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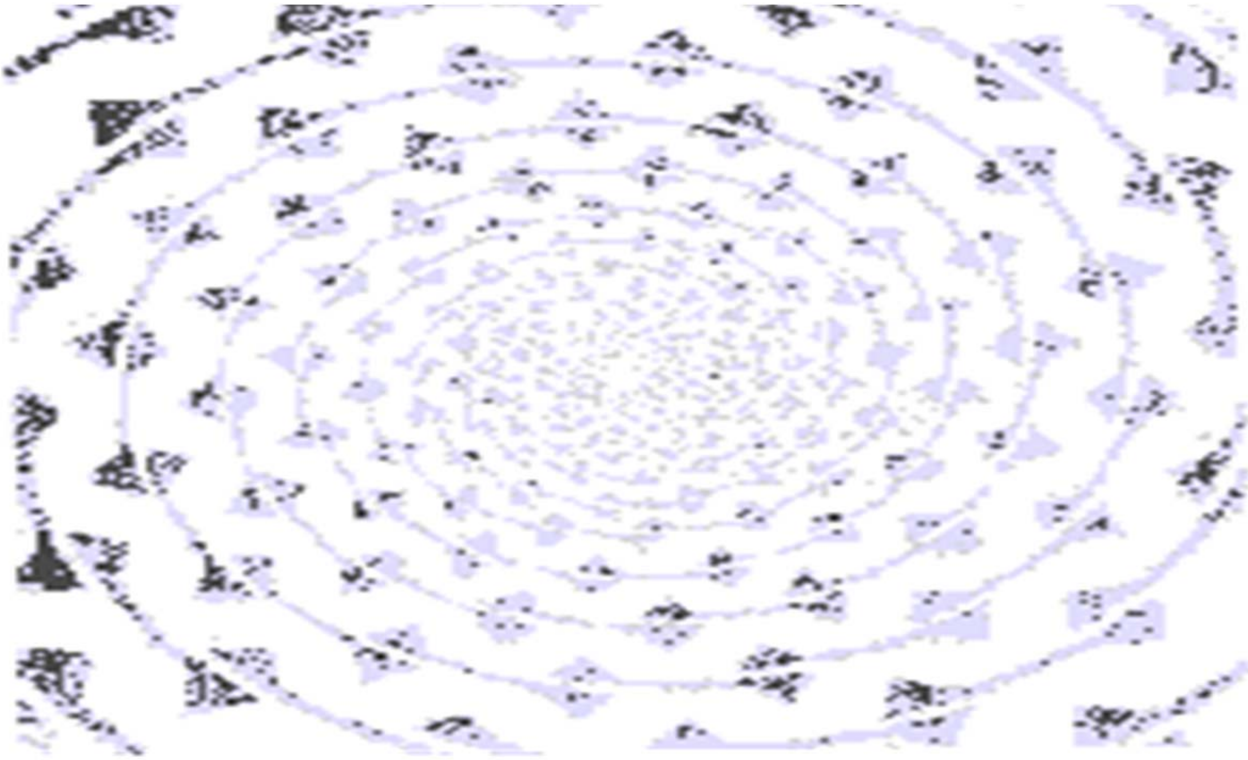

Introduction : Liberalization of Investment and Human Development

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CRIDHO Working Paper 2012/4

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La Cellule de recherche interdisciplinaire en droits de l'homme (CRIDHO) a été constituée au sein du Centre de philosophie du droit, Institut extra-facultaire de l'Université catholique de Louvain, par des chercheurs soucieux de réfléchir le développement contemporain des droits fondamentaux à l'aide d'outils d'autres disciplines, notamment l'économie et la philosophie politique. La CRIDHO travaille sur les rapports entre les mécanismes de marché et les droits fondamentaux, aussi bien au niveau des rapports interindividuels qu'au niveau des rapports noués entre Etats dans le cadre européen ou international.

The Interdisciplinary Research Cell in Human Rights (CRIDHO) has been created within the Centre for Legal Philosophy (CPDR), an extra-department Institute of the University of Louvain, by scholars seeking to understand the development of fundamental rights by relying on other disciplines, especially economics and political philosophy. The CRIDHO works on the relationship between market mechanisms and fundamental rights, both at the level of interindividual relationships as at the level of the relationships between States in the European or international context.

Introduction : liberalization of investment and human development

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This paper appeared as chapter 1 (pp. 1-24) of 4. *Foreign Direct Investment and Human Development*, Routledge, London, 2012, 350 pages (with Jan Wouters and Johan F. Swinnen, co-editors)

ABSTRACT

Particularly throughout the 1990s, one important strategy relied on by countries lacking capital or seeking to improve their access to technology by attracting investors has been to conclude international investment agreements (IIAs). Such treaties usually include provisions relating to the scope and definition of foreign investment ; admission and establishment ; national treatment in the post-establishment phase (a guarantee of non-discrimination against the investor of the other Party established in one Party); the most-favoured nation clause (ensuring that the investor of the other Party will benefit from the same treatment as any other foreign investor) ; fair and equitable treatment, including a protection from expriopriation ; guarantees of free transfers of funds and repatriation of capitals and profits ; and dispute settlement provisions (State-State and State-investor).

But how successful was such a strategy? Did it succeed in attracting investment? And even if it did, how can we assess the 'sovereignty costs', or the loss of 'policy space', associated with the conclusion of IIAs? If countries indeed compete for the arrival of foreign investment and if the conclusion of such agreements is one tool they rely on to gain an advantage on potential competitors, does this entail the risk that the concesssions they make will go too far, for example by renouncing the possibility of imposing performance requirements on the investor (though this could arguably strengthen the linkages with the host economy), by guaranteeing a freeze in the regulatory framework applicable to the investment, or by authorizing transfer pricing between the local subsidiary and the foreign-based parent, thereby reducing the fiscal revenues that could be gained from the arrival of the foreign investor? By concluding an investment agreement, a country signals its intention to respect the rights of investors and to create a legal and policy framework that will provide the kind of stability they usually expect. But could it be that, while it may be understandable for each country considered individually to seek to conclude IIAs with a view to attracting investors, the result is collectively sub-optimal, as the IIAs lose their "signalling" function once they come to be generalized?

