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Domestic investment laws, international economic law, and economic development

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World T.R. 109 "Development' is a legal concept which has been central to the practice of international economic law (IEL). This Article examines how "development' continues to be at the heart of struggles between domestic investment laws (DILs) and international economic law. By examining over 3000 international investment agreements (IIAs) and DILs signed in the last seven decades, this Article identifies the ways in which the concept of development has evolved in tandem with the growth of international economic law by dividing the history of international investment law into six main phases. It traces the emergence of "development' in DIL to the decolonization era arguing that post 1990, the proliferation of international investment treaties and growth of investment treaty arbitration have been used as tools of liberalization on the weak premise that this would lead to economic development. In this context, this Article examines closely the interpretation of "investment' by ICSID tribunals, promotion of international arbitration for economic development, attempts to internationalize economic development contracts, continued relevance of the New International Economic Order, and shift to sustainable development in IEL discourse.

Keywords: international investment law; investment arbitration; development; new international economic order

1. Introduction

"Economic development' has been pivotal to the growth of international investment law (IIL) and international economic law (IEL) more broadly.[1] This has been built on neoliberal principles which advance that in order to attain higher levels of economic development, developing States must liberalize domestic investment laws (DILs), sign international investment treaties (IIAs), and consent to international arbitration.[2] These principles, which have gained near universal acceptance over the last three decades, are now being questioned at domestic, regional, and global levels.[3] There are clear indications that liberalized IEL rules do not always lead to economic development especially as economic evidence for links between economic development and foreign investment law under IIAs remains slender.[4]

World T.R. 110 Although "development' is a mantra that is familiar in IEL discussions, the exact implications of "development' as a site of tension between domestic and international foreign investment protection law have not been fully explored in the existing literature.[5] Development is a vague and broad concept which embraces social, economic, and political objectives.[6] In basic usage, it means advancements in society, and at various junctions in history it has referred to industrialization, rebuilding of war-torn economies, poverty alleviation, rule of law, and foreign aid.[7] For some scholars, "development' is a fundamental moral and legal right,[8] while for others, it is a complex discourse shaping the relationship between Third World resistance and international law.[9] For critical legal scholars, "development' is an idealized history of the West and international economic institutions, which has propelled the universalism of international law.[10] "Development' has been the springboard, with varying success for broader engagements with international law on human rights, poverty alleviation, and protection of the environment.[11] However, as our Article will show, in practice "development' in IEL has remained a market-centred principle with more emphasis on the protection of property and contractual rights.[12] For the purposes of this article, "development' is defined as a concept used in IEL to embrace the legitimate realizations of all States, irrespective of their stages of development.

In our contribution to this special issue, we use "development' to show that against the background of neoliberalism, the relationship between DIL and IEL has vacillated over the last seven decades.

During the decolonization and NIEO eras, DILs were the main mechanisms for promoting foreign investment and economic development. However, this relationship was reversed following the fall of the Soviet Union in 1991 and triumph of market-based principles. Our analysis shows that even though "development' provisions in DILs have always had an influence on IELs, IIAs began to refer to "economic development' only after the legitimacy crisis and backlash by States post 2004. This has been followed by a quick shift to sustainable development. DILs and IIAs have never existed as disconnected regimes and even though DILs continue to co-exist with IIAs, in the current impasse, the disconnect between development in domestic regimes and at the international level remains evident.

The basic argument made in this Article is that "development' represents the continued dialectical battle for supremacy between domestic law and international law on foreign investment in a post-liberal IEL order, and what is to become a post-pandemic IEL order. While this battle has historically been a continuous struggle between more powerful capital exporting States and less powerful capital importing States, and between more liberal notions of property/contract protection and more nationalist principles, it is also one with several complex layers.[13] It can also be seen as a continuing struggle for the unabated existence of international standards of foreign investment protection and resistance of these standards by less powerful States that continue ***World T.R. 111** to assert their sovereign control over foreign investment.[14] These cyclical patterns of power struggle are evident in efforts by publicists to internationalize foreign investment contracts and the creation of treaty-based standards by developed countries to recognize an international regime of protection supported by a secure arbitration mechanism.[15]

This Article seeks to understand how divergent representations of "development' in DILs, and international law show the evolution of governance in the key stages of the liberalization of IIL, and the later recovery of the State's right to regulate foreign investment in the public interest. To tackle this research question, we have carried out a systematic textual review of hundreds of DILs, over 3000 international investment treaties and over 1000 investment arbitration awards.[16] While our main task is to identify similar trends on "development' in DILs, we deal with broad issues which remain at the centre of ongoing tensions in the field of IIL.

This Article is divided into five sections. In Section 1, we have provided a background and clarified the scope of our analysis. Section 2 examines the evolution of "development' identifying the main trends of development in DILs, matching changes with key junctions in the shift from domestic law to international law and back again to domestic law. Section 3 presents the core of our argument and focuses on major ways in which "development' is at the centre of tensions between DILs and international law on the protection of foreign investment.[17] We also make arguments for the renaissance of the New International Economic Order (NIEO), arguing that its principles continue to influence DILs. Section 4 examines the shift in emphasis from "economic development' to "sustainable development' in IEL. Finally, in Section 5, we provide a forward-looking conclusion arguing that in a post-COVID world, States will strengthen domestic regulation of foreign investment for development.

2. "Development' in International Law and Domestic Economic Law: Six Phases of "Development'

Like most concepts of international law, "development' has undergone radical changes over the last six decades and has been shaped by major world events.[18] These include the end of the second world war,[19] decolonization,[20] the Cold War era, the NIEO, the end of the Cold War and subsequent triumph of neoliberalism,[21] the establishment of the World Trade Organization (WTO) in 1995,[22] the 2008 global financial crisis, and now a possible retreat ***World T.R. 112** from neoliberalism and the COVID-19 pandemic.[23] In this section, we identify six main phases of foreign investment law, and match these phases with key trends in the evolution of "development' as a concept in foreign investment protection law.[24]

2.1 Phase One: The Era of Colonialism

The emergence of investment protection principles took place in the context of US investments in Latin America in the nineteenth century.[25] The US asserted the right of diplomatic protection, and the notion that disputes between Latin American States and the US arising from the treatment of American foreign investors should be settled according to an external, international minimum standard.[26] This tussle, which centred on the primacy of local laws and tribunals, took place without

any reference to economic notions.[27] As our analysis in the following sections will show, references to economic development began to appear only after the process of decolonization began and threats to foreign owned property in Asian and African colonies became real.

