fact of formal observance of the minimal cooperative obligation to respect by the EU. It is perhaps an understatement to say that the force of the political realist argument substantially evaporates in the face of this simple fact. The vast majority of Northern States have already committed collectively to bind themselves to respect human rights extraterritorially, both directly (in respect of their external policies and actions) and indirectly (with regard to internal policies with external effects). It will be a number of years yet before the full consequences of this act are properly understood and implemented. However, the commitment is there. This places a large amount of pressure on the few remaining Northern States to make similar commitments.

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14 As noted in the introduction, the UK has similarly committed itself to “[e]nsure that agreements facilitating investment overseas by UK or EU companies ... do not undermine the host country’s ability to meet its international human rights obligations.” Her Majesty’s Government of the United Kingdom, ‘Good Business: Implementing the UN Guiding Principles on Business and Human Rights’, Document Number Cm 8695, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, September 2013 (original emphasis).

15 For further discussion of the fundamental changes rendered to the EU with respect to human rights by the Lisbon Treaty see, Ingolf Pernice, ‘The Treaty of Lisbon and Fundamental Rights’, in Stefan Griller and Jacques Ziller (eds.), The Lisbon Treaty: EU Constitutionalism Without a Constitutional Treaty? (Springer, Vienna, 2008). For in depth critique of the likelihood that the Lisbon Treaty may catalyse a paradigm shift in the EU’s approach to human rights, specifically regarding its possible ‘double-standard’ with respect to internal and external human rights policies see, Grainne De Burca, ‘The Road Not Taken: The European Union as a Global Human Rights Actor’ 105 American Journal of International Law (2011). De Burca notes that in the early conceptual formulation of the EU, specifically in the travaux of the draft treaty on the European Political Community in the 1950s, “the drafting committees of the Ad Hoc Assembly were focused explicitly on the risk that the Community itself could become a violator of human rights. For example, the Constitutional Committee, obviously concerned about this prospect, discussed various possible ways of ensuring that the European Court of Human Rights had jurisdiction over Community acts”. Ibid, p. 660. “It was also proposed that the Community, along with the individual member states, should be subject to the explicit requirement to respect human rights and fundamental freedoms, but such an obligation did not appear in these terms in the final text.” Ibid, p. 662, footnote 58.
The pressure is increased in terms of this study due to the fact that it has already made clear concessions to a political realist position by advocating a minimalist conception of cooperative obligations, rather than pressing a maximalist conception oriented towards the comprehensive protection and fulfilment of rights abroad. This is an acknowledgement of what seems more presently acceptable in the current political atmosphere. In short, the study advocates a somewhat strategic minimalism that has already incorporated elements of the political realist argument, making a nod to the fact that we must crawl before we walk.

It is also important to note that while the creation of new institutions to implement the obligations described here is not ruled out, neither is it a necessity. This significantly eases the burden on States should they acknowledge and seek to implement these obligations. The study has been at pains to demonstrate that the changes required are not primarily institutional but procedural. The central institutions to be relied on (State agencies, National Human Rights Institutions, The International Coordinating Committee, UNCTAD and the DCF) are more than capable of adapting internally to these procedures with little additional cost.\textsuperscript{16} In fact, the study also establishes that such changes would be entirely in line with their existing mandates and processes, only intensified in some instances and explicitly informed and underpinned by human rights law in others.\textsuperscript{17}

\textsuperscript{16} This is not to suggest that the present underfunding of these institutions is not a significant problem, which should be urgently addressed. However, relative to the amounts of resources Northern States have found to devote to other institutions (most recently the IMF and many banks) the adequate funding of these institutions would not be a significant burden.

\textsuperscript{17} There are, however, some caveats. Firstly, there would need to be a widespread effort to educate personnel in these institutions as to the content and the ethos of the law which they would be essential in a collective effort to respect. Secondly, to establish the necessary coherence
Perhaps the strongest response, however, lies in the ultimately realist observation that the only constant in existence is change. Much of the force of the political realist argument lies in an assumption of the static nature of presently existing international power relations, grounding the premise that the currently powerful will be best served by a static international law. Even in a medium-term historical light this is a completely unfounded assumption. Indeed, from this viewpoint the political realist argument may seem so stuck in the short-term as to be virtually a defence of the status quo. In the interests of ‘realistic achievability’ it may end in advocating such minimalistic change as to be itself a waste of energy and resources.

Demonstrating the fallacy of a static model of international power relations has probably never been hard. Yet it is particularly easy at the present historical juncture. For more than a decade now the steady rise of new global economic powers has been at the forefront of international analysis, yet the consequences of this fundamental shift are still largely speculative and poorly understood. Change and uncertainty between agencies at the level of national government new horizontal arrangements of coordination and oversight will have to be made. However, with the growing commitments to policy coherence for development, these horizontal arrangements are often already mandated if not yet implemented. Finally, the exigencies of widespread and regular human rights impact assessment, crucially involving the collection of large amounts of complex data appropriately disaggregated and analysed, and the broadest range of inclusive participation possible, will represent the most significant adjustment.

As Frank puts it, while the political realist argument may sound like “a purely descriptive-empirical observation, it also has enormous prescriptive potential. If this power-realism is the prism through which law’s purchase is to be understood in the future, that perception - right or wrong as a description of the present - can indeed become a self-fulfilling prophecy.” Frank, 2006, supra note 5, p. 90.

For example, the UNDP states that the “21st century is witnessing a profound shift in global dynamics, driven by the fast-rising new powers of the developing world.” UNDP, Human Development Report 2013: The Rise of the South – Human Progress in a Diverse World (UNDP, New York, 2013).
are also heightened by the sharp decline of the traditional economic powers over this time, especially during and after the last global financial crisis, bringing an “open recognition that we live in a multipolar rather than a unipolar world.”

It is becoming commonplace to note that the “constellation of powers is changing rapidly”, and the “defining economic characteristic of the next few decades is likely to be the increasing size and expanding role of the developing world.” UNCTAD describes a ‘second generation’ of globalisation in emergence.

A distinctive characteristic of this phase of globalization is economic multipolarity, in which the South plays a distinctive role. Today, no negotiation of an international economic agreement is conceivable without the presence of China, India, Brazil and South Africa at the table.