We conclude that IIAs are not decisive in attracting investment. FDI inflows are generally dependent on other variables, especially the size of the market in the host country or trade openness ; and although a predictable and safe legal environment does matter to the investor, such predictability can be provided by other means (the more a country's traditional respect for the rule of law is established, the less it shall have to resort to investment treaties that protect the rights of investors). Moreover, if IIAs make any difference, it is especially in the extractive industry where very large investments are made, that are 'sunk' at the early stages of the project, and that are only profitable after a long period of time, leading the investor to be particularly risk-averse.

It would therefore be ill-advised for countries seeking to attract investment to do so by providing incentives in investment agreements, especially where such incentives are designed in a way that could be interpreted as exempting the investor from having to comply with requirements linked to human rights, or to social and environmental considerations. Such incentives are no substitute for the establishment of an attractive macro-economic and business climate, and they may in fact even be counter-productive as regards the immediate aim of attracting investors (let alone as regards the more ambitious aim of human development) if, as a result of entering the country, the investor would be risking its reputation and subject itself to criticism because of the laxity of the standards applied. It is therefore entirely justified, even from the point of view of the attractiveness of a country to investors*, to seek to explore which safeguards should be established under the domestic law of host countries in order to ensure that the arrival of FDI shall not negatively affect the rights of the local population, and shall instead contribute positively to human development indicators in the country ; and it is fitting for capital-exporting countries and for agencies such as export credit agencies or multilateral lending institutions to support this effort. Far from limiting the sovereignty of the countries seeking to attract investment, these tools are used in order to strengthen the bargaining position of these countries: they are a way to support them in making the choices that should benefit their populations most, when these countries could otherwise be tempted to 'signal' their willingness to* *attract investors by providing far-reaching forms of protection that reduce their policy space, or to offer advantages that will annul, or at least seriously diminish, the benefits they have a right to expect from the arrival of FDI.*

KEYWORDS

Foreign direct investment. - Human Development. - International Investment Agreements. - Bilateral Investment Agreements. - Regulatory competition.

Introduction : liberalization of investment and human development

Olivier De Schutter, Jo Swinnen and Jan Wouters

A. INTRODUCTION

It is a widely held view that there exists a positive relationship between the arrival of foreign direct investment and development, and that attracting foreign capital is essential to developing countries in order to finance their growth and to improve their access to technologies. This consensus view is expressed, for instance, by the Partnership for Growth and Development adopted in 1996 at the Ninth United Nations Conference on Trade and Development,[1] which states that "foreign direct investment (FDI) can play a key role in the economic growth and development process. [...] FDI is now considered to be an instrument through which economies are being integrated at the level of production into the globalizing world economy by bringing a package of assets, including capital, technology, managerial capacities and skills, and access to foreign markets. It also stimulates technological capacity-building for production, innovation and entrepreneurship within the larger domestic economy through catalysing backward and forward linkages".

However, beyond that general language, a number of questions remain. Perhaps the most widely studied of these concerns the relationship between the nature of the foreign investment considered and the impacts on development.[2] On the side of the investor, FDI may be undertaken in order to gain access to natural resources or other strategic assets, such as research and development capabilities ; in order to reach new consumer markets ; or in order to exploit locational comparative advantage.[3] The investment can take the form of greenfield investment, thus contributing to formation capital and enhancing local productive capacity, or simply lead to a transfer of ownership by mergers and acquisitions of local firms by foreign investors. Both the links of the host jurisdiction to the global economy (due to the trade effects of FDI) and the linkages with the local economy (upstream and downstream the investment itself) shall diverge widely depending on on which of these objectives of FDI (or which combination of objectives) is primarily pursued by the investor and which form, in turn, the investment strategy takes. Countries also differ widely in their ability to capture the benefits from increased FDI, depending on their general level of technological development and on existing macro-economic conditions, as well as on the absorptive capacity: in chapter 3 of this volume, Colen et al. note, for instance, that developed economies generally benefit from the presence of foreign companies through the spillover effects of such presence, but that domestic firms in developing or transition economies are not usually as well equipped to reap such benefits and enhance their productivity thanks to such presence.

In addition, while one of the main benefits generally attributed to the growth of FDI is the increased access to international markets and to networks that enhance the capacity of the receiving country to export, this in turn may or may not have positive impacts for the long-term development of the host country: for instance, while the expansion of exports from that country is generally considered to have macro-economic benefits, such benefits can be annulled by the sudden overvaluation of the local currency if the investments flow cannot be adequately absorbed by the local economy ; they can be so unequally distributed that the net welfare effects are negative rather than positive, as growth may go hand in hand with increased inequality, particularly where the arriving foreign firms hire the most

[1] UN doc. No. TD/378.
[2] See in particular B. Sharma and A. Gani, 2004. The Effects of Foreign Direct Investment on Human Development, *Global Economy Journal* 4(2): Article 9; P. Nunnenkamp, 2004. To what extent can foreign direct investment help achieve international development goals? *The World Economy* 27(5): 657–677.
[3] For further explanations of these different motivations, see in this volume chapter 3, section B, IV ; and chapter 4, section B, III.

qualified local workforce ; and the emphasis on export-led growth can lock the host country into certain lines of production that discourage it from investing in higher value-added products, so that it is merely led to exploit its static comparative advantage without being encouraged to climb up the development ladder.

B. THE FOCUS OF THIS VOLUME

In this volume, we pose another set of questions, that relate to the different tools that countries may rely on in order to attract FDI. Particularly throughout the 1990s, one important strategy relied on by countries lacking capital or seeking to improve their access to technology by attracting investors has been to conclude international investment agreements (IIAs).[4] These agreements may be bilateral or multilateral, and they can cover investment only or, as in the earlier "Friendship, Commerce and Navigation" agreements, be part of broader trade or cooperation agreements. Although they differ in these respects, however, investment agreements present a striking similarity across regions and negotiation fora. Such treaties usually include provisions relating to the scope and definition of foreign investment ; admission and establishment ; national treatment in the post-establishment phase (a guarantee of non-discrimination against the investor of the other Party established in one Party); the most-favoured nation clause (ensuring that the investor of the other Party will benefit from the same treatment as any other foreign investor) ; fair and equitable treatment, including a protection from expriopriation ; guarantees of free transfers of funds and repatriation of capitals and profits ; and dispute settlement provisions (State-State and State-investor).