Before the Second World War, foreign investment was carried out mainly on a civilizing mandate, during which colonial powers focussed on developing overseas territories for their economic benefits.[28] "Development' was attendant to competition for raw materials, which were essential for building the industrial power of the metropoles.[29] Although international law played a major role in colonization, the need for international principles did not arise, as foreign investment flows took place largely within the imperial system.[30] Within this system, trade and foreign investment were regulated by unequal treaties, the activities of trading companies, gunboat diplomacy, colonial concessions, and chartered corporations.[31] A few Friendship, Commerce, and Navigation (FCN) Treaties were signed by the US, but they made no express reference to development.[32] A modern exception was the 1949 Treaty of Friendship, Commerce, and Economic Development between the US and Uruguay.[33] Although most of the world was colonized, DILs could be found in the constitutions and laws of free States, especially Latin American States.[34]

After the end of the Second World War, the US began to promote "economic development' through the establishment of international economic institutions such as the International Bank for Reconstruction and Development.[35] The Havana Charter (the "Final Act of the ***World T.R. 113** United Nations Conference on Trade and Employment') helped lay the foundation for a modern IEL.[36] Article 12 of the Charter recognizes the importance of international investment for promoting economic development and reconstruction, but also the right of States to take appropriate measures to ensure that foreign investment is not used as a basis for interference in national policies.[37] Overall, during the latter years of the first phase of foreign investment protection law, foundations were laid for future attempts to internationalize foreign investment protection law using economic development as an impetus.[38]

2.2 Phase Two: The Decolonization Era

Following the end of the Second World War, many States gained independence in the 1950s and 1960s. For these States, even though there was urgency for economic development, asserting their "new-found' sovereignty over economic activities within their territories was of equal concern.[39] Colonial concessions were replaced by new contractual arrangement forms, including joint ventures agreements (JVAs) and production sharing agreements, which transferred total ownership and control of economic activities from colonial companies.[40] These States began to enact DILs and nationalize foreign-owned property.[41] Newly independent States of Asia and Africa joined forces with Latin American States to challenge principles of international law and attempted to universalize the Calvo Doctrine.[42] Afro-Asian States began to argue for their economic self-determination and struggles between DIL and IEL began to emerge. The first major General Assembly Resolution on self-determination was the General Assembly Resolution 523 (VI) of 12 January 1952 on Integrated Economic Development and Commercial Agreements.[43] Economic self-determination was reinforced through UN resolutions that were more specific.[44]

One of the most important developments of the decolonization era was the 1962 United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources (PSNR).[45] The issue of PSNR was first raised in the UN as part of debates in the General Assembly (UNGA) on the promotion and financing of economic development in under-developed countries.[46] The Resolution on PSNR considers that due regard should be paid to encouraging international co-operation in the economic development of developing countries.[47] It also declares that PSNR must be exercised in the interest of national development.[48] When this Resolution was passed, its declarations on expropriation and prompt compensation were ***World T.R. 114** considered very controversial.[49] However, in retrospect, we consider that the greater significance of the Resolution is its affirmation that even though economic development is essential, foreign investment agreements and activities should remain subject to domestic law. Establishment of the International Centre for the Settlement of Disputes (ICSID) by the World Bank in 1966 was another major milestone. Directors of the World Bank, led by Aron Broches, positioned "compulsory' arbitration under ICSID as an essential tool for encouraging economic development in developing countries.[50]

In the 1960s, many developing countries established development plans and national investment codes for economic development.[51] While most of these codes made no reference to development, some countries contained detailed provisions on development.[52] These codes recognized special status for enterprises which contributed to national economic development,[53] and recognized the

importance of foreign investment for national development.[54] Investment codes were recognized as legal counterparts of development plans.[55] For example, Philippine's 1967 Incentives and Guarantees Act highlighted the importance of investment that would increase national income and exports, provide more opportunities for employment, and provide for equitable wealth distribution.[56]

In addition, several codes included contribution tonational economy as a criterion for approval as capital investment.[57] As will be discussed in section 3 of this article, this requirement, which originated from DILs, is now recognized in more recent IIAs and has become part of investment treaty arbitration jurisprudence.

Indonesia's 1967 Law Concerning Investment of Foreign Capital deserves special mention because of its special focus on economic development.[58] This law was unique because it defined economic development as "transforming potential economic strength into actual economic strength through capital investment, the use of technology, increased knowledge, heightened efficiency, increased organizational and managerial ability'.[59] This law was considered two decades later in one of the first ICSID disputes, *Amco Asia Corporation and others v. Republic of Indonesia.* [60] In its 1983 decision on jurisdiction, even though the Tribunal relied upon the ICSID Convention's preamble which recognizes the importance of foreign investment for economic development, it stated that the preamble to the 1967 Law on Foreign Capital Investment had no direct bearing on its jurisdiction over the dispute.[61]

In addition to national investment codes, the constitutions of most newly independent countries contained provisions which provided guarantees against unlawful compulsory expropriation of all property.[62] During the decolonization era, the main regulatory framework for protecting ***World T.R. 115** and promoting foreign investment was DIL.[63] Although the 1962 OECD Draft Investment Agreement and Abs/Shawcross Draft Convention recognized the importance of capital flows for economic development, the first BITs did not adopt this "development language'.[64] This point of divergence is important because the two drafts were the models for the first generation of BITs signed between European countries and developing countries.[65] Majority of the first BITs are silent on development recognizing instead the importance of investment promotion for increased prosperity in their preambles. Notwithstanding, the IIA exchange notes of States such as Turkey and Indonesia signed during this era, make reference to economic development.[66] BITs signed by Switzerland with Senegal and Niger also recognize the importance of conforming to domestic law and providing reciprocal aid for economic development.[67] In its first BITs, Tanzania reiterated that development of its economy would necessitate certain exceptions.[68] Indonesia's BITs reserved its rights to national treatment in view of the present stage of its development[69] and its right to grant tax exemptions as a means of stimulating economic development.[70] Overall, requirements that investments must be made in accordance with domestic laws and regulations ensured the primacy of DILs over international law.[71]