And according to the UNDP,

[t]his growing diversity in voice and power is challenging the principles that have guided policymakers and driven the major post–Second World War institutions. Stronger voices from the South are demanding more-representative

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frameworks of international governance that embody the principles of democracy and equity.23

China’s rise alone is significantly destabilising the international order, whether for better or worse.24 There have even been calls for China to renounce its developing country status.25 By most accounts China seems to be charting a course that recognises a great degree of overlap between its interests and those of the developing world as a whole.26 Nevertheless, whatever China’s future international orientation turns out to be, it will significantly change the balance if not the modalities of global governance. Stiglitz predicts that “well within the next quarter century, China is likely to become the dominant economy in Asia, and Asia’s economy is likely to be larger than that of the United States.”27 More recently the the International Comparison Program hosted by the World Bank has reported that China may actually surpass the US in 2014, five years ahead of schedule according to “most economists”.28

In a related development, after two years of negotiations the BRICS have recently instituted their own New Development Bank (NDB) and a Contingency Reserve Arrangement (CRA) as

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25 This is despite the fact of its continuing high levels of poverty and social deprivation, being ranked in 2012 at 101 out of 186 States in terms of the UNDP’s human development index. UNDP, 2013, supra note 19, pp. 144-147. For a contrary view to the prevalent predictions of China’s growing global influence see, Jonathan Fenby, Will China Dominate the 21st Century? (Polity, Cambridge, 2014).
28 Chris Giles, ‘China Poised to Pass US as World’s Leading Economic Power this Year’, Financial Times, 30 April 2014. This prediction is based on comparison by purchasing power parities.
alternatives to the World Bank and the IMF, allegedly to “reduce their dependence on western institutions”, representing “their first major step towards reshaping the western-dominated international financial system.” Perhaps fundamental change in global economic and financial power structures has not been more likely since the establishment of the Bretton Woods system. On the other hand, perhaps the operations of these institutions will not differ significantly from those that already exist and will therefore make little difference to the majority of countries and their people.

Yet even if the latter is so, the very existence of two such major economic institutions that the traditional powers have no control over, brings a significant change in the power balance. An equally bad option with an alternative set of global powers is still an option that did not exist until now, and will still cause a power shift. At the very least it will significantly benefit the BRICS themselves, presumably boosting their economic rise. However, the greatest difference that these new institutions could make, particularly the NDB, is to the basic shape of the global development paradigm. Until now the World Bank has had a monopoly at this level. If the NDB follows roughly in similar footsteps to the World

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29 Diana Cariboni, ‘World Cup to Brics: Brazil’s Hospitality Moves from the Pitch to Politics’, Guardian, 14 July 2014.
31 In addition, China is seeking to establish an Asia Infrastructure Investment Bank to directly rival the World Bank and the Asian Development Bank in that region. Anderlini, 2014, supra note 24. Twenty-two other countries have reportedly shown interest in being co-founders of the new bank.
32 One Brazilian official, for example, has stated that while the BRICS have a “shared interest in incrementally changing international governance” the new institutions are “not intended to compete with the World Bank and the IMF, but rather to play a complementary role.” However, the NDB at least, will not impose “additional conditionalities”, though it is unclear what this could in fact mean. See, Cariboni, 2014, supra note 29.
Bank, organisationally and operationally speaking, and if predictions for a rapid rise in its ‘popularity’ come about, this institution could soon be the centre for either the design of a new paradigm, the administration of the old, or the rejection of a singular paradigm altogether.\(^{33}\) Yet the point here is not to evaluate all of the possible permutations for development and human rights.\(^{34}\) It is to simply state the fact of a significant shift in power that brings a high likelihood of accelerated shifts in the future. The basic point is that what the NDB does, operationally or ideologically, will be significant, and it is out of the hands of Northern States.

In contrast to the rise of other nations it is now clear that the North is in a period of decline.\(^{35}\) The US and Europe in particular have been depleted significantly by the global crisis.\(^{36}\) Europe is struggling to emerge from multiple recent setbacks, and is utilising an austere economic method that is constricting rather than boosting recovery. It would seem that long into the future the region will be far more preoccupied with its own stabilisation than in wielding authority and power on the international stage.

\(^{33}\) The last may be indicated both by the disparate development strategies of the members and reports that officials have described the basic mandate of the NDB as one focused on projects rather than policies.

\(^{34}\) For example, concerns have already been expressed that the new institutions may be as undemocratic and impenetrable to civil society as the existing IFIs and therefore prone to make the same mistakes. Mario Osava, ‘New BRICS Monetary Fund May Reproduce Inequalities’, Inter Press Service, 12 July 2014. Such criticisms may be premature. Reportedly, BRICS officials have promised proper consultations with civil society to establish mechanisms of transparency and openness.

\(^{35}\) “By 2050, Brazil, China and India combined are projected to account for 40% of world output in purchasing power parity terms.” UNDP, 2013, supra note 19, pp. 1.

\(^{36}\) “On both sides of the Atlantic, the optimism of the beginning of the decade has been replaced with a new gloom. ... a new grey pallor casts its shadow.” Stiglitz, 2010, supra note 24, p. 330, 343. According to Chang and Gabel, there are “severe and likely lasting challenges facing the economies of the USA and Europe”, and certain developing countries “are conducting themselves in an increasingly assertive and autonomous fashion”. Chang and Gabel, 2014, supra note 2, p. xxx.
Reich and Lebow also note the waning of US influence and the reality of an international system of increasingly diffused power exercised by a broad range of actors via a multiplicity of modalities.\textsuperscript{37} According to these authors, the US is finding it ever more difficult to translate the significant amount of power it clearly retains into actual influence over international processes,\textsuperscript{38} necessitating an updated theory of the operation of hegemony at the global level.\textsuperscript{39} They make a crucial distinction between power and influence, and the powerful are entreated to catch up with an international system that has shifted its foundation from the former to the latter.\textsuperscript{40} They advocate a new international role for the US based on its capacity for positive influence and emphasising the benefits provided by shared international norms and community goals.\textsuperscript{41} Slaughter also notes the realistic benefits of “a shift in attitudes towards international rules and institutions” given the fact that the US has “moved from superpower in the 1990s and early 2000s to overstretched international debtor in a world of rising powers.”\textsuperscript{42} Or as Stiglitz puts it,

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\textsuperscript{38} They note the increasingly obvious contradiction between the “extraordinary military and economic power of the US and its increasing inability to get other states to do what it wants”. Reich and Lebow, 2014, supra note 37, p. 3.  
\textsuperscript{39} Ibid.  
\textsuperscript{40} See also, Stiglitz, 2010, supra note 24, p. 330-331.  
\textsuperscript{41} Similarly, Weaver states that, “to sustain power in and through global governance, the US must in fact learn to let go of power.” Catherine Weaver, ‘Global Governance and the Paradox of US Decline’, Global Trends 2030, 27 July 2012.  
\textsuperscript{42} Anne-Marie Slaughter, ‘International Law and International Relations Theory: Twenty Years Later’, in Jeffrey Dunoff and Mark Pollack (eds.), \textit{Interdisciplinary Perspectives on International Law and International
the newly emerging global balance of power means that the United States will not be able to dictate the terms of the emerging world order. If it is to lead, it must be through moral suasion, by example and by the force of its arguments.\textsuperscript{43}