But how successful was such a strategy? Did it serve, indeed, to attract investment, if such was the primary aim of concluding investment agreements[5]? And even if the strategy did succeed in that respect, how can we assess the 'sovereignty costs', or the loss of 'policy space',[6] associated with the conclusion of IIAs? If countries indeed compete for the arrival of foreign investment and if the conclusion of such agreements is one tool they rely on to gain an advantage on potential competitors, does this entail the risk that the concesssions they make will go too far, for example by renouncing the possibility of imposing performance requirements on the investor (though this could arguably strengthen the linkages with the host economy), by guaranteeing a freeze in the regulatory framework applicable to the investment, or by authorizing transfer pricing between the local subsidiary and the foreign-based parent, thereby reducing the fiscal revenues that could be gained from the arrival of the foreign investor? By concluding an investment agreement, a country signals its intention to respect the rights of investors and to create a legal and policy framework that will provide the kind of stability they usually expect. But could it be that, while it may be understandable for each country considered individually to seek to conclude IIAs with a view to attracting investors, the result is collectively sub-optimal, as the IIAs lose their "signalling" function once they come to be generalized[7]?

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[4] While the first bilateral investment treaty was concluded between Paraguay and Germany in 1959, the growth in BITs was especially remarkable during the 1980s and 1990s. In 1979, there were 179 BITs. The figure grew to 2625 in 2006, the last year for which the United Nations Conference on Trade and Development (UNCTAD) dataset provides BIT data. For a detailed discussion of the growth of investment treaties in this volume, see chapter 4, section D.

[5] On this question, see Jeswald W. Salacuse & Nicholas P. Sullivan, 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain', *Harvard International Law Journal* 46, 2005, 67; and Jason Webb Jackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence', *Virginia Journal of International Law* 51, 2011, 397. See also United Nations Conference on Trade and Development, *The Role of International Investment Agreements in attracting Foreign Direct Investment to Developing Countries*, UN doc. UNCTAD/DIAE/IA/2009/5 (2009).

[6] On this notion, see Jörg Mayer, "Policy Space: What, For What, and Where?", 27 Development Policy Review 373-95 (2009) (originally presented as UNCTAD Discussion Paper No. 191, UN Doc. UNCTAD/OSG/DP/2008/6 (October 2008)). Mayer distinguishes "*de jure* sovereignty, which involves the formal authority of national policy-makers over policy instruments, and *de facto* control, which involves the ability of national policy-makers to effectively influence specific targets through the skilful use of policy instruments' and he defines national policy space as "the combination of *de jure* policy sovereignty and *de facto* national policy autonomy" (at p. 376). This notion was pioneered by Richard N. Cooper, *The Economics of Interdependence: Economic Policy in the Atlantic Community*. New York: McGraw Hill for the Council on Foreign Relations, 1968. See also Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a bit...and they could bite*, World Bank Policy Research Paper WPS 3121, World Bank: Washington DC, 2003.

[7] See, following this line of argument, Andrew T. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', 38 *Virginia Journal of International Law* 639-688 (1998); Zachary Elkins,

In recent years, doubts have been expressed with an increased frequency about the adequacy of a strategy relying on the conclusion of IIAs in order to attract foreign investors. While the flows of FDI have increased significantly over the years, from 55 billion US $ of yearly flows of FDI in 1980 to 1,306 billion US $ in 2006,[8] the impacts of investment agreements committing host countries to guaranteeing certain forms of treatment to the foreign investor have also become more visible. The Outcome document on the implementation of the MDGs that the General Assembly adopted by consensus on 22 September 2010 notes in this regard:

> We recognize that the increasing interdependence of national economies in a globalizing world and the emergence of rules-based regimes for international economic relations have meant that the space for national economic policy, that is, the scope for domestic policies, especially in the areas of trade, investment and international development, is now often framed by international disciplines, commitments and global market considerations. It is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space.[9]

The wording chosen by the Outcome document is cautious, and sounds almost like a warning addressed to States. It is, at least, far removed from the much more optimistic mood of the 1990s. What has happened in the meantime? In part, this change of attitude may be attributable to the fact that the IIAs concluded in large numbers in the late 1980s and in the 1990s have not always fulfilled their promises. Instead, governments may have gradually come to the realization that the agreements were severly imbalanced in favor of investors' rights. Over the past ten years, treaty-based investor-State dispute-settlement cases have multiplied: by the end of 2011, there were 450 known disputes,[10] 220 of which had been concluded. Of this total, approximately 40 % were decided in favour of the State and approximately 30% in favour of the investor, the remaining disputes being settled.[11] Altogether, 89 countries have been defendants in such claims, including 55 developing countries: the States facing the largest number of claims are Argentina (51 cases, mostly related to the privatization of the water services), Venezuela (25), Ecuador (23), and Mexico (19). Some of these claims relate to issues that raise important public interest concerns. In 2010 for instance, invoking the Australia-Hong Kong BIT, Philip Morris filed a claim against Australia challenging measures that government had adopted in order to protect public health and to discharge its obligations under the World Health Organization Framework Convention on Tobacco Control (FCTC).[12] A Swedish investor operating nuclear plants in Germany challenged the decision by this country to phase out its production of energy from nuclear power, following the Fukushima catastrophe. In addition, some provisions of investment treaties remain subject to widely diverging interpretations by arbitrators, creating the risk of a "chilling effect" on the host State seeking to adopt certain regulations. That is the case, in particular, for the clause referring to the "fair and equitable treatment" that should benefit the investor,[13] as well as to the significance of a necessity clause included in an investment treaty.[14]

Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 International Organization 811-846 (2006).

[8] The steady increase of FDI flows was interrupted in 2001-2003, however, following the economic downturn during that period. This slowing down of FDI affected developed economies far more significantly than developing economies, however. For a more detailed discussion of these trends, see chapter 3.

[9] UNGA Res. A/65/L.1, Keeping the promise: united to achieve the Millennium Development Goals, para. 37.

[10] In the absence of a public registry of claims in most arbitration forums, the total number of investor-State disputes under existing investment treaties may in fact be much higher.