2.3 Phase Three: The New International Economic Order (1970-1989)

Significant events occurred during the two decades between 1970 and 1990.[72] This period was marked by increased nationalization of foreign-owned property,[73] the oil embargo crisis,[74] renegotiation of foreign-owned contracts,[75] and the NIEO. The "Programme of Action' of the NIEO places emphasis on developmental issues including raw materials and primary commodities; the international monetary system and financing of the development of developing countries; industrialization; control of transnational corporations; and economic rights and duties of States and permanent sovereignty of States over natural resources.[76]

Although the DILs of many States remained unchanged between 1970 and 1990, some States enacted new DILs. A key example is Egypt's1974 investment law (amended in 1977), which marked a major shift in State policy aimed at achieving national reconstruction and economic development.[77] This law which was enacted to liberalize Egypt's foreign investment law[78] ***World T.R. 116** would be the basis for the first ICSID dispute related to the operation of a special economic zone (SEZ) and instituted on the basis of a DIL in 1984.[79] Even though this ICSID claim involved interpretation of Egypt's 1974 DIL, the majority did not address the link between economic development and the investors claims in its 1992 award. However, in his dissenting opinion, Mohamed El Mahdi examined links between the jurisdiction *rationae materiae* of the tribunal, Egypt's DIL and Article 25 of the ICSID Convention. He stated that the main characteristic "differentiating investors from developers or promoters or the like, seems to reside in the fact of the flow of invested capital, as an instrument for economic development, that brings the investor into the host State'.[80]

During the NIEO era, nationalization of foreign owned property occurred on a mass scale in

developing countries.[81] Some of these nationalizations occurred through DILs.[82] In Chile, a controversial 1971 constitutional amendment was the basis for the 1972 nationalization of the American multinational, International Telephone, and Telegraph Communications. Chile's 1974 Investment Statute provided that foreign investment shall consist of capital contributions made to an enterprise, derived from a former foreign investment, provided that such an enterprise had, among other objectives, production of goods or services which were of exceptional interest to the economic or social development of Chile.[83]

As it occurred during the first two phases of IIL, DILs provided that approval of foreign investment would be subject to the condition that they contributed to social and economic development.[84] Special exemptions and tax reliefs were reserved for foreign companies in order to promote economic and social development.[85] DILs recognized the importance of modern technology in order to elevate national technological levels and increase exports for economic development.[86] They also encouraged regulation of foreign investment for national development as paramount for achieving economic independence.[87]

DILs were influenced by international developments, especially aspirations for establishment of a NIEO and vice versa.[88] The 1974 Charter of Economic Rights and Duties of States recognized the importance of foreign economic development but gave primacy to national law.[89] It recognized the right of each State to regulate foreign investment in accordance with domestic laws and provided that settlement of disputes should be through domestic dispute settlement mechanisms.[90] Corroborating the NIEO, in its 1974 report on the role of Role of Multinational Corporations on Development and International Relations, the Group of Eminent Persons noted that it was necessary for developing countries to formulate strategies which were consistent with national goals and policy - including income distribution, labour conditions, ***World T.R. 117** industrialization, or balance of payments.[91] Delimitation of foreign investment to DIL was also reiterated by the "Organization of American States: Permanent Council Resolution on the Behaviour of Transnational Enterprises' which emphasized that transnational corporations should be subject to DIL and to the jurisdiction of national courts and conform with the development policies of host countries.[92] The World Bank's 1982 Bank Convention Establishing the Multilateral Investment Guarantee Agency provides that guarantees would be provided for investments which comply with the host country's laws, are consistent with declared development objectives, and contribute to development.[93]

Between 1970 and 1989, over 400 IIAs were signed by States.[94] States such as China signed their first BITs during this period.[95] States such Indonesia, Guinea, Venezuela, Brazil, Ethiopia, Chile, Tanzania, and India did not sign any new IIAs during this period.[96] For these States, DILs remained the main framework for promoting and protecting foreign investment. Like the IIAs signed during the previous phases of IIL, majority of IIAs signed during this period make no reference to "development'.[97] Notably, treaties signed by the United States and Switzerland began to refer to economic development in their preambles.[98] Under the US BIT programme initiated in 1981, the official policy was that "an open international investment system in which participants respond to market forces provides the best and most efficient mechanism to promote global economic development'.[99] Some BITs signed by Switzerland recognize that capital flows are important for maintaining an appropriate investment climate, in which foreign investors respect the sovereignty of the host country, and act consistently with the declared policies of the host countries and in their endeavour to substantially contribute to the development of the country.[100] The preamble to the Spain-Morocco BIT (1989) recognizes that fair and equitable (FET) treatment will stimulate economic development and that the only way to establish flow of capital is to respect the sovereignty and laws of the host country in an endeavour to contribute to its development.[101]

Overall, between 1970 and 1989, even as the battle for complete elevation of foreign investment protection from DIL to international law intensified, DILs remained the main amplifiers for the development needs of developing States.[102] UN resolutions which explicitly recognized the development concerns of developing countries were drafted using aspirational language and unlike BITs were not yet recognized as binding sources of international law.[103]

2.4 Phase Four (1990-2003): Liberalization and the Treatification of International Investment Law

Propelled by the fall of the Soviet Union, the year 1990 marked the ascendance of neoliberalism, market-based principles, and liberalization of foreign investment flows.[104] These events which ***World T.R. 118** laid the foundation for expansive interpretation of treaties eroded the sovereignty of

developing countries, and the primacy of DIL began to go into retreat.[105] A sharp rise in IIAs containing inflexible standards of investment protection[106] was also aided by heavy globalization rhetoric which was based on the premise that a world without boundaries required unbridled movement of trade and investment.[107] Declining development aid from multilateral institutions,[108] structural adjustment policies by international financial institutions,[109] and collapse of socialist models of economic development[110] paved the way for new approaches to foreign investment protection law. In the 1990s, Third World cohesion which had propelled the NIEO was replaced by competition between States for foreign investment and trade. The 1994 Marrakesh Agreement establishing the WTO recognized the importance of economic development but was part of the shift towards acceptance of trade liberalization and free trade.[111]

ICSID, which had been a relatively dormant institution for decades, only dealing with a few arbitrations arising from contractual disputes, assumed new importance after the 1990 *AAPL v. Sri Lanka* investment treaty award.[112] This decision confirmed the jurisdiction of ICSID tribunals at the unilateral instance of a foreign investor based on an investment treaty, thus increasing ICSID's caseload.[113] Broad arbitral interpretation of expropriation and FET clauses widened the liability of States well beyond what may have originally been intended. The effect was to circumscribe the scope of domestic legal powers within a narrow limit, as exceeding this scope could result in investment arbitration claims and large monetary awards.

