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# INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT: A HISTORY OF TWO CONCEPTS

**Yannick Radi***

## 1. Introduction

As suggested by the title of this edited volume, a historiography of the relationship between international investment law (IIL) and development reveals that the question of the nature of their relationship has generated passionate debates in particular within the investment community. Indeed, some regard IIL as a threat to development and as the source of a 'regulatory chill',[1] while others conceive of IIL as a tool to foster development. Beyond the empirical evidence used to support these respective viewpoints, these different perspectives often prove to be the result of diverging approaches to IIL and -underlying these approaches- of different legal backgrounds, methodologies and research objectives. In that epistemological context, *the* history of the concepts of IIL and development can hardly be told. No scholar can pretend to tell the objective history of this relationship, nor can she pretend to have an all-embracing approach to this history.

In light of the above, this chapter therefore proposes *a* history of international investment law and development that aims at retracing the *legal* relationship between these two concepts from within the 'box' of IIL, *i.e.* by analyzing the way states and arbitration tribunals have conceived of the relationship between IIL and development. More precisely, one endeavors to demonstrate that from this perspective IIL has always been a 'friend' to development. To do so, this chapter unravels and examines the policy objectives and challenges, the legal uncertainties and innovations that have characterized the relationship between IIL and development in the practice of states and arbitrators.

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* Assistant Professor in International Law, Leiden University, Grotius Centre for International Legal Studies (y.a.a.s.radi@law.leidenuniv.nl). The author is grateful to the editors and the participants to the workshop for their comments on the first draft of this chapter.

[1] See *e.g.*, M Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration', in K Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 39; J Waincymer, 'Balancing Property Rights and Human Rights in Expropriation' in P-M Marie Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 275.

To reach the above-mentioned objective, it is first necessary to briefly depict and 'pierce the veil' of these two concepts. The concept of development has evolved and its scope enlarged over the second half of the 20th century. From this conceptual evolution, three 'sub-concepts' of development have emerged.[2] In the context of the claim of decolonized states to the economic sovereignty over their natural resources, the concept of development referred, at the outset, to a *droit du développement* understood in terms of economic prosperity.[3] Progressively and as illustrated by the semantic shift from *droit du développement* to *droit au développement*,[4] development has been linked to human rights in its various components and been considered as a human right on its own. This is well illustrated by the Declaration on the Right to Development whose Article 1.1 states: '[T]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[5]' Finally, development has been conceived of in terms of sustainable development, encompassing -in an intergenerational perspective- the promotion/protection of social rights/human rights, the environment and economic prosperity.[6] In that sense, 'heads of State and Government as well as high level representatives renewed in 2012 'their commitment to sustainable development, and to ensure the promotion of economically, socially and environmentally sustainable future for (the) planet and for present and future generations'.[7] All these objectives - the promotion/protection of social rights/human rights, the environment and economic prosperity- constitute public interests of states and of the international community. Consequently, public interest can be regarded as the conceptual cornerstone of development.

[2] The exact content of these 'sub-concepts' is not clearly defined in the practice and is discussed in the literature. In this context, the present introduction does not intend to enter into the discussion of their precise content, but instead to depict their mainstream understanding.
[3] See Resolution on the Permanent Sovereignty over Natural Resources, United Nations General Assembly Resolution 1803 (XVII) (14 December 1962) UN Doc A/5217, available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/193/11/PDF/NR019311.pdf.
[4] See K M'Baye, 'Le droit au développement comme un droit de l'homme' (1972) 5 Revue des droits de l'homme 503.
[5] UNGA Res 41/128 (4 December 1986) UN Doc A/RES/41/128, available at http://www.un.org/documents/ga/res/41/a41r128.htm.
[6] See in particular Declaration on Environment and Development, UNGA Res 47/190 (22 December 1992) UN Doc A/ RES/47/190, available at http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.
[7] See Declaration on the 'Future We Want', para 1, UNGA Res 66/288 (27 July 2012) UN Doc A/RES/66/288, available at http://www.un.org/disabilities/documents/rio20_outcome_document_complete.pdf.

Although international law -especially customary law- had protected property abroad since the 19th century, IIL emerged at the time of the decolonization and exploded in the 1990's.[8] The identity and features of this regime are reflected in its 'components' and the objective it pursues. As to its components, one should not reduce IIL to international investment agreements (IIA), despite the impressive number of bilateral investment treaties (BIT) currently in force. IIL is indeed also made of two other components: investment arbitration and investment guarantees. Altogether, they constitute the pillars of the IIL regime. Which objective(s) does this regime pursue? Contrary to mainstream opinion, I argue that IIL aims and has always aimed primarily at promoting development in one or all the above-mentioned public interest dimensions. More precisely, while IIL has, since its genesis, aimed at the promotion of economic development, it is increasingly pursuing the protection and promotion of sustainable development. This teleological focus on development and its evolution has resulted in the evolution of the features and nature of IIL as well as of the underlying policy challenges and conflicts of interests stirring it.

In this teleological account of IIL, further explained below, the protection of foreign investments is viewed as a subsidiary objective aiming at attracting foreign investors to foster development. This subsidiary nature is sometimes forgotten or ignored by the investment community. From the perspective of arbitration, this is highly problematic inasmuch as this leads arbitrators to 'apply' IIAs in a way that fails to adequately take into account the public interests attached to the concept of the right to development and sustainable development. From the standpoint of scholarship, this reading of some arbitrators reinforces the understanding of IIL of many academics who regard IIL as ontologically and teleologically hostile to development. But as argued and examined in this chapter, although the relations between IIL and development are complex and their history is evolving, development constitutes the teleological focus of IIL.