[11] For this estimate and the information contained in this paragraph, see United Nations Conference on Trade and Development, *IIA Issues Note - Latest Developments in Investor-State Dispute Settlement*, No. 1, April 2012.

[12] For a similar claim filed by the same multinational group against Uruguay in March 2010, see *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7).

[13] See United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, UN doc. UNCTAD/DIAE/IA/2011/5, New York and Geneva, 2012. As recently as 2009, an author could note about the "fair and equitable treatment" standard, that it "... does not have a consolidated and conventional core meaning as such nor is there a definition of the standard that can be applied easily. So far it is only settled that fair and equitable treatment constitutes a standard that is independent from national legal order and is not limited to

But the falling out with first-generation BITs (as well as, to a lesser extent, IIAs in general) also may have to do with a change in the understanding of the notion of development itself. In the mid 1980s, the traditional focus on the expansion of gross national product or gross domestic product per capita shifted to a focus on human development. One indicator of this shift was the adoption in 1986, by the United Nations General Assembly, of the Declaration on the right to development, which defines development as a 'comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom', and in which 'all human rights and fundamental freedoms can be fully realized'.[15] It follows from this definition of development that even where the arrival of FDI is beneficial for the host country in aggregate terms, it may have a negative impact on the enjoyment of human rights of some groups of the population, who may not be compensated by the gains made by others. The question therefore emerges how FDI can be regulated to ensure that it contributes to human development, understood as the expansion of the freedoms that people enjoy.[16] This shift was further confirmed by the introduction of the human development index (HDI) by the United Nations Development Program (UNDP) in 1990, which for the first time[17] provided a clear, and operational alternative to the measures of GNP or GDP *per capita*.[18] Considering cross country data availability and pertinence, the UNDP selected three basic dimensions of development to be the main focus of its analysis of development: longevity, as a proxy for health; adult literacy, and later mean years of school enrollment, as proxies for education and learning; and per capita income, or "command over resources needed for a decent living". The HDI, an indicator combining these three components, relied on a multidimensional definition of development, and was seen as capable of bridging the gap between academia and practical policy-making.[19] The measure of HDI has evolved in many ways since it was first introduced more than twenty years ago.[20] But its main importance lies not in the precise methodology it recommends, but in the changed view of development that it signalled.

C. AN OVERVIEW

Our contribution to this debate is the outcome of a multi-year research project[21] that was conducted jointly by lawyers and economists, from the University of Louvain's Centre for Legal Philosophy (CPDR), and from the University of Leuven's Institute for International Law (IIL) and Centre for Institutions and Economic Performances (LICOS). We proceed in four steps. First, we provide a

restricting bad faith conduct of host States. Apart from this very minimal concept, however, its exact normative content is contested, hardly substantiated by State practice, and impossible to narrow down by traditional means of interpretative syllogism" (S. Schill, *The Multilateralization of International Investment Law,* Cambridge University Press, Cambridge, 2009, 263). See also on this notion K. Vandevelde, 'A unified theory of fair and equitable treatment', *New York University Journal of International Law and Policy,* 43(1), 2010, 43–106.

[14] For instance, in *El Paso v. Argentina*, the defending State invoked Article XI of the Argentina-United States BIT, that includes a necessity clause, explaining that it had been forced by circumstances (an extreme financial and economic crisis) to resort to the measures that led to the complaint. The majority disagreed, noting the responsibility of the Argentine government in the management of its public debt (*El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 656); one arbitrator however, Ms Brigitte Stern, expressed her concern that the view of the majority was overestimating the ability of the State to control such factors that may have external causes or result from developments in the market that a Government does not control (para. 667).

[15] Declaration on the right to development, adopted by the UN General Assembly in Res. 41/128of 4 December 1986 (A/RES/41/128), Preamble and Art. 1.

[16] Amartya K. Sen, *Development as Freedom*, Alfred A. Knopf, New York, 1999.

[17] Prior to the HDI, both the 'basic needs' and the Physical Quality of Life Index (PQLI) approaches relied heavily on social indicators.

[18] UNDP, 1990. *Human Development Report: Concept and Measurement of Human Development,* United Nations, New York.

[19] Desmond McNeill, 'Human Development': The Power of the Idea. *Journal of Human Development*, Vol. 8, No. 1, March 2007, pp. 5-22, at p. 13.

[20] See O. De Schutter, Jan Wouters, Philip De Man, Nicholas Hachez, and Matthias Sant'Ana, 'Foreign Direct Investment, Human Development, and Human Rights : Framing the Issues', *Human Rights & International Legal Discourse,* vol. 3, n° 2 (2009), pp. 137-176.

[21] Funded by the Interuniversity Attraction Poles Programme, Belgian State, Belgian Science Policy – Project IAP VI/06 (2007-2011).

general description of how international investment agreements have evolved, which legal regime they establish between investors, States of origin, and host States, and whether the proliferation of IIAs often with very similar provisions are formative of customary international law. The following chapter (Chapter 2), by Jan Wouters, Sanderijn Duquet and Nicolas Hachez, provides this assessment. It documents in particular how both arbitral practice and the IIAs themselves, in the way they are formulated, have gradually rebalanced the respective rights and duties of the Parties to such treaties. This contribution highlights the emerging 'new generation' of bilateral investment treaties (BITs) which, the authors cautiously conclude, may thus be indicating a progressive convergence in the interests of home and host States. Documenting the evolution of the most important clauses in the new generation of BITs - the fair and equitable treatment, expropriation, most favoured nation and national treatment standards –, this chapter analyses the extent to which this renovated approach perhaps moves us closer to consistent practice coupled with *opinio juris* -- in other terms, to the formation of a new regime of customary international law. It is following this mapping of the state of development of international law that the following chapters address what are the impacts of FDI on human development, and how States and other actors could maximize the positive impacts while reducing the risks FDI may entail in the host country.