Even though IIAs proliferated in the 1990s, the NIEO had evolved into competing norms and accomplished its task by ensuring the continuation of its doctrine in DIL and contract forms.[114] In the natural resources sector, States began to establish State-owned corporations. Concession agreements which had given total control to foreign oil companies were replaced by production sharing agreements. Such measures - which reflect the principles propelled by NIEO - demonstrated the struggle for primacy of domestic mechanisms and institutions.

For the first time, DILs were no longer the main source of foreign investment protection law. Newly enacted DILs continued to follow trends observed in the first three phases of IIL. They provided preferential treatment for enterprises which contributed to social and economic development and recognized the importance of foreign investment for economic development.[115] Influenced by the 1992 UN Rio Conference, a noticeable change during this phase is that DILs began to refer to "sustainable development'.[116] Cuba's Foreign Investment Act of 1995 was one of the first DILs to state that its purpose was sustainable development.[117]

World T.R. 119 Unlike the IIAs signed during this period, DIL remained the main amplifier of national development goals. They emphasized the importance of investment which leads to technological development, boosts exports, creates job opportunities, and improves standards of living.[118] However, a few IIAs recognized the importance of economic development and sustainable economic development in their preambles.[119]

Even though the period between 1990 and 2004 was a golden era for IIAs, DILs like South Africa's 2003 Black Empowerment Act, which sought to correct the economic inequities of Apartheid, were clear signs of cracks within the system.[120] This was also reflected in DILs that sought to reserve specific economic sectors for local investors.[121] It was evident that even as liberalization was taking place at the international level, at the national level States sought to control foreign investment.[122]

2.5 Phase Five (2004-2014): Backlash

By 2004, as reflected in the 2004 US Model BIT an apparent shift towards more balance between international standards of foreign investment protection and the right of a State to regulate foreign investment began to occur.[123] Economic crises in Asia and Argentina raised doubts as to the effectiveness of economic systems left uncontrolled by States and signalled the re-emergence of domestic law's role.[124] These were signposts of a new phase in the battle between DILs and the IEL, which had curtailed a State's power to use domestic law to control the activities of foreign investors.[125] The 2005 *Methanex v. United States of America* award which centred around alleged losses caused by the State of California's ban on the sale and use of a gasoline additive was significant because the US had to defend a claim using arguments built around sovereignty in establishing the notion of regulatory intervention.[126]

During the fifth phase, States continued to negotiate IIAs on a mass scale, and investment treaty arbitration claims increased exponentially. A few BITs and regional investment agreements signed during this period recognize the importance of economic development and sustainable economic

development in their preambles.[127] Even though the treatification of IIL continued to expand, a few developing countries continued to revise DILs. These laws recognized the importance of investment for sustainable development.[128] A few laws provided for incentives for foreign investments which contributed to development such as stability certificates.[129] Indonesia's 2007 investment code recognized the importance of developing a sustainable national economy based on economic democracy and improving sustainable economic development.[130]

*World T.R. 120 2.1.6 Phase Six (2015-Present): Reform and Recalibration

The last decade has been marked by State backlash, discontent, questioning of the IIL regime and renewed calls for reform.[131] By the mid-2000s, it was already clear that economic development was not a corollary of liberalization.[132] We are witnessing a new stage in the battle for supremacy between international law and domestic law. The EU member States which undermined "development' in their first BITs are now collectively promoting a development-based approach to IIL.[133]

There is clear evidence of a return to domestic investment law by some States. South Africa's 2015 Foreign Investment Law and subsequent termination of most of its BITs are emblematic of this change.[134] There is a strong return of the regulatory power of the State, which is recognized in newer IIAs called "balanced treaties'.[135] Regulatory control in the public interest has been elevated into the preambles of IIAs and is incorporated as a distinct article in some IIAs such as the Singapore-Indonesia BIT (2018).[136]

The legitimacy crisis of IIL has become an opportunity for States to strengthen regional and national domestic investment laws.[137] Proliferation of SEZs and SEZ laws is also taking place.[138] Economic liberalization is on the retreat - at least partially - in most States. For a State like Ethiopia, which had always adopted a conservative approach towards foreign investment, its DIL rather than IIAs has become an instrument for stronger liberalization in the private sector to accelerate economic development.[139] Indonesia, which has consistently championed development in its DILs, has now terminated majority of its BITs.[140] Indonesia's recent IIAs with Korea and Singapore confirm that - unlike most States - Indonesia aims to align its DIL with IIAs with its economic development goals. Thus, even though there are divergences between State policies for foreign investment protection at the international level, domestic level, and in contracts as a strategy for economic development, Indonesia has remained an exception to the general rule.

States are now actively using domestic law to elevate their economic development aspirations and reaffirm their sovereignty.[141] Recent DILs identify strategic sectors which are important for economic development.[142] They also emphasize that investment must be in accordance with domestic law and must contribute to sustainable economic development.[143] For example, Egypt's 2017 investment law recognizes that investors have a social responsibility for development objectives like increased national economic growth rates which contribute to sustainable development.[144]

Unlike the IIAs signed during the first phases of IIL's evolution, there is now some obvious gradual convergence between newly signed IIAs and domestic laws. Events of the last six decades have led to a diffusion of norms and there are now overlaps between DILs and the IIAs of certain ***World T.R. 121*** countries. Recently signed IIAs recognize that promotion of foreign investment should contribute to sustainable development[145] and economic development.[146] However, recent IIAs like the United States-Mexico-Canada Agreement (USMCA, 2018) and the larger majority of IIAs in force make no express reference to "development'.