To tell this complex history that has put at the forefront of IIL the public interests attached to the concept of the right to development and sustainable development as well as to decipher its intricacies, this chapter distinguishes between two periods when the focus and attention of

[8] See *i.e.* K J Vandevelde, 'A Brief History of International Investment Agreements', (2005) 12 University of California, Davis 157.

foreign investment policy-makers has been respectively on economic development (Section 2) and sustainable development (Section 3).[9]

## 2. International investment law and economic development

At the time of the New International Economic Order,[10] when developing states were dismantling the customary international law of the protection of aliens abroad,[11] foreign investors were faced with the risk of being expropriated without compensation or of suffering discriminatory and arbitrary treatments.[12] As a result, they became reluctant to operate in developing states. Such mistrust threatened the economy of these newly independent states, which was largely dependent on foreign direct investment.[13]

In light of this context, it is first argued that IIL was conceived of and designed, first and foremost, with the view to promote economic development (2.1). Second, it is put forth that this focus on economic development and the traditional 'absence' of the public interests attached to the right to development and sustainable development in the 'old' and great majority of IIA still in force should not lead to the conclusion that IIL has 'sacrificed' development considerations (2.2).

### 2.1. International investment law in the service of economic development

Given its original features and the context of its inception, IIL can be conceived of, at the time of its genesis, as a 'systemic package deal' concluded between developing states and

[9] This distinction pursues didactic motives. It goes without saying that the history of international investment law and development does not reflect such 'clear-cut' divided periods.

[10] See Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (S-VI) (1 May 1974) UN Doc A/RES/29/3201; Charter of Rights and Economic Duties of States, UNGA Res 3281 (XXIX) (12 December 1974) UN Doc A/RES/29/3281.

[11] As to the relation between the international law of the protection of aliens abroad and international investment law, see P Juillard, 'L'évolution du droit des investissements' (1994) 250 Recueil des Cours de l'Académie de Droit International 9, 76.

[12] Customary international law provided indeed the minimum standard of treatment as embodied in the *Neer* decision of the Mexico-USA Claims Commission and the compensation of expropriation as formulated by the US Secretary of States, see *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (15 October 1926) (1926) 4 RIAA 60; Letter of the US Secretary of States to the Mexican embassy (21 July 1938), quoted in A F Lowenfeld, *International Economic Law* (OUP 2002) 398.

[13] See A Broches, 'The Convention for Settlement of Investment Disputes' (1972) 136 Recueil des Cours 331, 343.

developed states.[14] On this basis, it is claimed that -from a teleological point of view- the protection of foreign investors has always been only instrumental in promoting economic development (2.1.1). As to IIL instruments, I put forward that the substantive and procedural protection of foreign investors granted by developing states cannot be considered in isolation, but instead that they should be considered in combination with the investment insurance accorded by developed states to their investors (2.1.2).

#### 2.1.1. The objectives of international investment law: protection-for-economic development

Likely because of the traditional 'one-sided' dimension of IIAs in terms of the addressees of treaty obligations, investment protection is often perceived as the only objective of IIL.[15] This perception is mistaken inasmuch as, from the outset, IIL has aimed at the promotion of states' economic development. This is evidenced by the 'founding convention' of BIT practice, *i.e.* the 1963 OECD draft Convention on the protection of foreign property that recognizes in its Preamble 'the importance of promoting the flow of capital for economic activity and development'.[16] Likewise, the Preamble of the first BIT ever concluded between Germany and Pakistan provides that 'an understanding reached between the two States is likely to promote investment, encourage private industrial and financial enterprise and to increase the prosperity of both States'.[17]

Not only does the objective of prosperity and development exist, but it should also be regarded as the main objective pursued by IIAs. Indeed, they do not aim at favoring investment operations *per se*, but at promoting the economic prosperity of states more broadly. The protection of foreign investments is both a secondary and an indirect objective of IIAs: indirect, because this protection aims at encouraging and promoting investment operations, secondary, because the protection of investments and their promotion has been

[14] See Y Radi, *La standardisation et le droit international – Contours d'une théorie dialectique de la formation du droit* (Bruylant 2013), 256-261.
[15] See *e.g.*, H Mann, 'Reconceptualizating International Investment Law: its Role in Sustainable Development' 2013 (17) Lewis & Clark Law Review 521, 524.
[16] OECD draft Convention on the protection of foreign property (1963) available at: http://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf.
[17] Treaty for the Promotion and Protection of Investments concluded between Pakistan and the Federal Republic of Germany (1959), available at: http://www.iisd.org/pdf/2006/investment_pakistan_germany.pdf.

conceived of as a tool to stimulate states' economic prosperity. In this sense, the Tribunal in *Joseph Charles Lemire* stated:

> The object and purpose of the BIT—the third interpretive criterion—is defined in its Preamble: the parties "desir[e] to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party" and recognize that the BIT "will stimulate the flow of private capital and the economic development of the Parties." The main purpose of the BIT is thus the stimulation of foreign investment and of the accompanying flow of capital. But this main purpose is not sought in the abstract; it is inserted in a wider context, the economic development for both signatory countries. 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. [18]