1. The economic consequences of foreign direct investment

Part II of the book examines the economic consequences of FDI. It is composed of three chapters. In chapter 3, Liesbeth Colen, Miet Maertens and Johan Swinnen take as departure point the belief that the increased liberalization of investment regimes in developing countries contributes importantly to the economic and overall development of the host country. The chapter reviews the theoretical arguments and the empirical evidence of this assertion. Theoretical arguments predict FDI to enhance growth by bringing capital and knowledge to the host country, and by creating linkages with domestic firms. It remains difficult to identify the causality in the relation between FDI and growth, but micro-level studies provide strong evidence that FDI enhances growth through horizontal spillovers, as the technology imported by the investor and know-how flow into the host economy. Through its effect on growth, but also through more direct channels, FDI is likely to contribute to poverty reduction, although inequality might increase in the short run. Whether or not these effects will occur, and the importance of measures that shall have to be taken by the host government in order to cushion the impacts of transition, are likely to depend on the type of FDI, the economic sector and the absorptive capacity of the host economy. The authors conclude, however, that with respect to non-economic indicators of human development – human rights, labour standards, gender, the environment – FDI creates a 'climb to the top' rather than a 'race to the bottom'. They acknowledge that FDI is not a simple solution for enhancing growth. However, when the conditions are right, it can be an important engine for growth and human development.

Chapter 4 looks at the use of international investment agreements as a tool to attract FDI: written again from an economists' perspective, it asks whether such a tool works. Liesbeth Colen, Miet Maertens and Johan Swinnen examine the literature concerning the determinants of FDI flows to developing countries, and they provide a detailed discussion of the role of international investment treaties. They find that a very large number of empirical studies have analysed what determines the decision of whether and where to invest. Following the typology used by Dunning and UNCTAD,[22] they divide host country determinants of FDI into (i) the legal and policy framework, (ii) the economic determinants and (iii) business facilitation. The legal and policy framework includes the treatment guaranteed to foreign investors both under domestic legislation and under investment treaties. The general sequence is that once this legal and policy framework is established, investors will enter the country if there are economic incentives to do so, and this may be further encouraged by measures intended to improve the business climate : it would appear that, to a large extent, a legal and policy framework open to FDI, while in certain respects a necessary condition for FDI inflows, is not

[22] UNCTAD, 1998. World Investment Report 1998: Trends and Determinants, United Nations publications, NY and Geneva; J.H. Dunning, 1980. Toward an eclectic theory of international production: Some empirical tests, *Journal of International Business Studies* 11: 9–31 ; J.H. Dunning, 2002. Determinants of foreign direct investment: globalization induced changes and the role of FDI policies. World Investment Prospects, Economist Intelligence Unit, London.

necessarily a sufficient condition, where other determinants are not present. The borders between these various determinants are fluid, however. For instance, although part of the legal and policy framework, investment agreements may provide certain financial incentives, for instance fiscal advantages or the guarantee that the profits may be repatriated ; and in the name of creating a friendly business climate, investment promotion agencies may lower entry costs or subsidize the foreign investor. In addition, the quality of institutions -- effective measures to reduce corruption and to ensure the adequate delivery of public goods and the maintenance of infrastructure -- plays an important role in the investment decision at all three levels. Nevertheless, this typology is useful in ranking the different considerations that shall guide the choice of the investor whether to enter a country or not.

The empirical studies examined in chapter 4 find that the major determinants of FDI are economic factors such as market size and trade openness, as measured by exports and imports in relation to total GDP, with a greater emphasis on the latter determinant in recent years as a result of globalization and the development of global supply chains. However the relationship is by no means automatic, as illustrated by the situation of Sub-Saharan African countries that are very open to trade but that nevertheless are generally not able to attract FDI. For other variables there is less consensus in the literature. In general, the studies find that the political and economic factors such as market size, skilled labor and trade policies are more important for the locational decision of foreign investment than the legal structure for protection of investors' rights and the ability to avoid double taxation by double-taxation treaties. Therefore, the economic empirical literature confirms the suspicion expressed by some in the legal literature[23]: there is weak evidence that the conclusion of IIAs has more than a marginal impact on FDI inflows, and where it does seem to have some effect, it is mostly as a substitute for poor institutional quality, particularly in Sub-Saharan African countries[24] or in transition economies swiftly moving towards open market policies.[25] While some studies do show a positive correlation between the conclusion of IIAs and the presence of FDI,[26] the direction of causality is often far from clear: historically, it has not been unusual for IIAs to be concluded in order to protect already established investors, sometimes at their very request, and some empirical studies suggest that increased FDI flows encourage a country to sign IIAs, rather than the conclusion of an IIA being a factor accelerating FDI.[27]

Because FDI inflows can take a number of different forms, that shall contribute more or less significantly to human development in the host country, it matters considerably which type of investment is encouraged by the conclusion of IIAs. Chapter 5, by Liesbeth Colen and Andrea Guariso, presents original research that, for the first time, studies the potentially heterogeneous effect of international investment agreements on different sectors of FDI. They test the hypothesis that if bilateral investment treaties (BITs) attract FDI by reducing the risk of expropriation, the effect on FDI is likely to be stronger for those sectors in which foreign investment involves large primary investment costs and is susceptible to expropriation. Indeed, they note, investors in these sectors may have a higher demand for investment protection and therefore react more to policy measures providing such protection. BITs are well tailored to reassuring investors particularly in the extractive industry sector because of the importance of sunk investments and the long time-life of such investments, leading to what the authors call a 'time inconsistency' problem: while the country where the resources are located

[23] See, notably, M. Sornarajah,1986. 'State responsibility and bilateral investment treaties', *Journal of World Trade Law* 20: 79–98 ; and, more recently, Jason Webb Jackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence', op. cit.

[24] However, most econometric studies find institutional quality in general and the conclusion of IIAs to be rather strongly correlated. This would suggest that, rather than a substitute for poor institutional quality, IIAs are part of a broader strengthening of the legal and policy framework that serves to reassure investors.

[25] As illustrated in chapter 5 of this volume by Colen and Guariso, who find a positive correlation between FDI inflows and the growth of BITs in 12 post-Soviet Union Central and Eastern European countries during the transition phase (1995-2009).

[26] M. Busse, J. Königer and P. Nunnenkamp, 2010. FDI promotion through bilateral investment treaties: more than a bit? *Review of World Economics*, 146: 147–177.