For the purposes of this Article, the most striking change that has occurred in IIA drafting is standalone clauses which state that covered investments must contribute to the economic development of the host State.[147] After a long hiatus from BIT negotiation, Brazil's recent Cooperation and Facilitation Investment Agreements (CFIA) recognize the obligation of investors to contribute to the sustainable development of the host State.[148] The EU-China Comprehensive Agreement on Investment (EU-China CAI) (2021) is a perfect example of the convergence that is taking place between development provisions in domestic law, regional law, and international law.[149] Even though the EU-China CAI has not yet come into force, it is noteworthy for the following twin goals: to liberalize investment and to promote sustainable development provisions.[150] The EU-China CAI also recognizes that economic development, social development, and environmental protection are interdependent and mutually reinforcing dimensions of sustainable development.[151] In June 2021, the EU launched negotiations with Angola for its first-ever Sustainable Investment Facilitation Agreement.[152] This is meant to form a new type of IIA aimed at promoting sustainable and responsible investment to support climate and energy transformations.[153]

3. "Development' and Tensions between Domestic Law and International Law

Section 2 of this Article has highlighted that convergence between development provisions in DILs and IELs is a recent trend in the post-liberalization phase of IIL. This section shows the main ways in which the notion of "development' is central to the struggle that persists between DIL and IEL by shifting focus to investment arbitration awards. As we shall show, even though these tensions have always existed, the themes examined in this section have become more pronounced in the sixth phase of IIL. Understanding these themes is important because even though development may be viewed as a concept with deep theoretical implications, it also has practical implications on the rights and obligations of foreign investors and States including the rights of States to regulate.

3.1 Definition of "Investment'

Although IIL centres around "foreign investment', there is no consensus on what type of investment qualifies as protected investment under IIL.[154] Identifying investment treaty -covered foreign investment is important because unlike DILs, IIAs can provide what may be perceived as

Table 1. Showing Main Phases of International Investment Law

Phase	"Economic Development'	International Economic Law	Domestic Investment Law
Colonization	Civilization Mandate	Treaty of Friendship, Commerce, and Economic Development between the US and Uruguay (1949)	-
Decolonization	Economic Aid and Self - determination	UNGA Res 523 on Integrated Economic Development and Commercial agreements (1952) UNGA Res on Permanent Sovereignty over Natural Resources (1962)	Tanganyika: Foreign Investments (Protection) Act (1963) Indonesia, Law Concerning Investment of Foreign Capital (1967)
New International Economic Order (1970-1989)	Self-determination and Permanent Sovereignty over Natural Resources	United Nations: Charter of Economic Rights and Duties of States (1974)	Law No 43 Concerning the Investment of Arab and Foreign Funds and the Free Zones (1974)
Treatification (1990-2003)	Emphasis on Attracting FDI	World Bank Guidelines on the Treatment of Foreign Direct Investment (1992) The General Agreement on Tariffs and Trade (1994)	Cuba, Foreign Investment Act (1995)
Backlash (2004-2014)	Less Emphasis on Attracting FDI	UNCTAD Investment Policy Framework for Sustainable Development (2012)	South Africa Protection of Investment Act (2015)
Reform (2015-present)	Shift to Sustainable Economic Development	EU-China Comprehensive Investment Agreement (2021)	Colombo Port City Economic Commission Act (2021)
Source: Authors' compilation (2022).			

World T.R. 122 higher levels of protection[155] including access to international arbitration.[156] The greatest asymmetry of this irregularity between domestic-bound and internationally protected economic activity has emerged from the decisions of ICSID tribunals.[157] During regional consultations

which took place before establishment of ICSID, a major issue was the types of disputes the Centre would have jurisdiction to determine. In response to these questions, Aron Broches emphasized that a detailed definition would be excluded and that "investment dispute' in the Convention's preamble, would exclude purely political, economic, or commercial disputes. Broches argued ***World T.R. 123** that a precise definition of investment disputes would undermine the primary objective of the ICSID Convention.[158]

Interpretation of Article 25 (2) has proved contentious and ICSID tribunals have remained divided on the definition of "investment' as a basis for jurisdiction, especially with regard to contribution to economic development.[159] As one tribunal has noted, reference to economic development in the ICSID preamble as well as the object and purpose of IIAs could support both a broad and narrow meaning of investment.[160] This is complicated by the fact that ICSID arbitration was originally designed for the settlement of contract-based disputes and not IIA disputes.[161] Unlike the ICSID Convention, IIAs contained explicit but broad definitions of covered investment. As we showed in section 2 above, while DILs include provisions on economic development, most IIAs which are the main basis for ICSID disputes do not contain standalone clauses requiring contribution to economic development. In non-ICSID cases, tribunals have also considered whether invested assets must contribute to the economic development of the host State. However, they have done so with caution and some level of flexibility, noting that this does not amount to a tick-boxing exercise.[162]

Prior to the 2001 *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco* award, contribution to the economic development of the host State did not feature prominently in the decision making of tribunals.[163] Some ICSID tribunals had examined in passing the importance of the ICSID Convention for economic development but only in purely contract-based disputes which also involved application of DIL.[164] In *Salini v. Morocco,* the tribunal noted that "in reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition'.[165] This has led to development of a fourprong "Salini test'.

In several disputes, States have failed to convince tribunals to reject jurisdiction on the sole basis that activities of foreign investors have not contributed to economic development. A State argued, for example, that mere purchase of land by a foreign investor did not contribute to economic development and was not an investment within the meaning of the ICSID Convention.[166] In *Croatian Courier Coo#peratief U A v. Croatia,* the claimant who operated a postal service company alleged that government agencies violated the BIT by attempting to re-monopolize the postal services market. Croatia argued that by using a private equity fund, the Claimant had not contributed to the development of its economy. However, the Tribunal held that the Claimant had made a contribution through its indirect ownership of shares and through a series of capital expenditures.[167]

States have argued against the creation of corporations of convenience by foreign investors to gain access to international arbitration.[168] In one case, the claimant argued that there was a breach of FET because it had been encouraged to invest in mining exploration as a means of ***World T.R. 124** bringing development to the economically depressed north of Costa Rica.[169] In a recent award, the Tribunal stated that two contracts for an integrated information technology platform to mobilize resources to finance public development projects in Cameroon were "investments' and not mere commercial service because the objective of the IT platform was linked to Cameroon's economic development.[170]