In such a deeply unstable environment of power and influence\textsuperscript{44} the currently powerful are forced to re-conceptualise what is actually in their best interests. The political realist argument makes the assumption that cooperative obligations are against the interests of the currently powerful. However, this assumption is also incorrect. Given the instability of the present environment and the evident trends, it is a distinct possibility that in the not too distant future the States who now feel themselves served by a lack of rules on cooperation will rue their absence. From this viewpoint, cooperative obligations begin to take on the character of a wise insurance policy.\textsuperscript{45} Indeed, it is an insurance policy that would also allow the North to relax its strong opposition to change, in the knowledge that the security and developmental interests of its people will be protected by international law, even as it allows other


\textsuperscript{43} Stiglitz, 2010, supra note 24, p. 342.

\textsuperscript{44} It must also be noted here that not only the raw economic power of the North is in decline, so is the strength and legitimacy of the international economic legal structures it has created. The fragility of the investment regime has been covered in depth in this study. Faundez and Tan also note the same fragility in the case of international economic law more generally. Julio Faundez and Celine Tan, ‘Introduction’, in Julio Faundez and Celine Tan (eds.), \textit{International Economic Law, Globalization and Developing Countries} (Edward Elgar, Cheltenham, 2010), p. 33.

\textsuperscript{45} According to the UNDP, by 2020 the three leading developing countries, Brazil, China and India, “will surpass the aggregate production of Canada, France, Germany, Italy, the United Kingdom and the United States.” UNDP, 2013, supra note 19, pp. iv.
countries to become more influential in shaping the economic order.

If there is a good chance that cooperative obligations will soon serve the currently powerful then their present ‘absence’ does not serve them. The present denial of these obligations as binding is against their self-interest. Historically, no nation, empire or otherwise-defined collective has ever maintained endless power and dominance.46 Even if US/Northern hegemony in international affairs still exists,47 there is a wealth of evidence that it will not survive much longer.48 This line of reasoning also highlights the pivotal role that could now be played by the more powerful developing countries, particularly within the rubric of South-South cooperation.49 Much may depend on their acknowledgement of the form of obligations described here, and their adoption of the processes advocated to ensure their adherence to these obligations, as role models for the North.

Returning to the viewpoint of the North, there is also an evident urgency. There is a window which is now open due to

46 In case this obvious truth needs any elaboration see for example, Stuart Kaufman, Richard Little and William Wohlforth (eds.), The Balance of Power in World History (Palgrave Macmillan, New York, 2007). Gibbon is often credited with beginning the academic investigation of power’s impermanence in history; Edward Gibbon, The History of the Decline and Fall of the Roman Empire, edited and abridged by David Womersley (Penguin, London, 2000).
48 According to Reich and Lebow, the international relations scholars who still believe in US hegemony, and who would be the prime source of the political realist argument, are fundamentally mistaken, “unreconciled to change and nostalgic for a world that is long since gone.” Reich and Lebow, 2014, supra note 37, p. 1.
a certain amount of global convergence or intersection. The traditionally powerful have little to lose, and those on the rise still have something to gain. This may not be the case in a future where the presently rising powers attain sufficient influence as to feel that cooperative obligations would, in turn, overly restrict them in the exercise of their economic power at the international level. Therefore, now is the time to take full advantage of this current intersection of interests.

Crucially, prospective opposition to the implementation of these obligations from investors and multinational corporations, which could be viewed as weakening their hold on governments, must be strongly resisted. The likelihood of a future global dystopia if their interests continue to be pandered to is very high. The self-interest of the currently powerful States is again centrally involved. In resisting the siren call of investors in return for campaign contributions and the like, States must recognise that they have no allegiance beyond utility and profit, and the more they are catered to the more States make themselves irrelevant and powerless. In so reducing themselves at the behest of investors, they disregard their democratic and constitutional duty to their own populations, let alone those of other States.

Again there is an intersection of interests. Northern States are already, and increasingly, feeling the backlash of a dependence on and deference to private international capital, in terms of higher rates of social exclusion and lower social welfare. Kennedy is right to state that

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it would be more accurate today to start from the premise that all economies, including the world economy, are developing economies. ... In short, the difference between the First and Third Worlds has eroded because all nations now face political, social, and economic challenges once typical of the Third World.\textsuperscript{51}

The prime challenge is a dependence on foreign capital. The experiences of Iceland, Spain, Ireland and Greece stand out. Yet, the whole world has been brought to its lowest economic point since the Great Depression due to a crisis caused substantially by irresponsible levels of deference to international capital. No State in existence may operate without critical attention to the way in which it is viewed by the most amorphous of non-State entities, ‘international capital markets’.\textsuperscript{52}

The North is beginning to be caught up in the same prisoner’s dilemma that previously only affected the developing countries, which is fundamentally formed by a global competition, now increasingly between all States, for mobile international capital to fund development and finance

\textsuperscript{51} This presents “the basic question for rulers: how much time do we have? How long can we kick the can down the road, trying to get things right, before the problem swamps us through the machinery of political or social unrest?” David Kennedy, ‘Law and the Political Economy of the World’ 26 Leiden Journal of International Law 1 (2013), pp. 9, 10 and 45.

\textsuperscript{52} Optimists like Sornarajah see that in creating such extremes a neo-liberal development paradigm sows the seeds of its own downfall, as it engenders a horizontal field of discontent across North and South in opposition. “All these circumstances have produced a set of forces, which must be directed at shaping a law based on justice”. Muthucumaraswamy Sornarajah, ‘Economic Neo-Liberalism and the International Law on Foreign Investment’, in Antony Anghie (et al eds.), The Third World and International Order: Law, Politics and Globalization (Martinus Nijhoff, Leiden, 2003), p. 190. The population in the developed world is now being educated by experience, an irony surely not lost on multitudes in the South. Chang and Grabel see recent developments as auguring “the beginning of the end of the neoliberal approach to development.” Chang and Grabel, 2014, supra note 2, p. xxvi.
growth. To return to the edict of Lao Tzu, ‘above all, do not compete’, Northern States are losing their ability to abide by this sage advice and are now being forced into the fray. As explained, game theory proves that the only solution to this dilemma is cooperation between all States in order to control international capital; hence the obvious relevance of a cooperative norm. The only other option exacerbates the atomised, fierce and spiralling competition, resulting simply in varieties of a basic international order in which international capital controls States, and through States, people.