[27] E. Aisbett, 2009. Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus causation. In: K.P. Sauvant and L.E. Sachs (eds.), *The effect of treaties on foreign direct investment: bilateral investment treaties, double taxation treaties, and investment flows*, Oxford University Press, Oxford.

needs to attract investors who have the capital and technology[28] that allow to exploit such resources, once the investments are made, the host country government may be tempted to breach its promises and extract rents or expropriate property or funds, especially following a change in government. In addition, insofar as investors in the extractive industry sector exploit natural resources, it is politically tempting for the host government to invoke sovereignty reasons (and even more precisely, the permanent sovereignty of its people over natural resources) in order to justify nationalization measures or the forced negotiation of the terms of agreement with the foreign investors present. It is therefore unsurprising that some studies show that this sector is perhaps the most susceptible to expropriation causing serious economic losses to the investor.[29]

The empirical study presented, which takes a sample of twelve countries in Central and Eastern Europa and the former Soviet Union following their transition to an open market economy,[30] appears to confirm that suspicion. Colen and Guariso find that especially FDI in the mining sector is attracted by new BITs. However, the specialization of countries into the exploitation of natural resources -- particularly non-renewable natural resources -- entails a number of challenges, related both to the ability for the country concerned to move beyond the export of raw materials and to revenue-sharing, or larger governance issues.[31] The results from this cross-country comparison therefore lead the authors to challenge the idea that BITs are a desirable policy tool to enhance development through increased foreign investments : it is hardly an exaggeration to say that BITs are effective at attracting investors precisely in those sectors that are the most controversial, and where the policy space for host governments requires most to be protected, particularly in their ability to impose certain performance requirements or certain types of revenue-sharing. The authors conclude that their results suggest that BITs 'do not attract the most development enhancing FDI', since investments in the mining sector 'often have limited linkages with the local economy, create little knowledge transfer and are likely to repatriate the majority of profits made'. At the same time, we cannot ignore the reality of the dilemmas governments of resource-rich but capital-poor countries face: typically, large-scale extractive projects are those that require the technology and scale of investment that they do not possess domestically ; and while host government agreements (HGAs), directly concluded between the host country government and the individual investor for a particular investment project, may to a certain extent substitute for IIAs, the bargaining position of the host government is not necessarily stronger in the negotiation of such individualized, project-level HGAs.

2. The Role of the capital-importing State in channelling foreign direct investment towards development ends

Part III of the book draws some conclusions, from the perspective of the policy-maker, of the conclusions arrived at in the preceding chapters. This part focuses on the negotiation and the regulation of FDI, asking how investment agreements should be negotiated and which measures should be adopted to preserve the necessary policy space for host countries. It is composed of four chapters. In chapter 6, Olivier De Schutter examines how institutions and procedures established at the national level could be improved in order to ensure that investment agreements work for the benefit of human development, as defined in this volume. It first recalls the framework set by international human rights law, and the duties this body of law imposes on all organs of the State -- including the Executive, but also parliaments and courts -- to ensure that investment agreements shall not displace human rights obligations or otherwise discourage the State from progressively implementing human rights. This presentation distinguishes between two levels of agreements, and it

[28] This refers to infrastructure technology, rather than managerial skills, which play a more important roles in the services industry.
[29] C. Hajzler, 2010. Expropriation of Foreign Direct Investments: Sectoral Patterns from 1993 to 2006. *University of Otago Economic Discussion Papers* No. 1011.
[30] One advantage of this choice is that the sub-set of countries concerned have entered into a large number of investment agreements since the early 1990s, with 800 BITs entering into force between 1990 and 2009: thus, the study, while geographically and temporally confined, provides an exceptionally useful ground for empirical study on the impacts of such agreements on the type of FDI attracted.
[31] On the 'resource curse', see in particular M. Humphreys, J. Sachs, and J. Stiglitz, eds, *Escaping the Resource Curse* (New York: Columbia University Press, 2007), and in this volume, chapter 6, section A.

discusses the different initiatives that have recently sought to reconcile investment liberalization with obligations imposed under human rights law. First, bilateral or multilateral agreements may be concluded in order to attract investors, by guaranteeing them certain forms of protection, which either confirm existing customary international law or go beyond it: in this volume, these have been referred to, generically, as international investment agreements (IIAs). Guiding principles have been proposed to the United Nations Human Rights Council in March 2012 in order to ensure that the negotiation and conclusion of such treaties shall not undermine human rights, defining a methodology for human rights impact assessments of investment agreements in this regard.[32] In addition to IIAs however, project-level investment agreements may be concluded, particularly for larger-scale investment projects that have a long duration, between the individual investor and the host Government. Such agreements are often called host government agreements (HGAs): they are internationalized contracts, rather than international treaties. On the issue of HGAs also, a set of Principles for Responsible Contracts to favour the integration of the management of human rights risks in the negotiations between Governments and investors has recently been presented to the Human Rights Council:[33] like the above-mentioned methodology on human rights impact assessments, the presentation of these Principles demonstrates the growing interest for bridging the areas of investment and human rights, in part in order to ensure that the race to attract investors shall not result in the host State neglecting its duties to protect and fulfil the human rights of its population.

Chapter 6 addresses the dilemmas we face when we attempt to bridge these two areas of international law, and to ensure that States remain faithful to their human rights duties while negotiating investment agreements. It discusses in particular some of the difficulties involved in managing tradeoffs, in the typical case where the arrival of FDI creates both winners and losers. It explains why cost-benefit analysis is generally inappropriate to address the question of tradeoffs, and why a procedural approach may be more desirable, emphasizing participation and inclusive deliberative processes rather than top-down expert approaches. However, even while it looks attractive in principle, a participatory approach to addressing the tensions between investment agreements and human rights also raises a number of questions, particularly as regards project-level agreements that take the form of HGAs between the investor and the host State. How, for instance, should we consider the relationship between a substantive approach to assessing the adequacy of a particular HGA in the context of specific investment projects, and a procedural approach emphasizing participation? A substantive approach is one in which whether or not an investment should take place is decided on the basis of its contribution to human development as measured from a pre-defined scale, based on indicators and methodologies that are set not by the communities affected themselves, but by experts or in regulations, and in principle on a uniform basis rather than in a ways specific to each project. A procedural approach, by contrast, gives more weight to the result of deliberative processes within the communities affected. On this point, the chapter concludes that each of these approaches has weaknesses, and that only by combining the two approaches can we arrive at satisfactory results: it is only through this combination, it suggests, that the notion of 'free, prior and informed consent' of the communities affected by the investment project can become both meaningful and workable.