In these cases, which usually involve a developing respondent State, tribunals have adopted reasoning that may appear unfair to non-specialists. For example, a tribunal has recognized that intangible assets like mere purchase of bad loans are not speculative transactions, but investments which contribute to economic development.[171] They have also stated that corporate structures play an important role in financing private foreign investment and driving economic development. It has been held that merely determining the potential value of a mining project could make an important contribution to gross domestic product (GDP).[172] In one case, the Tribunal held that even though the investment failed and could no longer contribute to economic development, it still had jurisdiction to determine the dispute under the ICSID Convention.[173] In another case, the Tribunal stated that it would be farfetched for it to dismiss the claim for lack of jurisdiction just because the Respondent argued that the object of investment treaty protection was to stimulate economic development of the State. The Respondent argued in this case that if a foreign investor failed to abide by domestic law, the investment could not contribute to its development.[174] The cases mentioned above show that there is a wide divide between the expectations of developing host States and the decision making of international tribunals.[175] While States expect that foreign investment will make substantial contributions to their economic development and growth, tribunals have favoured an approach which

gives more weight to the existence of risk, duration of the investment and some contribution no matter how small.[176]

As we discussed above, unlike the majority of IIAs which are silent on development, DILs of many developing countries contain detailed development provisions. However, in ICSID disputes based solely on DILs which expressly refer to economic development, the reasoning of tribunals will not be very different from decisions in ICSID investment treaty awards. In the only publicly known investment arbitration award of this nature, *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo* (DRC), the Tribunal held that by establishing civil engineering and valuing natural resources in the DRC to determine their exportable volume, the claimants, Lebanese nationals, had fulfilled the conditions set by the DRC 2002 Investment Code for economic development.[177] Because the DRC has to date signed 19 BITs with only four of these BITs being in force, its DIL which protects both domestic and foreign investors remains the principal FIL.[178] Beginning in the late 1980s, the DRC (formerly Zaire) began to ***World T.R. 125** implement economic liberalization through its DILs.[179] Although the DRC 2002 Investment Code does not make express reference to economic development, it provides that investments must increase the production and manufacture of goods and services.[180] The DRC argued that economic activity which was in essence a commercial lease contract could not qualify as a covered investment under DRC's DIL. However, the ICSID Tribunal held that by establishing a company in Zaire with a share capital of 30 million ## in 1991(1,900 USD calculated based on exchange rates per USD in 1991) and developing a sawmill and electricity production business the Claimants had fulfilled the requirement of the ICSID Convention and DRC's DIL to contribute to DRC's economy.[181]

Recent IIAs which now provide that "investment' must contribute to the economic development of the host State, are a reaction to inconsistent arbitral practice.[182] They are also an attempt by States to ensure that domestic development concerns are recognized at the international level. It is however unclear how tribunals would determine their jurisdiction in disputes instituted under these newer IIAs. In a recent award, a tribunal has stated that State treaty practice and arbitral jurisprudence show that States' agreement on the meaning of the term "investment' found in IIAs or domestic investment legislation should be afforded due weight.[183] Other tribunals have stated that while a hybrid approach must be adopted, international law principles will prevail over domestic law.[184] However, as the decisions above have shown, ICSID tribunals appear to favour a flexible jurisdictional threshold.

3.2 State Contracts and Internationalization

Contracts with States are a fundamental means of entry by foreign investors into domestic markets.[185] Even though arguments have been made to the contrary, the DIL of the host State has the most dominant ties with contracts of this nature.[186] This is because unlike IELs, contracts are signed between States and foreign investors and parties usually choose the domestic law of the host State as the applicable law. In addition, while foreign investment contracts provided for stabilization clauses, DILs allowed States to make changes which in turn had an effect on the rights of foreign investors.[187] As we stated above in Section 2, during the decolonization phase, developing countries replaced foreign-owned concession contracts with "more equitable' contractual arrangements like JVAs.[188] Because these contracts were invariably bound to DILs which provided for domestic dispute settlement and less favourable standards of compensation for unlawful expropriation, arguments for the internationalization and delocalization of investment contracts began to emerge.[189] Failed and continuous attempts to elevate State contracts from the province of domestic law into international law, purely on the argument that such agreements contribute to the economic development of developing countries, shows the continued battle between international law and foreign investment.[190] In the 1970s, arguments were advanced by international scholars and a few arbitration awards for the recognition of economic development contracts ***World T.R. 126** which were to be regulated by rules of international law.[191] The DILs of some States such as Senegal and Dahomey (Benin) recognized that establishment agreements with enterprises in certain sectors were of great importance to economic development.[192] However, these investments were subject to domestic law.

The DILs of some States, especially in Latin America, ensured that State contracts were regulated by domestic law. Chile's 1974 foreign investment statute provided that entry of foreign capital investment into Chile could only be through contracts signed with the foreign investment committee.[193] Cuba's 1982 Legislative Decree on Economic Association between Cuban and Foreign Entities, which sought to open up Cuba's economy to foreign capital, established a Commission which had the sole authority to grant approval for State enterprises to enter into economic association agreements with foreigners only for enterprises which had the purpose of promoting Cuba's development.[194]

It can be argued that failed attempts to fully "internationalize' economic development contracts in the 1970s and 1980s had a ripple effect on the emergence of investment treaty arbitration post-1990.[195] DILs signed in the first phase of IIL did not provide for automatic consent to international arbitration.[196] As the idea of compulsory international arbitration for economic development agreements lost steam, international arbitration began to spread through the practice of international institutions into DILs and IIAs.[197] The battle for internationalization of foreign contracts solely on the basis of "economic development' is no longer prominent, but it remains influential.[198] In a relatively recent contract-based award, the Tribunal held that because of their international nature and connection to trade and import laws, State contracts which are long-term economic development contracts are subject to international law rather than domestic law.[199] DILs requiring parliamentary ratification of foreign investment contracts or the ratification of oil and mining contracts have also weakened arguments on the automatic internationalization of long-term contracts with foreign investors.[200] It can be argued that newer IIAs, which provide that investment must be in accordance with domestic law, ensure that foreign investment contracts remain subject to domestic law.