Following the same rationale, the ICSID Convention also shows the primacy of economic development in the objectives pursued by IIL. Indeed, the Preamble of the Washington Convention starts by mentioning 'the need for international cooperation for economic development, and the role of private international investment therein'.[19] The report of the executive directors on this Convention is even more explicit:

> In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of investment disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.[20]

In light of the above, it is not surprising that the *Amco* tribunal expressed the view that the Convention [ICSID Convention] is aimed to protect, to the same extent and with the same vigour, the investor and the host State, not forgetting that to protect investment is to protect the general interest of development and of developing countries.[21]

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[18] *Joseph Charles Lemire v. Ukraine* (21 January 2010), Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18, paras. 271-273. See also *AWG Group Ltd. v. The Argentine Republic* (30 July 2010), Decision on Liability, para. 218; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* (30 July 2010), Decision on Liability, ICSID Case No. ARB/03/19, para. 218; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic* (30 July 2010), Decision on Liability, ICSID Case No. ARB/03/17, para. 200.

[19] Convention on the settlement of investment disputes between states and national of other states (1965) (ICSID Convention) available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf.

[20] Point 9, Report of the Executive directors of the International bank for reconstruction and development on the Convention on the settlement of investment disputes between states and nationals of other states, attached to the ICSID Convention available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf.

[21] *Amco Asia Corp. v. Republic of Indonesia* (24 September 1985), Award on Jurisdiction, ICSID Case No. ARB/81/01, para. 23.

As is evidenced by this teleological overview, IIL has always aimed primarily at the promotion of economic development, the protection of foreign investors being only instrumental to it. From the start, this objective was the object of the *do ut des* developing and developed states agreed on.

### 2.1.2. The instruments of international investment law: protection-for-insurance

The primacy of economic development and the instrumental dimension of the protection of foreign investments is further evidenced by the role and status of IIAs in the IIL 'machinery'. Indeed, they should not be viewed in isolation but in the broader context of a 'bargain' concluded between developing and developed states to promote economic prosperity. IIAs were concluded in return for the granting of an investment insurance to investors by their home states.[22] In other words, developed states accepted to grant insurances to their investors for their investments in developing states subject to the condition that those developing states had concluded an IIA with them. The interconnection of investment insurances and treaty protection is further illustrated by the subrogation clauses of IIAs which confer identical rights upon the party to the IIA as those of the investor indemnified.[23] In that sense, investors' protection and investments' insurance were constitutive of a 'systemic package deal', the aim of which being the stimulation of the economic development of states.[24]

[22] For instance, France had two insurance mechanisms in the 1970s controlled by the *Compagnie française d'assurance du commerce extérieur* (COFACE) and by the *Banque française du commerce extérieur*. For an analysis of domestic insurance mechanisms, see in particular D Carreau, P Juillard, *Droit international économique* (Dalloz 2007), 515-520.

[23] See *i.e.* Article 10 UK-Angola BIT: '(1) If one Contracting Party or its designated Agency ("the first Contracting Party") makes a payment under an indemnity given in respect of an investment in the territory of the other Contracting Party ("the second Contracting Party"), the second Contracting Party shall recognise: (a) the assignment to the first Contracting Party by law or by legal transaction of all the rights and claims of the party indemnified; and (b) that the first Contracting Party is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the party indemnified. (2) The first Contracting Party shall be entitled in all circumstances to the same treatment in respect of (a) the rights and claims acquired by it by virtue of the assignment; and (b) any payments received in pursuance of those rights and claims, as the party indemnified was entitled to receive by virtue of this Agreement in respect of the investment concerned and its related returns. (3) Any payments received in non-convertible currency by the first Contracting Party in pursuance of the rights and claims acquired shall be freely available to the first Contracting Party for the purpose of meeting any expenditure incurred in the territory of the second Contracting Party.', available at http://unctad.org/sections/dite/iia/docs/bits/uk_angola.pdf.

[24] That being said, this does not mean that developed states were not individually interested in the furtherance of this common interest. Indeed, such a 'systemic package deal' was also beneficiary to the growth of their foreign direct investment operations.

The interconnection of investors' protection and investments' insurance is also well illustrated by the 1985 Convention Establishing the Multilateral Investment Guarantee Agency (MIGA).[25] As to the primary objective of the Convention, its Preamble provides:

> Considering the need to strengthen international cooperation for economic development and to foster the contribution to such development of foreign investment in general and private foreign investment in particular; Recognizing that the flow of foreign investment to developing countries would be facilitated and further encouraged by alleviating concerns related to non-commercial risks.

However for an investment to be eligible for insurance and for the MIGA to be willing to contribute to development, the Agency should be satisfied that the host state provide a fair and equitable treatment as well as legal protection for the investment.[26] In this sense, Article 24 of the Seoul Convention provides that MIGA should promote and facilitate the conclusion of agreements among its members on the promotion and the protection of investments. As it appears with the MIGA as well, the objectives and instruments constituting the IIL regime can be conceived of as a 'systemic package deal' aiming at the promotion of economic development.

### 2.2. International investment law and the taking into account of public interests

Having originally focused on economic development, international investment law has conferred substantive and procedural protection to foreign investors. For all that, does it entail that IIL has sacrificed the protection/promotion of public interests, *i.e.*, human rights, labor conditions, the environment, which are attached to the concepts of the right to development and sustainable development?