Chapter 6 also examines another question that arises in the context of investment-specific assessments, that concerns the institutional division of labour between the central authorities and the local communities more directly affected by the investment project. It emphasizes the complementarity of the processes that take place at the national level (and which determine the investment policy of the country as a whole) and the processes that take place at the local level (involving the local communities directly affected by the arrival of investment). Decisions cannot be made centrally without ensuring that the rights of the local communities are fully respected, and these communities have a right to participate in the decision-making process, to seek and obtain information, and to have

[32] See Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food: Addendum, UN doc. A/HRC/19/59/Add.5 (19 December 2011).

[33] Addendum to the Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, J. Ruggie – 'Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators', 25 May 2011, UN Doc. A/HRC/17/31/Add.3.

access to remedies against any decision affecting them. But it is argued at the same time that, for local processes to be effective – i.e., for the local communities directly affected by the investment project to be able to truly express their preferences –, a national framework for investment is required.

Such a framework is first of all required for the obvious reason that the rights of the local communities must be effectively protected in order to these communities to be in a position that allows them to exercise effective bargaining power in their discussions with the investor. But in addition, the choices made by one community cannot be analyzed or understood in isolation from the choices made by the other communities in the same jurisdiction. This is the case because the benefits linked to the arrival of investment primarily accrue to the region where the investment is located, which gains disproportionately in comparison to the other regions. This results in a collective action problem: while it may be rational for *each region acting in isolation* to agree to conditions that are less demanding for the investor (as each region may fear that the investor will otherwise relocate in another region, which in turn would attract more resources thanks to the presence of the investor), it is *collectively* sub-optimal for all regions not to impose more demanding conditions. This highlights the importance of a framework for investment set at the national level, rather than only at the level of each constituent unit within States, in order to ensure that the benefits of investment are maximized and the potential risks or costs minimized. The objective of such a framework, it is argued, should not only be to ensure that each local community may effectively participate in determining the conditions under which the investment may proceed insofar as it is affected; it should also be to ensure that not all the benefits are captured by the local community, but that other parts of the country may reap part of the benefits. Such a framework should be explicitly conceived as redistributive: it should promote a more inclusive national economy rather than the formation of 'clusters' of prosperity co-existing with islands of poverty and under-development, thus at the same time removing an incentive for different regions in the country to pursue beggar-thy-neighbour policies that, ultimately, are self-defeating for the population as a whole.

3. The role of the capital-exporting State in controlling investment abroad

The following chapters of Part III move further identifying the tools through which the current situation could be improved, in order to support the efforts of host countries seeking to channel FDI towards the ends most conducive of human development. It may be worth noting at this juncture that States have a duty under international law to protect human rights, even outside their national territory, to the extent that they can influence situations that may lead to human rights violations. That applies, in particular, to the home States of transnational corporations, which deploy activities in other States that their State of origin.[34] In Article 56 of the Charter of the United Nations, 'All Members pledge themselves to take joint and separate action in cooperation with the Organization...' to achieve purposes set out in Article 55 of the Charter. Such purposes include: '... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'[35] The Universal Declaration of Human Rights, which provides an authoritative interpretation of the requirements of the United Nations Charter[36] but has also come to be recognized as expressing general principles of law as a source of international law,[37] set outs a duty of

[34] See Olivier De Schutter, 'The responsibility of states', in S. Chesterman and A. Fisher (eds), *Public Security, Private Order. The Outsourcing of public services and its limits*, Oxford Univ. Press, 2009, pp. 17-37.
[35] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.
[36] See the Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968), where it was stated unanimously that the Declaration "states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for all members of the international community" (para. 2).
[37] International Court of Justice, *United States Diplomatic and Consular Staff in Tehran (United States v. Iran) (Merits)* (I.C.J. Reports 1980), at 42. See Horst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', 25 *Georgia Journal of International and Comparative Law*, vol. 25 (1995-1996), p. 287, at pp. 351-352; Thomas Buergenthal, 'International Human Rights Law and Institutions: Accomplishments and Prospects', *Washington Law Review*, Vol. 63 (1988), pp. 1 at 9 ; Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', *Australian Yearbook of International Law*, Vol. 12 (1988-9), pp. 82-108 at 100-102 ; Olivier De Schutter, 'The Status of Human Rights in International Law', in Catarina Krause and Martin Scheinin (eds),

international cooperation in Article 22. This provision states that everyone is entitled to realization, "... through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." These rules impose on States a duty to cooperate internationally for the fulfilment of human rights by using all the means at their disposal within the limits set by international law. They include a duty to regulate the conduct of private investors, where such conduct could result in human rights violations even though such violations would occur under the territorial jurisdiction of another State.[38]

The same extraterritorial duties of States apply with respect to the realization of the right to development. The 1986 Declaration on the Right to Development referred to above provides that States are required to create international conditions favourable to the realisation of the right to development, have the duty to cooperate in order to achieve this right, and are required to act collectively to formulate development policies oriented to the fulfilment of this right.[39] In the Millennium Declaration the Heads of States and Governments recognized unanimously that: "... in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level."[40]

The duty to support human rights beyond the State's national territory also finds support in general international law. Customary international law prohibits a State from allowing its territory to be used to cause damage on the territory of another State, a principle that is at the origin of the whole corpus of international environmental law.[41] The International Court of Justice referred to the principle in the advisory opinions it adopted on the issue of the *Legality of the Threat or Use of Nuclear Weapons* -- where New Zealand was asserting that nuclear tests should be prohibited where this would create a risk for the country's population -- and, in contentious proceedings, in the *Gabčíkovo-Nagymaros Project* case opposing Hungary to Slovakia : in these cases, the Court affirms that 'the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment'.[42] The principle was again referred to by the Court in its judgment of 20 April 2010 delivered in the *Pulp Mills* case opposing Argentina to Uruguay.[43]

But the "do no harm" principle goes beyond transboundary pollution, and it extends beyond a duty to abstain from causing harm: it implies a positive duty to control private actors operating abroad to ensure that human rights, including the right to development, are not violated by such actors.[44] Indeed, the general obligation to exercise influence on the conduct of non-State actors where such conduct

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International Protection of Human Rights : A Textbook (Abo Akademi University Institute for Human Rights, Turku : Abo, 2009), pp. 39-60.