3.3 International Investment Arbitration and the Resolution of Foreign Investment Disputes

In the last five decades, international arbitration has become the preferred means for settling foreign investment disputes. Before this, developing States embraced the Calvo clause which meant that foreign investors should be limited to domestic remedies.[201] Expansion of international investment arbitration can be traced to arguments that settling disputes through a depoliticized and neutral forum was essential for economic development.[202] This is reflected in the preamble to ***World T.R. 127** the ICSID Convention and reports of the World Bank Directors, which formed the background for acceptance by State parties.[203] Some newly independent States were convinced that settlement of disputes under the ICSID Convention would promote social and economic development.[204] Arguments have been made over the years, that arbitration contributes to the economic development of developing host States.[205] In practice, however, this has not been the case. Even though most claims have been dismissed in favour of States, arbitral awards can lead to very significant financial costs for developing States.[206]

The rise of investment treaty arbitration has led to subordination of domestic law as applicable law spurred on by what has been termed "neo-liberal interpretations' by arbitral tribunals.[207] As stated above, prior to the growth of investment treaty arbitration in the 1990s, it was argued that disputes involving breach of long-term economic development agreements could not be settled by domestic courts which applied domestic law. The basis for this argument was that contracts which contributed to the economic development of developing countries required additional security guarantees.[208] However, "internationalization' and "delocalization' of State contracts never gained full acceptance by developing States and never became established principles of international law.[209] Even though DILs and State contracts have been overshadowed by discussions on investment treaties, some States continue to regulate State contracts through DILs. A recent example of these types of DIL is Egypt's Decree 2592 of 2020 which prohibits public entities and State-owned companies from including arbitration clauses (agreements) in their contracts with foreign investors.[210]

In ICSID disputes which involve application of both DILs and IIAs, ambivalence of arbitration for economic development is more pronounced. This is because the goals and purposes of each regime may apply differently. For instance, in *CEMEX Caracas v. Venezuela,* the Respondent argued that the purpose of its domestic law was not "economic opening and liberalization', but "national development' and that for this reason, the Claimant's argument that the DIL's purposes could not be achieved without access to ICSID Arbitration as a "neutral forum' was not reflected in the law.[211] Over the years, some arbitrators have used the aim of economic development to read in expansive notions like legitimate expectations of investors.[212]

3.4 Renaissance of the New International Economic Order

At the end of the 1990s, it was believed that the NIEO had lost relevance with the rise in international investment arbitration and international investment treaties. In the last decade, a new phenomenon is emerging, and it is clear from DILs, that principles of the NIEO are being revived.[213] It can be argued that principles of the NIEO are re-emerging because developing ***World T.R. 128** States now realize that liberalization of foreign investment through IEL has not led to economic growth or increased prosperity. Far from being dead and buried, the NIEO principles, which were inspired by DIL, are no longer limited to rhetoric and UNGA resolutions.[214] This is also evident in foreign investment contracts

which are subject to domestic law, State withdrawal from the investment treaty regime, growth of investment screening mechanisms, and refusal of some States to renew IIAs or sign new IIAs.[215] Also, growing acceptance by arbitral tribunals that foreign investments must be in accordance with the domestic law of the host State can be traced to NIEO principles.[216]

Renaissance of the NIEO can be seen in Tanzania's 2017 DIL on Permanent Sovereignty Over Natural Resources, the Pan African Investment Code (2016), ECOWAS Investment Code (2018), and Netherlands Model BIT (2019).[217] These agreements provide that investments must be made in accordance with domestic law and provide for exhaustion of local remedies or recognize that dispute resolution must take place using domestic dispute settlement institutions.[218] In 2021, Ecuador re-joined and ratified the ICSID Convention. However, because Ecuador has terminated almost all its IIAs which provide for consent to ICSID arbitration, its exposure to international arbitration is currently limited.[219]

4. The Shift to Sustainable Development

As stated in section 2.1.6 above, sustainable development has become a central theme in IEL.[220] The origins of this "movement' can be traced to the 1972 Stockholm Declaration, the 1992 Rio Declaration on Environment and Development and influence of the 2015 UN Sustainable Development Goals.[221] Since 1945, the UN has been the leading international forum for development. Its activities have been marked by emphasis on providing technical assistance, the work of its specialized agencies and thematic development decades. The Millennium Development Goals, which were replaced by the Sustainable Development Goals in 2016, are a cumulation of seven decades of developmental multilateralism and recognition that economic development, social development, and environmental protection are interdependent and mutually reinforcing components of sustainable development.

Although the idea of "sustained development'[222] had been explored by scholars and policy makers for decades, it was the 1987 Brundtland Report - UN Report of the World Commission on Environment and Development: Our Common Future - that positioned "sustainable development' as a global agenda. By defining sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs', the report set the scene for emergence of environmental global governance.[223] ***World T.R. 129*** Although most of the report focussed on environmental trends, it stated that the UN and OECD codes of conduct for transnational corporations should deal explicitly with environmental matters and the objective of sustainable development. The report also recommended that detailed and specific instruments were necessary for ensuring responsibility in transnational investment.[224]

Thus, while economic development first emerged as a domestic concern which was transposed from DIL into international economic law, the case is reversed with sustainable development which has emerged from more general international law. The 1987 Brundtland Report recognized that pursuit of sustainable development required changes in domestic and international policies of every nation.[225] After the 1987 report, sustainable development was incorporated into important IEL documents such as the 1994 Marrakesh Agreement establishing the WTO and the finalized text of the OECD Multilateral Agreement on Investment. However, this also was a signal that development and liberalization would remain normative equals.[226] The subsequent failure of the Doha Development exposed the fallacies of the world trading system and "development' at the WTO which has been framed in the context of special and differential treatment.[227]

In IIL, sustainable development is a multidimensional concept which requires consideration of broad concerns beyond investment protection such as protection of the environment, human rights, and poverty eradication.[228] Though any concept can be subverted, this is a signal that States can exercise some control within their regulatory space.[229] However, the slow but eventual shift from "economic development' to "sustainable economic development'[230] in BITs,[231] FTAs, national investment codes, SEZ laws,[232] national development plans and State contracts[233] is an attempt to salvage IIL's legitimacy crisis and economic development deficit. There are expectations that this shift will be a game changer because economic development is monodimensional and suitable for calculating benefits in economic terms only without assessing other effects such as public welfare.

The United Nations Conference on Trade and Development (UNCTAD) has been at the forefront of urging States to formulate national investment policies and negotiate IIAs which promote sustainable development.[234] It recommends different policies for national investment policy guidelines and IIAs. At the domestic level, it recommends that policies should be grounded in a country's overall development strategy by prioritizing investment in specific sectors and protecting foreign investment.