Part of the literature and NGOs answer to this question positively.[27] In addition to the argument that IIAs place no obligation upon foreign investors, this claim is based on the traditional general wording of IIAs provisions that are silent on public interest and states' regulatory power to protect/promote them.

[25] Convention establishing the Multilateral investment guarantee agency (1985) (Convention establishing MIGA) available at http://www.miga.org/documents/miga_convention_november_2010.pdf

[26] Article 12 (e) (iv) of the Convention establishing MIGA; following the same rationale, see also para. 3 of the preamble of the Convention establishing MIGA.

[27] See *e.g.* n 1.

Obviously, IIAs place obligations only upon states and public interests are rarely 'visible' in the 'old' generation of IIAs. However, the existence of broadly-worded obligations does not equate to the granting of an absolute protection to foreign investors, nor to the deprivation of states' ability to regulate for the benefit of the public. In that sense, I first argue that public interest comes into play to fill in the space of indeterminacy that characterizes IIAs provisions (2.2.1) and second that mainstream arbitration practice uses it to take into account and safeguard the various public interests attached to the concepts of the right to development and sustainable development (2.2.2).

### 2.2.1. The 'invisible presence' of public interests in IIA provisions

Among the obligations provided in the 'old' generation of IIAs which are deemed to hurt most developing states, the fair and equitable treatment (FET) standard and indirect expropriation are often mentioned.[28] These provisions are characterized by their normative vagueness. This means that beyond their normative core, which enshrines a balance of interests struck by state parties, there exists a space of vagueness to be substantiated by arbitrators, on a case-by-case basis, by taking into account all the relevant interests at stake in the dispute at hand.[29]

In the context of investment arbitration, these interests consist of the public interest of the host state and the private interest of the foreign investor. FET and the concept of indirect expropriation being characterized by a normative indeterminacy, the taking into account of these interests and their balancing gives them a normative substance in a given factual situation. In that sense, even though the normative core of the above-mentioned provisions

[28] See *e.g.* H Mann, 'Reconceptualizating International Investment Law: its Role in Sustainable Development', *supra* note 15, 533-534.

[29] As noted in the literature, the customary rules on state responsibility provide that the weighing of the interests of states and investors forms part of the determination as to whether a substantive violation has occurred, see S A Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13(4) JIEL 1037, 1046, who refers especially to the Restatement (Third) Foreign Relations Law of the United States, Section 712(g) (1986)) and the work of L B Sohn and R R Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 AJIL 561.

protects investors' interests, they do not exclude public interests; on the contrary, in light of the *telos* of IIAs,[30] public interests play a key role to 'substantiate' these treaty provisions.[31] As it appears here, conventional practice does not fix the relationship between the public interest of the host state and the private interest of the foreign investor on its own, nor does it settle the conflict between these interests in a given case. In the normative frame of FET and indirect expropriation, it is up to investment arbitration tribunals to decide on the extent to which public interests that are attached to the right to development and sustainable development should be taken into account.

### 2.2.2. The balancing of public and private interests in international investment arbitration

From this decision of arbitration tribunals as to the extent to which public interests should be taken into account derives the scope of the regulatory space that is left to host states to protect/promote public interests. Have arbitration tribunals deprived states of this regulatory power; have they annihilated the regulatory space of public interest? Beyond the few often-cited decisions that are used to stigmatize the investment law regime,[32] I argue that arbitration practice *as a whole* safeguards the regulatory space of host states by striking a balance between the private interest of foreign investors and the public interest of host states. This is evidenced by the arbitration case-law on indirect expropriation and fair and equitable treatment.

[30] This is reinforced by the potential application of international law to the settlement of the dispute and the interpretation of IIA provisions conducted under Article 31(3)(c) of the Vienna Convention on the Law of Treaties. Indeed, both the application of international law and systemic interpretation offer the opportunity to arbitrators to take into account international law rules, *e.g.* human rights, environmental law, which protect and promote various public interests.

[31] By the same token, given this normative vagueness, it is argued that the narrative on 'conflicts' should focus on interests instead of on norms. Indeed, it is often said in the context of the debate about the fragmentation of international law that IIL is in conflict with other areas of international law, such as international human rights law. Furthermore, when non-investment provisions are incorporated within the 'box' of investment arbitration to settle the dispute through applicable law or systemic integration, scholars often regard the situation at stake as a conflict of norms. On the contrary, I argue that such a situation should not be regarded as a normative conflict. Due to the vagueness of IIA provisions, a vagueness that is also characteristic of international human rights norms for example, it cannot be said *ex ante* that there is such a conflict. The only conflict that exists at this stage is a conflict between the respective interests of the parties to the dispute. See Y Radi, 'The "Human Nature" of International Investment Law' (2013) 1 TDM 4.

[32] See the *Metalclad* decision as to indirect expropriation quoted *e.g.* in H Mann, 'Investment Agreements and the Regulatory State: Can Exceptions Clauses Create a Safe Haven for Governments ?' (2007) Background Paper for the Developing Country Investment Negotiators' Forum, 4-5; see *Metalclad Corp. v. United Mexican States* (30 August 2000), Award, ICSID Case ARB (AF)97/1, para. 103.

The provision on indirect expropriation protects foreign investors against state measures having an effect tantamount/equivalent to (direct) expropriation. The vagueness of this provision results precisely from its silence as to the criteria of this equivalence. In any case, it is through criteria elaborated by investment tribunals themselves that arbitrators balance between public and private interests and thereby 'substantiate' the notion of indirect expropriation.