It must be emphasised here that investment itself is not to be viewed in any way as an enemy. It must simply be understood that unregulated, uncontrolled and de-humanised investment ‘free’ of its social rationale and basis, and legally insulated from any significant external balance on its core internal profit motive, will inevitably tend to become an enemy to any society. It is thereby incentivised and encouraged to develop this way. As noted by UNCTAD,

There is no disputing that money and finance have a critical role to play in any market economy. The danger comes from allowing financial markets to set the policy agenda and to dictate social values. ... [T]his makes for bad economics; but it also makes for bad politics and bad ethics. ... [A] self-regulating market society would eventually give rise to deeply disruptive strains and crises and even collapse.  

Ultimately a balance is obviously required. If the argument here comes down heavily against increasing the power of

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54 For a very insightful discussion of the fact that “property rights are, in essence, rights against other people ... [meaning] that all property rights
investors it is only because their present levels of power have destroyed trust and confidence, and much more. It is in fact nothing but a practical exercise in the democratic and humane survival of all States, as all of them will ultimately be threatened by unbounded markets and investors, if they are not already.\textsuperscript{55}

It is the purpose of law to mark this balance and ensure its maintenance. International human rights law is essential in this regard. The acknowledgement of the cooperative obligations inherent in this branch of law is a necessary first step. They provide some of the essential answers to the “hard questions about reforming global governance, revitalizing international development cooperation, and strengthening the provision of global public goods.”\textsuperscript{56}

Of essential relevance to the political realist argument, Thomas Frank eloquently stresses the strength of the historical case that

rules arise naturally out of societies - not necessarily ones in which the members are friendly with one another - on the

govern power relations between people”, the need for a return to the original, and necessarily, socialised conception of property rights advocated as far back as Adam Smith, and the interaction between property rights and international cooperation see, Janet Dine, \textit{Companies, International Trade and Human Rights} (Cambridge University, Cambridge, 2010), pp. 250-290.

\textsuperscript{55} “These “investor States” must not shrug their shoulders to foreign States bending over backwards in order to please investors ... [U]nder unregulated international financial markets each State ultimately runs the risk of becoming a race-to-the-bottom State ... States may sometimes hesitate to embrace ETOs because they see them as a burden limiting their room for manoeuvre. The reverse, however, is true. ETOs allow States to assert their regulatory powers, escape the vagaries of global markets and the powers of investors.” Rolf Künemann, \textit{Twelve Reasons to Strengthen Extraterritorial Human Rights Obligations} (FIAN International, Heidelberg, 2013), p. 11.

\textsuperscript{56} UNCTAD, 2011, supra note 53, para 202.
basis of experience in calculating long-term mutual advantage.\textsuperscript{57}

They arise because they are in the best long-term interest of all concerned; that is, because they are the only true rational, or realistic, choice. Cooperative obligations are but one example.

Rational choice, in other words, must take into account the important interest of a state - even a superpower - in strengthening the rule of law in interstate relations by making itself hostage to the rule, through compliance with it, even to the detriment of short-term national interests.\textsuperscript{58}

The difference is then far from that between an airy idealist and a hard-headed realist approach. Instead, it is between two versions of realism, short-term and long-term. Again, Frank finds the best phrasing:

In practice, the difference between the defenders and the challengers of law's empire is neither about the importance of "rational choice" nor about the primacy of the national interest in determining compliance with international law. Rather, it is between a longer view of national interest and a narrower, more immediate approach to interest gratification. Notably, both long-term and short-term approaches have an equal claim to be operating within a theory of rational choice. The former, however, takes fully into account the power of legitimacy, while the latter focuses only on the legitimacy of power.\textsuperscript{59}

\textsuperscript{57} Frank, 2006, supra note 5, p. 89 (emphasis added).
\textsuperscript{58} Ibid, p. 93.
\textsuperscript{59} Frank, 2006, supra note 5, p. 106.
8.2 – Power and Human Rights

The second line of critique holds that human rights have traditionally been used by the powerful to disguise, facilitate and justify their practices of domination over others.60 Furthermore the vagueness of human rights may also render them inutile as a decisive element in the process of decision-making. Finally, employing human rights could actually be detrimental to an emancipatory and transformational project, by playing into the hands of the powerful, as human rights might be ‘part of the problem’ from the outset, and by precluding other narratives and tools for change, and other ‘conceptions of the good’.61 By implication, it might be argued that cooperative obligations and their implementation are therefore not only undesirable, but to be actively avoided.

While this set of objections proceeds from a valuable critique of human rights generally, it does not support either of these conclusions in the present case. The objections fail for three essential reasons. First, they induce a fear that is misplaced in the present context due to two reasons; a level of confusion over what ‘human rights’ actually are, and the distinct nature of cooperative obligations as advocated here. Second, the objections are in any case overstated and unnecessarily paralysing.62 Finally, they do not provide, and

60 As Kennedy puts it, law and human rights may act as “the vernacular through which power and wealth justify their exercise and shroud their authority.” Kennedy, 2013, supra note 51, p. 7.
62 “These critiques should be taken seriously, but they arguably underestimate the potential of human rights as legal norms.” Malcolm
are perhaps not originally intended to provide, sufficient reason to completely abandon the human rights project. Therefore, they do not, and should not, prevent a drive to implement a regime of cooperative obligations.

The three central points will be made through a brief discussion of the relevant views of three authors, Martti Koskenniemi, David Kennedy and Samuel Moyn. Koskenniemi, for example, makes the following core argument in a seminal essay.

[T]he rhetoric of human rights ... [can become] petrified into a legalistic paradigm that marginalizes values or interests that resist translation into rights-language. In this way the liberal principle of the priority of the right over the good ... leaves no room for the articulation or realization of conceptions of the common good.

In the present case, this argument may be taken to apply most directly to the process of human rights impact assessments. Yet, for it to apply properly HRIAs would have to entirely displace all other methods of assessing economic policies and affecting outcomes. This would be to discontinue the current practice of assessments through other frames of reference, such as environmental assessments and social impact assessments. More than this however, it would be to close off the possibility of all other possible future

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Langford (et al), 'Introduction: An Emerging Field', in Langford (et al eds.), 2013, supra note 4, p. 29.

63 The following is not meant to suggest that these authors would make the same arguments expressed in the same way as I have characterised here, in relation either to the present study or to cooperative obligations in general. The point is simply to formulate possible objections to the present project that may be implied by their writings.

methodologies of impact assessment currently unimaginined. The present approach does not seek to achieve either of these aims. In fact, HRIAs and other forms of assessment are generally seen to be quite complementary.