[235] By contrast, UNCTAD's policy options for operationalizing sustainable development objectives in IIAs focus on reforming IIA clauses, through the right of States to regulate and omit clauses such as FET and umbrella clauses.[236] In essence, although UNCTAD promotes reform of IIL it equally promotes balancing liberalization with the right to regulate. ***World T.R. 130** The main challenge is that the DILs of most countries do not match their commitments to sustainable development in newer IIAs. This may be because states continue to use DILs to protect their sovereignty and prioritize their developmental needs. For example, even though the 2020 China-EU CAI is modelled as a balanced sustainable development IIA, the Law of the People's Republic of China on Foreign Investment, which came into force in 2020, does not mention sustainable development or protection of the environment. It mentions labour protection but also places emphasis on national economy and social development, and high-level investment liberalization. Other recently signed IIAs which follow the UNCTAD sustainable development framework do not match recently enacted DILs of the contracting parties.[237]

Even though efforts to integrate sustainable development and broader norms into IIAs are laudable, in practice it may be nothing more than the substitution of one ambiguous concept for another. For this reason, DILs may remain a stronger development-oriented form of State regulation. Arbitral tribunals have not yet tested the full limits of newer generation IIAs, and only time will tell if these IIAs lead to more development friendly arbitral awards and principles.[238] However, failed attempts by treaty drafters and States to fully integrate non-economic goals such as human rights, labour rights, technology transfer, and protection of the environment into the decision making of international tribunals is a clear signal to developing States that a subjective self-judging standard of economic development may never fit into the international investment law regime.[239]

As sustainable development is a relatively new feature, unlike "economic development' fewer disputes have dealt with express interpretation of sustainable development.[240] Thus, although more and more disputes deal with labour rights, protection of the environment, human rights, and rights of states to regulate, sustainable development jurisprudence is still embryonic.[241] Generally, arbitration awards have been related to procedural issues such as third party presentations on the ground of sustainable development. In an ICSID dispute instituted on the basis of Papua New Guinea's 1992 Investment Promotion Act in 2012, Papua New Guinea (PNG) argued that the Claimant could not be a "foreign investor' as the company existed to fulfil the sole public purpose of promoting sustainable development and advancing the general welfare of the PNG people.[242] However, this claim was dismissed for lack of jurisdiction.

The September 2021 award in *Eco Oro Minerals Corp v. Republic of Colombia* fully captures the tussle between domestic law, investment contracts and international investment law, and (sustainable) economic development.[243] Even though the tribunal stated that there was an (inevitable) tension between Colombia's environmental protection and economic development needs,[244] it held that Colombia had breached its obligation to treat the Claimant's investments in accordance with the customary international law minimum standard of treatment of aliens. This dispute which was instituted on the basis of the Canada-Colombia FTA (2008) Investment Chapter, has also involved interpretation of Colombia's mining legislation, Colombia's National Development Plan Law, and decisions of Colombia's Constitutional Court. The Canada-Colombia FTA is a new generation IIA which recognizes the resolve of the parties to promote ***World T.R. 131** sustainable development, the differences in the level of development and the size of the Parties' economies, and the importance of creating opportunities for economic development.[245] It also provides that except in rare circumstances, measures that are designed to protect the environment shall not constitute indirect expropriation.[246] The reasoning of the Tribunal may be explained away by the fact that the FTA provides that the applicable law in the dispute shall be rules of international law; moreover, the FTA does not contain a requirement - found in other IIAs and domestic investment laws - that investments must be in accordance with domestic law. The FTA also provides that even though a tribunal may take into consideration the domestic law of the respondent State, it does not have jurisdiction to determine the legality of a measure, alleged to be in breach of the FTA under the domestic law of the disputing Party.[247]

Eco Oro Minerals Corp v. Republic of Colombia shows that in practice, development and protection of the environment have not yet been fully integrated into the decision making of investment arbitration tribunals.[248] Exceptions can be seen in the dissenting opinions of some arbitrators, but these remain in the minority and for now bear little weight on actual dispute outcomes.[249] Another important decision to consider is the 2021 decision of the European Union-Korea Free Trade Agreement Sustainable Development Proceeding.[250] At the centre of this proceeding was harmonization of Korea's domestic labour laws in accordance with its sustainable development commitments under the FTA. It is the first time that compliance with the sustainable development provisions of an EU FTA

has been challenged. The Expert Panel found that Korea did not act inconsistently with the Article 13.4.3 by failing to ratify the ILO Convention.[251] The two FTA decisions led to important reflections on the effect of sustainable development in IEL and the true intentions of key players such as the EU. For the time being, emphasis in IIL appears to be on successfully defending arbitration claims, rather than changes in domestic policies. Overall, the shift from economic development and sustainable development is no more than a new phase in the liberalization and battle between IEL and DIL.

5. Conclusion

This article has shown that "economic development' has been central to tensions between international law and DIL. "Development' has also been shaped by economic and political developments of the last six decades. Our analysis has shown that even though most States take their economic development seriously, only a few - such as Indonesia - have consistently aligned development goals under IIAs and domestic law over the years. The relationship between DIL and IEL has never been watertight.

At the global level, we have witnessed a shift in emphasis from economic aid for development to liberalization of trade and foreign investment for economic development to the more recent sustainable development. These shifts have occurred against the background of liberalization and created a regime built on thousands of IIAs backed by the investment arbitration mechanism. International investment law has struggled to keep up with these shifts in international policy ***World T.R. 132*** making and has failed to live up to its grand bargains of economic development. There is no doubt that the COVID-19 pandemic will have a long-lasting effects on the current rules of IEL. If the events of the last decade and COVID-19 pandemic were to teach us any lesson, it is that international rules are not perfectly suited for dealing with basic problems of economic development. Employment opportunities, eradication of poverty, manufacture of goods and services, public health, protection of indigenous communities, GDP growth, reduced inequality, and protection of the environment, are all legitimate state development objectives. As the WTO MC12 Outcome Document adopted on 17 June 2022 shows, the respective needs and concerns of states at different levels of economic development will always differ.[252] The pandemic has shown that international economic structures were never a substitute for national development and that developing States which take economic development of people seriously must adjust their DILs to adapt to this glaring reality. In the next decade, liberalization rhetoric will remain on the decline, pandemic-related disputes challenging State regulation will emerge, and domestic regulation of foreign investment will become stronger. These changes are already occurring.[253]

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