In the past, arbitration practice was on the surface 'Manichean' inasmuch as it appeared to focus either on the effect of state measures ('sole effect doctrine'), favoring thereby foreign investors' interests, or on their purpose ('police power doctrine'), favoring the host states' interests. However, beyond the *dogma* of the 'sole effect'[33] and 'police power'[34] doctrines, as asserted in *obiter dicta*, and beyond the divergences among tribunals as to the exact weight to be given to the various circumstances, it is put forth that, whatever the starting point of tribunals' reasoning, most tribunals have increasingly relied on the following test: a state measure aiming at the protection/promotion of a public interest amounts to an expropriation only in extreme situations, namely when they result in the loss of control or in the complete destruction of the value of the investment.[35] As a matter of principle, investors have to bear the brunt of the satisfaction of the public interests pursued by state measures without being compensated; however, if these measures annihilate their investment, it is up to society to accept the consequences of such satisfaction and to offer a compensation.[36] While being at the core of the case-law, this balancing is made explicit in the test of proportionality that has been used by some arbitration tribunals, in particular the *Tecmed* tribunal, which reasoned:

[33] For a radical expression of this doctrine, see in particular *Metalclad Corporation v. Mexico* (30 August 2000), Award, ICSID Case No. ARB(AF)/97/1, para. 103

[34] For a radical expression of this doctrine, see in particular *Methanex* v. *The United States* (3 August 2005), UNCITRAL, Final Award, para. 7.

[35] Compare for instance, on the one hand, the *Feldman* and *Tecmed* cases and, on the other hand, the *Encana* case. See *Feldman* v. *Mexico* (16 December 2002), Award on Merits, ICSID Case No. ARB(AF)/99/1, para. 152; *Tecnicas Medioambientales Tecmed, S.A.* v. *United Mexican States* (29 May 2003), Award, ICSID Case No. ARB (AF)/00/2, para. 115; *EnCana Corporation* v. *Republic of Ecuador* (3 February 2006), Award, LCIA Case No. UN3481, para. 169.

[36] In that sense, the distinction between regulation and expropriation can be discussed. As asked by Judge Higgins: 'Is not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss?' R Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1982) 259 Recueil des Cours 267, 331. In fact, the author shares the view expressed by Judge Higgins, arguing that the difference between expropriation and regulation based on public purpose is hardly viable intellectually. In this regard, the conclusions reached by Judge Higgins in the context of international law, are equally pertinent also for investment law: 'A regulation that amounted (by virtue of its scope and effect) to a taking, would need to be 'for a public purpose' (in the sense of in general, rather than for a private, interest). And just compensation would be due. At the same time interferences with property for economic and financial regulatory purposes are tolerated to a significant extent.', *idem*.

> After establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality. Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal ... from examining the actions of the State ... to determine whether such measures are with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the action of the state and whether such deprivation was compensated or not ... it should be also considered that the foreign investor has a reduced or nil participation in the taking of the decisions that affect it.[37]

In light of the case-law of arbitration tribunals, I argue that despite the 'silence' of the indirect expropriation provision, mainstream arbitration practice has protected the regulatory space where states protect/promote the various public interests that form part of the concepts of the right to development and sustainable development.

The same holds true with respect to FET. Indeed, diverging from the *Tecmed obiter*,[38] most arbitration tribunals follow this practice as formulated notably by the *Saluka* tribunal:

> The determination of a breach of Article 3.1 by the Czech Republic therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other. A foreign investor protected by

[37] *Tecnicas Medioambientales Tecmed, S.A.* v. *United Mexican States* (29 May 2003), Award, ICSID Case No. ARB (AF)/00/2, para 122. See also *Total S.A. v. République d'Argentine* (27 December 2010), Award, ICSID Case No. ARB/04/01, para. 232.

[38] 'The foreign investors expects 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 investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives and requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.', *Tecnicas Medioambientales Tecmed, S.A. v. Mexico* (29 May 2003), Award, ICSID Case No. ARB (AF)/00/2, para. 154.

> the Treaty may in any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.[39]

Relying on the legitimate expectations that one has conceptualized elsewhere as a 'two-step' test assessing first, the existence of expectations and second, the legitimacy of their breach,[40] arbitration practice as a whole strikes a balance between private and public interests. Thereby, it pays due respect to the regulatory space of states and the public interests attached to the right to development and sustainable development.

In light of the above, one may wonder why IIL has been regarded as a foe or at least as 'insensitive' to public interest. A few explanations to this perception may be suggested.

A first explanation can be found in the practice of arbitration tribunals themselves. Indeed, beyond the -subjective- fact that arbitrators may not all have the same sensitiveness to public interest considerations and the -objective- reality that a few tribunals accorded a broad protection to investors' interests to the detriment of the public interest,[41] the reasoning in support of their decision plays an important role here. Indeed, the wording and the argumentation used -as illustrated by the above-mentioned example of the 'sole effect doctrine'- may give the impression to their audience that they discarded public interests considerations.