The argument also precludes the possibility that alternative ‘conceptions of the good’ may either be encompassed within the human rights paradigm without damage to them, or may be unearthed by its employment. Just as the environment or social wellbeing are not prejudiced by the human rights paradigm, there is no reason to expect that these other alternatives would be either. In fact, they may thereby be nurtured. The study has gone to some lengths, in section 7.3, to show that a number of other vocabularies of change or ‘conceptions of the good’ in relation to the investment regime are deeply compatible with the human rights critique and its mode of resolution.

Furthermore, the fact that not all claims for justice will fit into a human rights impact assessment is no necessary argument against its conduct as an exercise in futility. It will nevertheless capture a significant amount of such claims, to the benefit of at least some if not all of those in need. The present framework is designed only to ensure respect for human rights, and will neither mandate one specific programme for achieving a fuller conception of justice, nor

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foreclose any others, on condition that they respect human rights.

Koskenniemi’s second foundational argument is that rights-rhetoric ... does not hold a coherent set of normative demands that could be resorted to in the administration of society. ... rights-rhetoric is constantly reduced to conflicting and contested arguments about the political good.66

Relying heavily on Dworkin’s conception of ‘rights as trumps’,67 Koskenniemi argues that they are often, if not always, too malleable to operate in this fashion and do not therefore provide any concrete guidance to policy-makers.

Because there is no essential conception of a right, it seems difficult to object to the common practice in Western societies whereby beneficiaries of a policy dress their interests in the fulfilment of that policy in terms of their ‘human rights’.68

However, this does not mean that human rights are devoid of specific content and fail to actually draw lines between what they protect and what they do not. Although dresses may be worn by all people, they still either fit or do not fit, and they still look somewhat strange on the vast majority of men. Koskenniemi’s argument runs the risk of overstating the vagueness of rights. That rights may be contested in some contexts does not mean they can be plausibly contested in all contexts. And if issue is taken with the adjective, ‘plausible’,

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pointing out that this too is an inherently indeterminate notion with no ‘essential conception’, then the argument becomes inevitably pointless and degenerates into a simple, but useless observation of reality; that all words and human concepts, and indeed all things, are fundamentally indeterminate.

Koskenniemi notes that,

[claims of right can be recast as claims of an objective reason, reflected in the fact that rights ‘straddle’ between legal positivity and naturalism. ... Yet this duality creates an ambivalence: the more we insist on the ability of rights to impose an external standard for the community, the more it starts to resemble theology, and the more difficulty we have in aligning it with the ideal of popular sovereignty. ... [However, to fall back on] positive law standards, again, questions the universalism with which rights are associated and focuses on the procedural aspects of the constant struggle about where to draw the line between community interests and individual rights.69

This is undoubtedly true. However, the present study is comfortable in the middle ground of constant struggle and incomplete normative guidance. It is aware that acknowledging and implementing cooperative obligations will not lead to the respect of human rights without a political struggle, nor does it seek to avoid that struggle but to engage with it. Its clear focus on the ‘procedural aspects’ related to the drawing of policy lines inherent in the imposition of a formal obligation to cooperate, provides the space for a debate without concretely forcing specific outcomes. Outcomes will depend heavily on the scope of participants included, the

persuasiveness of the arguments presented and the information brought to light in the process, but the procedures themselves will prevent an outcome based solely on the exercise of power, which is as inimical to popular sovereignty as theologically normative bureaucracy. Koskenniemi’s argument then amounts to a cogent reason to temper expectations, rather than to abandon the frame of human rights altogether. As such, human rights impact assessments are emphasised, not to provide detailed and specific policy prescriptions for every decision, but to closely monitor the policy debate in a formal and authoritative manner, marking clearly where it strays close to or beyond certain limits, and excluding those policies that stand outside these limits, primarily through force of the actors and arguments involved.

Koskenniemi himself rejects a response that counsels the abandonment of human rights as “unwarranted ... inasmuch as there does not exist any other language either, in which political conflict would have already been resolved.” He identifies only one other option; “to continue rights talk without actually believing in the a-political or foundational nature of rights”, or in other words, “to adopt a purely strategic attitude towards rights”. Given the absence of an alternative this is the best case scenario, one which Koskenniemi himself might well be read as provisionally

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leaning towards. In this case, he advocates the basic aspiration
to develop politics in which deviating conceptions of the
good – whether or not expressed in rights language – can be
debated and realised without having to assume that they
are taken seriously only if they can lay claim to an a-
political absoluteness that is connoted by rights as
trumps.\textsuperscript{73}

As explained, in its comfort with engagement in political
struggle the approach taken here is not entirely reliant on a
notion of rights as trumps, and is worthy of pursuit even if it
is realised that the rights employed give no concrete
 guarantees. This may be interpreted as a strategic approach,
but in that case it is not unusual, nor is it more or less
problematic than other comparable legal approaches. Legal
theorists diverge on the nature of rights, and a position that
accepts their utility and practicality while rejecting their basic
nature as automatic trumps is perfectly coherent.\textsuperscript{74}

As to Koskenniemi’s basic aspiration, the orientation of this
study is certainly not designed to reach it directly. The
processes described here clearly require reference to the
framework of international human rights law. Yet, this linkage
need not be immediate or direct, and is open to interpretation.
This is in fact a positive side-effect of the very lack of fixity in

\textsuperscript{73} Ibid, p. 116.

\textsuperscript{74} In fact, “human rights are rarely expressed as absolute trumps but as
strong standards that must be overcome with significant justification.”
Malcolm Langford and Mac Darrow, ‘Moral Theory, International Law and
Global Justice”, in Langford (et al eds.), 2013, supra note 4, p. 425. Indeed,
Koskenniemi himself notes a valid response from Alston, to the effect that
human rights can nevertheless provide “a meaningful basis for social order
without being rigid, absolute or forever enduring”. Koskenniemi, 2000,
supra note 61, p. 112, quoting from Philip Alston, 'Introduction', in Philip
Alston (ed.), \textit{Human Rights Law} (International Library of Essays in Law and
rights that Koskenniemi bemoans. The project could be seen to lay procedural foundations in the human rights language that, if successful, could be learned from and implemented in other terms.\textsuperscript{75} It would also open up spaces for debate and political action that may be used in unforeseen ways. Therefore, it would not seem to do Koskenniemi’s aspiration any harm. To the contrary, it would be a basically complementary development.