In addition to arbitrators, scholarship also contributes to this vision of IIL as being a foe to public interests. As just said, the quality of arbitrators' reasoning can be improved; however, contrary to civil society, which may be mislead by the deficiencies of legal reasoning or may make a strategic use of them to caricature and stigmatize IIL, this is precisely the basic task of scholars to analyze and to make sense of judicial and arbitration decisions. In that sense, investment scholars should more often 'pierce the veil' of the wording of awards and uncover their *ratio decidendi*. Even more, beyond the unavoidable plurality of approaches within the investment law epistemic community, they should not use these sometimes ill-argued

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[39] *Saluka Investments BV (The Netherlands) v. The Czech Republic* (17 March 2006), Award, para. 306.
[40] See Y Radi, 'Realizing Human Rights in Investment Treaty Arbitration: A Perspective from Within the International Investment Law Toolbox' (2012) 37 N.C. J. Int'l L. & Com. Reg. 1108, 1149-1151.
[41] See *e.g. Tecnicas Medioambientales Tecmed, S.A. v. Mexico* (29 May 2003), Award, ICSID Case No. ARB (AF)/00/2, para. 154.

decisions and the few pro-investors decisions[42] to create an 'academic artefact' which differs from the practice of arbitration tribunals.

In addition to arbitrators and scholars, states also contribute greatly to the perception of IIL as being a foe to public interests through their IIA practice. This famous quote helps to understand the key problem generated by this practice: 'Justice must not only be done; it must be seen to be done'.[43] The traditional secrecy opted for by states in the settlement of investment disputes has very likely contributed to the 'invisibility' of the taking into account of public interests; so did the above-mentioned terseness of the 'old' generation of IIAs. In that regard, the increasing publicization of international investment arbitration through mechanisms such as *amicus curiae*,[44] is likely to contribute to mitigate this perception. In the same vein, the current 'formalization' of this taking into account in new treaty provisions and the increasing mention of sustainable development as an objective of IIAs will contribute to the realization that IIL is doing justice to public interests.

## 3. International investment law and sustainable development

As evidenced by the preambles of the 'new' generation of IIAs and of free trade agreements (FTAs) in particular, sustainable development is an objective increasingly pursued by IIL.[45] This entails that in addition to economic development, IIL is nowadays conceived of as a tool to protect/promote labor rights/human rights and the environment.

Although sustainable development constitutes a unique objective, I argue that it is pursued through two strategies whose objectives are notably different. This section unearths and analyzes these two strategies and reflects upon their implications as to the evolution of the relations between IIL and development. The first strategy relates to state measures enacted to

[42] It has been empirically evidenced in the literature that host states have prevailed more often than they have lost, see S D Frank, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86 N.C. L. Rev. 1.

[43] See *R v Sussex Justices, Ex Parte McCarthy* ([1924] 1 KB 256, [1923] All ER 233).

[44] See *i.e.* Rule 37 of the ICSID rules of procedure for arbitration proceedings available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

[45] See, *e.g.*, the preamble of the United States-Chile Free Trade Agreement: 'The Government of the United States of America and the Government of the Republic of Chile, resolved to: ... PROMOTE sustainable development' (2003) available at http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text; the preamble of the North American Free Trade Agreement (NAFTA): 'The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to: ... STRENGTHEN the development and enforcement of environmental laws and regulations' (1992) available at https://www.nafta-sec-alena.org/Default.aspx?tabid=97&language=en-US; the preamble of the Netherlands-Namibia BIT: 'Considering that these objectives [of investment protection] can be achieved without compromising health, safety and environmental measures of general application' (2002) available at http://www.unctadxi.org/templates/DocSearch____779.aspx.

protect/promote public interests and makes explicit the limits of investors' protection under IIAs *vis-à-vis* such measures (3.1). On the other hand, the second strategy addresses other situations where labor conditions and the environment are at risk *because of* state conducts. It aims at controlling the use of states' regulatory power for the benefit of these two categories of public interest. (3.2). In that sense, it constitutes a (r)evolution in the role assigned to IIAs and more generally to IIL.

### 3.1. The promotion of sustainable development through the express protection of states' regulatory power

As argued above, the application of vague provisions that are typical for the 'old' and still mainstream IIA practice has not resulted in the annihilation of the regulatory power of states. It remains that the 'new' generation of IIAs is characterized by an express protection of this power and of the taking into account of public interests. To make sense of this evolution, one first needs to unravel its motives (3.1.1) and then to assess -in a prospective manner- the added-value of the provisions that explicitly protect states' regulatory power and public interests (3.1.2).

#### 3.1.1. The motives of the evolution: the *de facto* bilateralization of BITs and the reinforcement of the public dimension of investment disputes

This evolution is the product of two phenomena that met in the last decade of the 20th century. The first one relates to the multilateralization of capital flows and the consequent *de facto* bilateralization of the BITs concluded between developing states and developed states. Indeed, although BITs protected the foreign investments of both parties, the lack of FDIs originating from developing states deprived in their respect the *de jure* treaty protection of any effectiveness. The growth of FDIs emanating from those developing states has changed the situation and conferred a proper reciprocity to BITs. In that economic and political context, the status of developed states and home states on the one hand, and developing states and host states on the other hand cannot anymore be fully assimilated.[46] Developing states are

[46] In that sense, see *e.g.* A Newcombe, 'Sustainable Development and Investment Treaty Law' (2007) 8 JWIT 357; Spears (n 31), 1042-1043.

increasingly home states of foreign direct investment operations.[47] On the other hand, developed states are increasingly in the position of host states; as a result, they can be faced with a claim emanating from an investor of a developing state. This explains why developed states are becoming more and more supportive of the protection of public interest and of the protection of states' regulatory power.

The second phenomenon relates to the reinforcement of the public dimension of investment disputes. For a long time, arbitration has been based on state contracts concluded by host states and foreign investors.[48] Investment disputes were at that time of a contractual nature and mainly concerned the alleged violation of this contract by the host state. Since the 1990 *AAPL* decision[49] and the view expressed that a foreign investor can rely on the BIT dispute settlement provision irrespective of the prior conclusion of a state contract -a development known as 'arbitration without privity'-,[50] most investment disputes have a conventional dimension and concern the alleged violation of BITs.[51] This development has increased the impact of investment arbitration on public interest and public policies. Indeed, it has resulted in an explosion of the number of claims filed by foreign investors and thereby to the multiplication of proceedings where domestic public interests and policy choices are under arbitration scrutiny.[52] Furthermore, one should realize that investment arbitration does not only impact the public interest in the domestic scene of the host state involved in the proceedings, but that it has larger consequences. Indeed, given the similarity of IIA

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[47] Developing countries' transnational corporations now account for a quarter of global foreign direct investment (FDI) outflows, see United Nations Conference on Trade and Development (UNCTAD), World Investment Report (WIR) (2010), xix.

[48] For a discussion of the legal status of states contracts, see in particular P Mayer, 'Le mythe de l'ordre juridique de base (ou *Grundlegung*)' in P Fouchard, Ph Kahn and A Lyon-Caen (eds), *Le droit des relations économiques internationales – Etudes offertes à Berthold Goldman* (Litec 1982) 199; P Weil, 'Problèmes relatifs aux contrats passés entre un Etat et un particulier' (1969) 128 Recueil des cours 94.

[49] *Asian Agricultural Products Ltd. v. Sri Lanka* (27 June 1990), Final Award, ICSID Case No. ARB/87/3.

[50] See J Paulsson, 'Arbitration Without Privity' (1995) 10 *ICSID Review* 232; see also W Ben Hamida, *L'arbitrage transnational unilatéral. Réflexions sur une procédure réservée à l'initiative d'une personne privée contre une personne publique* (Bruylant 2004).

[51] Among the disputes registered by the ICSID in 2010, IIAs amounted to 73% of the instruments constituting the basis of consent to arbitration, while contracts and domestic legislation amounted respectively to 22% and 5%, see ICSID cases – Statistics, No. 2010-2 at 20.

[52] See in particular G van Harten, M Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 EJIL 121, 122; R Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2005) 37 N.Y.U. J. Int'l L. & Pol. 953, 956.

provisions, the decision of a tribunal in one case is of interest for the policy choices of all the states party to IIAs.[53]

These two phenomena have met to shed a brighter light on public interest and states' regulatory power in IIL and have greatly contributed to the emergence of new provisions that protect explicitly those public interests and state regulatory power.

### 3.1.2. The explicit 'presence' of public interest in international investment agreements

The body provisions of IIAs address public interest issues and states' regulatory power following two main strategies: the provision of exceptions and the refinement of substantive standards.[54]

Although the provisions on exceptions diverge as to the exact substantive and procedural requirements to which those exceptions are conditional,[55] they have in common to enable states to enforce measures which are necessary to protect human, animal or plant life or health. Key in those provisions is the notion of necessity.[56] Indeed, for this clause to cover the state measure at hand, the arbitration tribunal has to assess in particular the respective weight of the public interest protected by the state measure and the harm made to the investment.

The second 'sustainable development' strategy, *i.e.* the refinement of substantive standards, often consists in the reaffirmation that the exercise of the regulatory power of states with respect to health and the environment cannot be considered to violate IIAs.[57] However, most of the provisions which embody this strategy provides that it could be the case in rare

[53] See Y Radi, *La standardisation et le droit international – Contours d'une théorie dialectique de la formation du droit*, *supra* note 14, 359-370; S W Schill, 'International Investment Law and Comparative Public Law – An Introduction', in S W Schill, *International Investment Law and Comparative Public Law* (OUP 2010) 3, 18-20.
[54] See Spears (n 31), 1048.
[55] For a typology of these different types of exception clause, see *ibid.*, 1060-1062.
[56] 'Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health; (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or (c) for the conservation of living or non-living exhaustible natural resources.', Model Agreement for the Promotion and Protection of Investments, (2004), available at: http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf.
[57] See *e.g.* Common Investment Area Agreement (COMESA CIAA) Article 20(8) (2007): 'Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.'

circumstances. For instance, the Annex B of the 2012 US Model BIT makes clear as to expropriation: '*Except in rare circumstances,*[58] non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.'[59]

These evolutions of the treaty practice aiming at the protection of public interest and states' regulatory power have been criticized on different grounds. Some have expressed this concern that the provision of an exhaustive list of policy objectives may result in a restriction of the normative space left by traditional substantive standards.[60] Others have also raised the question as to whether it makes any sense to import general exceptions provisions from trade agreements into IIAs.[61]

In light of the features of the two above-mentioned strategies, *i.e.* the necessity of state measures as to exceptions clauses and the restrictions to the protection of public interests and of the states' regulatory power in the refined substantive standards, I put forth that the main issue raised by these two strategies relates to their efficiency. Indeed, from a prospective point of view, it seems that their 'substantive' added-value will be virtually insignificant. This is so because, as argued previously, the 'silent' provisions typical of the 'old' generation of IIAs enable the taking into account of public interests and their balancing with investors' interests in a way similar to the exception provisions and the refined substantive standards. And as evidenced by the analysis of the case-law, arbitration practice as a whole has paid due respect to the regulatory power of states and to their public interests.