David Kennedy’s critique charges the human rights movement with inattention to ‘the dark sides’ of their efforts.\textsuperscript{76}

These movements have been insufficiently pragmatic, unwilling to acknowledge their power and weigh carefully the costs as well as the benefits of their interventions. ... The challenge for activists is to take responsibility for participating in the politics of that creation, instead of hiding behind the mask of neutral expertise, advising others on how they might become humane.\textsuperscript{77}

Elsewhere Kennedy concludes that “the human rights movement might, on balance, and acknowledging its enormous achievement, be more part of the problem in today’s world than part of the solution.”\textsuperscript{78} Yet, even he notes clearly that the arguments he relies on to support this conclusion are only hypotheses, stating that “to my knowledge none of them has been proven – they are in the air as assertions, worries,

\textsuperscript{75} Similarly, the project itself draws to some extent from inspiration in the realm of environmental law and sustainable development.
\textsuperscript{76} David Kennedy, \textit{The Dark Sides of Virtue: Reassessing International Humanitarianism} (Princeton University Press, Princeton, 2011).
polemical charges.”79 This does not mean his conclusions are necessarily wrong, or that his unproven arguments have no merit.

Some arguments made by Kennedy are simply irrelevant in regards to this study. For instance, he argues that human rights act as agents “[i]nsulating the economy, ... defining problems and solutions in ways not likely to change the economy.”80 In light of this study there is little more to say to this. Cooperative obligations, and indeed the whole corpus of socio-economic rights as understood by most human rights practitioners today, are instead aimed at the exact opposite, placing the need to change the economy front and centre. Perhaps rights are what you do with them, or what you see in them. There is always a choice. It may be more generous and accurate to read Kennedy in line with Rajagopal, who poses this choice between a hegemonic use of rights discourse and a counter-hegemonic one.81

Kennedy’s words go a long way to indicate how bound this critique is with a notion of human rights as civil and political

80 Ibid, p. 109. Similarly, Kennedy argues that, through a human rights lens, “[t]he effects of a wide array of laws that do not explicitly condone violations but nevertheless affect the incidence of violation in a society are left unattended.” Ibid, p. 110. The whole ethos of the employment of human rights here is to attend closely to a very important set of these laws.
rights only, excluding any serious engagement with socio-economic rights and the burgeoning awareness of the structural barriers to their realisation inherent in a (particularly neo-liberal) capitalist economy. Indeed, this new awareness is a re-discovery of the insights more polemically provided by socialist proponents and governments at the inception of modern human rights law, that are variations on the Marxian critique of rights in general, and which ultimately led to the drafting of two Covenants instead of one. Now we are seeing a real effort to heal this deep wound in the human rights movement as a whole, yet this healing process will take time.

The key point to make is that the wound is not an inherent defect, it is not congenital, but is instead developmental; it is not a product of nature, but a product of particularly poor nurture. The formation of this inherent nature of human rights was a project interrupted very early in its development, and has only recently been recommenced. To conclude, as Kennedy does, that the wound in human rights cannot be healed by “more intensive commitment”, but is instead “structural, to the philosophy of human rights, to the conditions of political possibility that make human rights an emancipatory strategy in the first place, to the institutional character of the movement, or to the ideology of its participants and supporters”, is not only premature, but is dangerous and counterproductive. It acts to conceptually close down the transformational promise of human rights before efforts to realise it are properly begun.

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82 For a version of this critique updated and applied to the present human rights movement see, Brad Roth, ‘Retrieving Marx for the Human Rights Project’ 17 Leiden Journal of International Law 1 (2004).

83 Indeed, this could be seen to place some of Kennedy’s own motives in question. Such is Charlesworth’s central objection to Kennedy’s article.
There is nevertheless, much to be drawn from Kennedy. In line with this study, human rights professionals are called to be an active and integral part of the decision-making process. The idea is not for these professionals simply to sit by and judge *post facto* decisions, policies and agreements, or to trust to a formal rule of law to automatically deliver fair distributions and outcomes.\(^84\) As Kennedy puts it, there needs to be an “appetite for political decision” and a preparedness “to accept responsibility for the damage his or her initiatives will cause”, for in this world nothing is perfect.\(^85\) But it will achieve much, and only by being deeply involved and rubbing shoulders repeatedly with practitioners from other fields, with politicians and business groups, will the mettle of the human rights movement be proven. Furthermore, only in this way will it be sufficiently ‘close’ to affect thinking, process and culture in government, business and economic management, where it is most needed and where it is currently most absent.

Cooperative obligations would in fact seem to be highly correlated with Kennedy’s own personal vision for change. In particular, he would seem to be most interested in

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\(^84\) Elsewhere Kennedy notes that “[t]here is something mesmerising about the idea that a formal rule of law could somehow ... replace contestable arguments about the consequences of different distributions with the apparent neutrality of legal best practice.” David Kennedy, The “Rule of Law,” Political Choices and Development Common Sense’, in David Trubek and Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, Cambridge, 2006), p. 144. This is indeed an important tendency of which to be aware, but it is not one to which the present study succumbs.  

\(^85\) “In this light we ought not to see humanism *against* power, talking to power, advising power, restraining power, but humanism as power; not humanism as the modest handmaiden of force, but humanism as the motive and method of force; humanism moreover as a professional experience.” David Kennedy, ‘The International Human Rights Regime: Still Part of the Problem?’, in Rob Dickinson (et al eds.), *Examining Critical Perspectives on Human Rights* (Cambridge University Press, Cambridge, 2013), p. 23 (original emphasis).
encouraging a “global politics” centred on finding real solutions to pressing problems of “social and economic dualism”, of a “rumbling fault line ... between an insider and an outsider class, between leading and lagging sectors, both within and between national economies and political units.”

The present project would seem to be ideally designed to do just this. Cooperative obligations are indeed well placed to help produce the exact emancipatory global politics and a “new global governance regime” to be “imagined and built through collective hope” and “struggle”, which Kennedy calls for. Cooperative obligations are far from the “status quo project for a stable time” that Kennedy equates with the human rights movement.

Despite the fact that many, if not most, ‘members’ of the human rights movement would see it as more targeted and pragmatic, Moyn characterises ‘human rights’ as “a recognizably utopian paradigm”, and stresses the observation that, as a coherent and forceful social movement, it “is striking to register how recently this program became widespread”, in the mid to late 1970s. He chronicles their rise in response to, and enabled by, the perceived failure of other recognisably ‘utopian’ movements. Moyn argues that the value of this contingent and novel perspective allows us to better evaluate the utility of human rights and the prospects for their future.