The above-mentioned Annex B of the 2012 US Model BIT illustrates that point; indeed, I believe that the 'rare circumstances' it refers to, will likely correspond to the situations in which mainstream arbitration practice concludes to the violation of the indirect expropriation provision, *i.e.* a loss of control or a complete destruction of the value of the investment. The future will teach us whether the practice of investment tribunals confirms this opinion. Meanwhile, it remains that the explicit presence of public interest in the new generation of IIAs makes the justice that is done to public interest in IIL more visible and thereby

[58] Emphasis added.

[59] US Model BIT – Treaty between the United States of America and the Government of [Country] concerning the Encouragement and Reciprocal Protections of Investment (2012), available at: http://www.state.gov/documents/organization/188371.pdf.

[60] See *e.g.* N DiMascio, J Pauwelyn, 'Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102 AJIL 48, 82-83.

[61] Mann (n 28), 11-12.

participates to the legitimization of the regime in the eyes of local populations and the civil society.

### 3.2. The promotion of sustainable development through the control of the use of states' regulatory power

Contrary to the above-mentioned provisions, the provisions of the 'new' generation of IIAs controlling the use of states' regulatory power with the view to protect/promote sustainable development objectives constitute a major innovation in IIL. Indeed, they address situations where public interests are harmed *by* state conducts and they aim at prohibiting/preventing these conducts. This primary focus on state conducts responsible for the harm to public interests constitute in my view an important (r)evolution of the role assigned to IIAs and IIL. In light of the examination of these mechanisms (3.2.1), it is therefore necessary to take good note of this innovation and to inquire into its policy motives and implications (3.2.2).

#### 3.2.1. The normative features of the (r)evolution

In order to protect and promote sustainable development, the 'new' generation of IIAs contains innovative provisions as to the conduct that is expected and required from states with respect to the environment and labor conditions. Irrespective of the issue of their (non)-bindingness, these provisions *mutatis mutandis* reaffirm the commitments of states with respect to their labor standards and environmental international obligations. This is illustrated by Article 13.1 of the 2012 US Model BIT: 'The Parties reaffirm their respective obligations as members of the International Labor Organization ('ILO') and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up'.[62] 'Non-lowering provisions' relating to these two fields are also typical provisions of the 'new' generation of IIAs. For instance, Article 13.2 of the above-mentioned model provides:

> The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an

[62] 2012 US BIT Model (n 67).

> encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.[63]

Most of the provisions mentioned above are coupled with a dispute settlement mechanism that generally consists of inter-state consultation. This is also illustrated by the 2012 US Model BIT whose Article 13.4 provides: 'A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.[64]'
These provisions constitute an important step in the promotion of sustainable development, but also in the role assigned to IIL.

### 3.2.2. The policy motives and implications of the (r)evolution

Over the last decades, states and international organizations have placed issues of interest for the international community as a whole at the core of their policy agenda. In addition to democracy, the rule of law, one finds among their priorities the protection and promotion of sustainable development and its various components: labor rights/human rights, the environment and economic development.[65]

This political agenda has led states to make of IIL an international tool in the service of those public interests attached to the concept of sustainable development. This strategy has two revolutionary implications as to states' regulatory power. First, under IIAs containing provisions reaffirming the commitments of states with respect to their labor standards and environmental international obligations, states are required -in a more or less binding manner- not to violate, *e.g.* their international labor law obligations, irrespective of any objective relating to the attraction of foreign investors. This is a direct control over the use of the regulatory power aiming at preventing and prohibiting state conducts which harm domestic constituencies in relation to labor conditions and the environment. Second and with respect to the objective of attracting or maintaining the presence of foreign investors, states are also

[63] *Ibid.*
[64] *Ibid.*
[65] See *e.g.* United Nations Millenium Declaration (8 September 2000) UN Doc A/55/L.2, available at http://www.un.org/millennium/declaration/ares552e.htm.

under treaty control. One should realize that this evolution constitutes a direct interference with the choices to be made -in more or less 'easy' cases- between various public interests, *i.e.* the protection/promotion of labor conditions and the environment, on the one hand, and the attraction of foreign investment to foster economic development, on the other hand. These choices to be made are not underlain by the classical public/private conflict of interests the investment community is familiar with, but instead, by a conflict between different public interests. These provisions that aim at controlling the use of states' regulatory power evidence another evolution in the role that is attributed to IIL in the promotion of development.

## 4. Conclusion

Since the aftermath of decolonization to the current globalization, IIL and development have had a long common history. This chapter endeavors to demonstrate that -from a legal point of view- IIL has always aimed at promoting development: yesterday, economic development, today, sustainable development. Along this teleological evolution, I put forth that this regime, taken as a whole, has never sacrificed the public interests attached to the concept of the right to development and sustainable development, *i.e.* the environment, human rights and labor rights. This teleological evolution from economic development to sustainable development has impacted on the design and content of IIL. Beyond the explicit protection of public interest and states' regulatory power *vis-à-vis* foreign investors' interests, I claim that the focus on sustainable development has led most fundamentally at targeting states' conduct in new situations so far unknown to IIL. This nascent (r)evolution marks the start of a new era in the history of IIL and development.