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86 Ibid, p. 33 (original emphasis).
87 Ibid, p. 34.
88 “[I]nternational human rights should be seen not as an extraneous and utopian political project, but rather, a comparatively objective and feasible framework of claims and obligations corresponding to minimum substantive guarantees for a life with dignity, and an increasingly important vocabulary and toolkit for empowerment.” Darrow, 2013, supra note 65, p. 100.
He notes an important point, that although the human rights project may have ascended to its present utopian position through its minimal aspirations in comparison to other projects, it has since been tasked with bearing the burden of all global aspirations for a better world.\textsuperscript{90} This has built unrealistic expectations that Moyn believes may backfire on the project if they are not met. The moral of his narrative is to guard against such expectations. The practitioners within the project should be wary of framing it, themselves and their work in terms that overreach its capabilities. They should be careful also to leave other aspirations and goals to more suitable methods and ‘conceptions of the good’. Yet, it is no reason, once a level of humility is achieved, not to advance the movement and promising elements in it.

Moyn’s critique contains an inherent charge that human rights are ill-equipped “to define the good life and offer a plan for bringing it about”, essentially because of their “suprapolitical birth” as ‘utopian’ project in the 1970s.\textsuperscript{91} Yet this is to elide the possibility that human rights has ‘grown’ in this regard over intervening decades. It is repeated here that the human rights movement has been somewhat transformed since the re-discovery of socio-economic rights in the 1990s, and continues to be fundamentally altered by this fact. In addition, Moyn’s point can nonetheless be partially conceded without loss of relevance for the particular project here. The thrust of Moyn’s argument may be taken as demonstrating that human rights alone may be under-equipped to affect real change. This may well be the case, and indeed it is an

\textsuperscript{90} Following their ascension, “human rights were forced to take on the grand political mission of providing a global framework for the achievement of freedom, identity and prosperity. They were forced, slowly but surely, to assume the very maximalism they triumphed by avoiding.” Ibid, p. 9.

\textsuperscript{91} Ibid, p. 214.
argument made explicitly in this study, through its reliance on heterodox economics.

Moyn also notes that “when human rights exploded in the 1970s they were focused so centrally on civil and political rights, their social and economic cousins have come to be regarded as “second-generation” principles.”92 Again, this indicates that the content of ‘human rights’ and the ‘human rights movement’ that is the subject of his analysis, is exhausted by civil and political rights. The critique is then largely, if not entirely, a critique of civil and political rights alone. It therefore misses the essential thrust of this study.

For example, Koskenniemi states the following.

The power and the weakness of rights is that they focus on the need to protect the individual against oppression and injustice by the community or the state ... Although ‘rights-talk’ has of course spread beyond individual rights to characterize various kinds of economic, social, and cultural objectives as well as different collective goods ... the latter differ from the former in the all-important sense in which they are understood to be (‘merely’) programmatory ... instead of creating legally enforceable claims ... To the extent that rights may be thought to create legally enforceable claims, they too portray social conflict as ultimately having to do with the rights of individuals. In such a case the relevant social goods worthy of protection are reduced to private interests ... [Therefore,] an abstract personhood and the conception of individual rights that goes with it cannot address the sense of injustice that arises, for example, from structural (economic/social) causation or from the sense of belonging to an oppressed

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92 Ibid, p. 17.
minority. But also in many other contexts, posing the normative question in terms of individual rights fails to grasp its social meaning.93

Yet, with regard to this study at least, and with regard to any analysis applying a deep understanding of socio-economic rights, it would be difficult to agree with any assessment that the structural or social meaning has been left out. Contrary to the possibility that cooperative obligations as formulated here ‘fail to grasp’ this meaning, it is in fact central to the formulation. This is perhaps because the present conceptualisation of the utility of socio-economic rights in this study falls into neither of Koskenniemi’s polarising categories of, firstly, purely hortatory guides for policy, or secondly, individual rights protected through a strict understanding of violation.

In this study the obligations sought to be implemented are essentially collective obligations, based in individual rights but not entirely reduced to them. A deep understanding of these rights illuminates the fact that they are in no way clearly dissociable as entirely and only individual entitlements, or meaningfully reducible to such a characterisation. Instead they are always bound up in basic ways with the collective good, as realisable only in the context of the broader rights of a collective to survival and prosperity. A purely atomistic conception of individual rights alone has no meaning.94 In Somers’ words, “human rights are only viable within an organized political community ... [and] it is only through citizenship that the right to have any rights at all can be

93 Koskenniemi, 2000, supra note 61, p. 104.
guaranteed.”95 Perhaps the observation that socio-economic rights bring this fact of community closer to the surface than civil and political rights is a partial explanation of their growing relevance in the present world, saturated as it has come to be in a failure of individualism.96

Moyn observes that at the time of the inception of the human rights regime the inclusion of socio-economic rights was not controversial due to the strong social-welfarist consensus at the time in the West and the dominance of social communism in the East. Social entitlements were then the global norm, expressing a clear understanding “that unregulated capitalism could not be allowed to bring the world low again.”97

The fact that the rights defined at this time were agreed essentially between welfare States and communist States meant that they provided no means of choosing between the two. Both were theoretically included in the human rights-based ‘conception of the good’. According to Moyn, this was one of the very reasons behind the failure of human rights to rise to the level of global utopian movement at the time. In the late 1940s and the first decades of the Cold War it apparently

96 Yet community is equally necessary to the actualisation of civil and political rights. They only appear to be better suited to a culture of individualism. It is nevertheless the case that socio-economic rights do draw out the necessity of the social more clearly. There is unfortunately no space to pursue the modes by which socio-economic entitlements as rights challenge both capitalism itself (especially its extreme neo-liberal version) and a facile identity of human rights with liberal individualism, private property and an ingrained opposition to the State, or any other form of collectively motivated authority that may impinge on individual freedom. To take socio-economic rights seriously the concept of human rights must be much more than this. See, Ibid, pp. 152-162. See also, Vinodh Jaichand, ‘An Introduction to Economic, Social and Cultural Rights: Overcoming the Constraints of Categorization through Implementation’, in Azizur Chowdhury and Jahid Bhuiyan (eds.), An Introduction to International Human Rights Law (Brill Leiden, 2010).
97 Moyn, 2010, supra note 6, p. 64.
had nothing to add to the two ‘utopian’ capitalist and communist projects already on offer.\footnote{“[T]he language of rights could not determine the choice between a welfarist and a communist scheme – a fact which, more than any other, accounts for the marginalization of human rights as a new ideological paradigm at this moment.” Ibid, p. 73.} This indicates two fundamental reasons why socio-economic rights are now so important. Firstly, although they are of lesser value in choosing between communism and capitalism, they do provide a clear means of distinguishing between a welfare State and a neo-liberal competition State. Secondly, within the welfare State chosen, and as an essential element in its constitution, socio-economic rights clearly require the property right to be significantly qualified in the interests of the common good. In fact, they themselves are an important means of qualifying it. In other words, socio-economic rights in particular are essential rules for regulating capitalism, and are presently in resurgence because capitalism is in dire need of regulation.

Most clearly with Moyn, utilising the extreme terminology of utopia, but as with Kennedy and Koskenniemi to lesser degrees, there is a strong tendency to overstate the extent, size, power and ambitions of perhaps the vast majority of actual people and organisations that make up the corpus of the ‘human rights movement’ to which they vaguely refer. Inasmuch as this is true they mischaracterise the object of their study, meaning that their analysis is likely to be misplaced in the case of many particular elements of this ‘movement’. The implication is that one of these many elements is likely to be that embodied in cooperative obligations and the project advanced in this study. Some may indeed view the present project as utopian. But many will view it more simply as a minimal first step that would aid in bringing a measure of justice to international economic
relations and arrangements. The same is true of human rights in general. Some may view the achievement of the minimal requirements of a dignified existence for all as a clearly utopian project. Many will see it as an extraordinarily low aim given the abundance of wealth and resources on the planet and our current levels of technology and organisation. Many will view the human rights project as a bare minimum to prevent dystopia, rather than to implement a utopian vision. To this extent, viewing human rights as utopian becomes tied to the political realist argument above, and may similarly act to short-circuit the imagination and change, precluding all but the most infinitesimal approaches to justice.

A final important point made by Moyn is that the successful genesis of the human rights movement as we know it today owes much to its promise to de-politicise important choices. This issue is of special note. Moyn argues that human rights rose primarily because of its self-presentation as a legalist,

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99 Moyn himself recognises that to some it may be simply a “way of working to make the world a slightly less wicked place.” Ibid, p. 147.
100 “[S]cientific and technological advances have increased our capacity to address problems of poverty in general ... The costs of doing so, estimated at an additional $50-60 billion per year, are hardly prohibitive. ... Rich countries clearly have the capacity to remove poverty (and to achieve economic and social rights).” International Council on Human Rights Policy, Duties Sans Frontiers (International Council on Human Rights Policy, Versoix, 2003), pp. 2-3, and 19.
101 Moyn describes a true believer, Moses Moskowitz, who stated that, “I wanted to work for something that was permanent, of universal importance and indestructible ... I didn’t believe it will bring the redemption, but I believed we could not proceed unless this principle was established.” Moyn, 2010, supra note 6, p. 123.
102 It is interesting to note that, according to Block and Somers, the persistence of neo-liberalism itself is also largely explained by this illusory promise of de-politicisation, masking an otherwise clear and continuous political dominance by the wealthy. See, Fred Block and Margaret Somers, The Power of Market Fundamentalism: Karl Polanyi’s Critique (Harvard University Press, London, 2014).
apolitical approach, a “systematic defense of human rights and ideals and not a political struggle.” He stresses that, at least at this initial juncture, its very success “depended on keeping radical claims for social change separated” from its ethos and processes.

There are important lessons here. The present study aims specifically at broadening the international political discourse in more areas than it aims to narrow it. It recognises the down-sides of this foundational retreat from politics. It aims at placing limits on a discourse of development in certain directions, but it acts also to mandate the inclusion of a wider range of possibilities and alternatives in other directions. There is no project here to close down political debate. If anything, it is a project to open it up, through the action of law, where politics and economics have coalesced around wealth and privilege to close it down. This is to recognise that while law may restrict politics to some extent, and, as argued here, should more explicitly restrict economics as well, this is a good thing.

It is a good thing because it does not simply limit. It has a dual action; when used responsibly, vigilantly and transparently, it both limits a political space and prevents its collapse. It may be thought of as a set of barriers that must ever maintain a tension between inclusion and exclusion to create and maintain a necessary space for the contestation of ideas. Yet to do so it must exclude certain extremities in economic policy and be alive to certain tendencies, acting

103 “[T]his was to be a recipe of tremendous power: in the face of soiled utopias in politics, a nonpartisan morality existed outside and above them.” Moyn, 2010, supra note 6, p. 132.
104 Ibid, p. 139.
105 Ibid, p. 142.
against the dominance of certain ideas and coalitions that threaten to escape the space and collapse it.106 As such, the project would seem to be in line with a proposal made elsewhere by Kennedy, to “rethink international law as a terrain for political and economic struggle rather than as a normative or technical substitute for political choice, itself indifferent to natural flows of economic activity.”107 Yet, it goes a little further, to explicitly acknowledge the role of law not only as the terrain itself, but also in defining where the struggle is falling into the sea.

Finally, the ultimate dilemma posed by Moyn and his critique is in fact a false dilemma.

[T]he program of human rights faces a fateful choice: whether to expand its horizons so as to take on the burden of politics more honestly, or to give way to new and other political visions that have yet to be fully outlined.108

It should first be pointed out that Moyn provides no ‘other political visions’ that are currently viable. Yet, he also presumes that if other alternatives should arise, they will be incompatible with human rights. As argued, this is not at all clear. It might be equally possible that alternative and better, fuller visions of the good are basically harmonious with human rights. If this is the case there is nothing to ‘give way’ to. Instead, there are more likely to be partners to ally with. A mutual alliance of future programmes may merge into each other without any loss of meaning. Or human rights may even be the midwife or the necessary condition of more far reaching

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106 Somers clearly states the necessity of maintaining such a space. Somers, 2008, supra note 10, p. 8.
visions. In short, aside from Moyn’s preoccupation with competition, cooperation is also possible between alternative ‘conceptions of the good’. In the face of the failure of so many previous utopias incompatible with the basic implementation of the full range of integrated human rights, it is in fact more likely that future utopias will not be incompatible.

Perhaps the main lesson in this second line of critique is not to expect too much. Once the critique is internalised however, it is certainly no reason to abandon a promising endeavour. To quote Nuemann:

Hardly any other ideological element is held in such profound contempt in our civilisation as international law. Every nation has seen it break down as an instrument for organising peace, and a theory that disposes of its universalist claims has the obvious advantage of appearing to be realistic. The fallacy should be equally obvious, however. To abandon universalism because of its failures is like rejecting civil rights because they help legitimise and veil class exploitation, or democracy because it conceals boss control .... Faced with a corrupt administration of justice, the reasonable person does not demand a return to the war of each against all, but fights for an honest system. Likewise, when we have shown that international law has been misused for imperialistic aims, our task has begun, not ended. We must fight against imperialism.109

From this perspective it must be recognised that cooperative obligations will be no different to any other element of

international law; they are no guarantee. They will require a
great deal of dedicated work simply to ensure a level of basic
respect in international relations. However, once aware of the
rocks in the road ahead, and once the baggage of the past has
been repacked, there is little point in remaining in the same
place staring at one’s shoes.

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