[38] Olivier De Schutter, *International Human Rights Law. Cases, Materials and Commentary*, Cambridge University Press, 2010, chap. 4.

[39] Articles 3 and 4. The right to development has been repeatedly referred to in subsequent declarations adopted unanimously, for example the Millennium Declaration and the 1993 Vienna Declaration and Programme of Action of the 1993 World Conference on Human Rights. See further Margot E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press, 2007).

[40] Millennium Declaration, UNGA Res 55/2 (8 September 2000), para. 2.

[41] *Trail Smelter Case (United States v. Canada)*, 3 R.I.A.A. 1905 (1941); see also the dissenting opinion of Judge Weeramantry to the Advisory Opinion of the International Court of Justice on the *Legality of threat or use of nuclear weapons* in which, referring to the principle that 'damage must not be caused to other nations', Judge Weeramantry considered that the claim by New Zealand that nuclear tests should be prohibited where this could risk having an impact on that country's population, should be decided 'in the context of [this] deeply entrenched principle, grounded in common sense, case law, international conventions, and customary international law'.

[42] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78

[43] *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, par. 193.

[44] See also N. Jägers, *Corporate Human Rights Obligations: in Search of Accountability*, Intersentia, Antwerpen-Oxford-New York, 2002, p. 172 (deriving from 'the general principle formulated in the *Corfu Channel* case – that a State has the obligation not knowingly to allow its territory to be used for acts contrary to the rights of other States – that home State responsibility can arise where the home State has not exercised due diligence in controlling parent companies that are effectively under its control').

might lead to human rights being violated outside the State's national territory has been emphasized by various United Nations human rights treaty bodies. The Committee on Economic, Social and Cultural Rights in particular affirms that States parties should ‘prevent third parties from violating the right [protected under the International Covenant on Economic, Social and Cultural Rights] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law’.[45] Specifically in regard to corporations, the Committee on Economic, Social and Cultural Rights has further stated that: ‘States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant.’[46] Similarly, the Committee on the Elimination of Racial Discrimination has called upon States to regulate the extraterritorial actions of third parties registered in their territory. For example, in 2007, it called upon Canada to ‘…take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada', recommending in particular that the State party 'explore ways to hold transnational corporations registered in Canada accountable’.[47]

Chapters 7, 8 and 9 examine various tools through which States may -- and perhaps should, consistent with the obligations outlined above -- incentivize investors to proceed so as to contribute positively to development in the host country. Three channels through which such influence may be exercised are examined in turn: they are export credit agencies and investment insurance agencies (chapter 7); the negotiation of bilateral or multilateral frameworks for investment (chapter 8); and development banks, using the European Investment Bank as an illustration (chapter 9). While a perhaps more direct way to achieve similar results would consist in the home State of the investor regulating that investor's behaviour and providing victims of human rights violations committed by that investor with remedies in the courts of the home State, the use of extraterritorial regulation has been heavily contested, and denounced as an infringment on the sovereignty of the host State.[48] Moreover, extraterritorial regulation of private companies by the State of origin may be ineffective, either because of the ability for such companies to organize themselves into separate legal entities so as to create a 'veil' between the parent and the subsidiary and thus to allow the parent company to escape any form of liability for the acts of the subsidiary, or more generally because, unless combined with the appropriate incentives, the addressees of such regulations will be tempted to use all means at their disposal to circumvent them. Thus, the editors of this volume deliberately chose to focus on tools that are not regulatory in the strict or direct sense, but that could be use to align the incentives private investors have to behave in certain ways with the requirements of human development.

In chapter 7, Matthias Sant'Ana examines the impacts of export credit and investment insurance agencies on human development and human rights. These institutions provide investors and exporters with loans, insurance and guarantees against risks incurred in international trade and investment activities. Because their role is to complement private actors in the lending and insurance markets, they have been increasingly subject to international disciplines to avoid the risks of trade distortions. Sant'Ana notes however that, while often considered with suspicion because of their ability to support

[45] See, eg, Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 (2000), para. 39; or Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11 (26 November 2002), para. 31.
[46] Committee on Economic, Social and Cultural Rights, ‘Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights’, UN Doc. E/C.12/2011/1 (20 May 2011), para. 5.
[47] CERD/C/CAN/CO/18, paragraph 17 (Concluding Observations / Comments, 25 May 2007).
[48] On this debate, see, *inter alia*, N. Jägers, *Corporate Human Rights Obligations: in Search of Accountability*, op. cit.; and O. De Schutter, 'Les affaires *Total* et *Unocal* : complicité et extraterritorialité en matière d’imposition aux entreprises d’obligations en matière de droits de l’homme', *Annuaire français de droit international*, vol. LII (2006), pp. 55-101; and O. De Schutter, 'Rapport général - La responsabilité des Etats dans le contrôle des sociétés transnationales : vers une Convention internationale sur la lutte contre les atteintes aux droits de l’homme commises par les sociétés transnationales’, in *La responsabilité des entreprises multinationales en matière de droits de l’homme*, Bruxelles, Bruylant-Némésis, 2010, pp. 19-100.

the national exporters at the expense of their competitors from other competitors (and thus to provide a form of subsidization), these agencies also can act as watchdogs vis-à-vis the very actors they support, by imposing on them certain conditionalities or reporting requirements. In recent years, he notes, export credit agencies have increasingly been moving in this direction. Sant'Ana documents this shift from export credit agencies as a tool for hidden and distortive subsidization, to these agencies operating in order to make globalization more humane -- although the two, it should be added immediately, are not necessarily incompatible. In doing so, he assesses the manner in which this evolution squares with the requirement, under international law, that states should cooperate to promote development, and that they should take appropriate measures to avoid negative human rights impacts of the activities they support abroad: his premise is in this regard that 'States are required to exercise influence on non-state actors by properly regulating multinational corporations operating from their territory, by conditioning public support to these enterprises to adequate standards of human rights due diligence'.[49] Besides proposing that additional standards be integrated in ECA lending and insurance practice, he suggests that establishing procedural requirements, such as impact assessments, can be particularly useful by moving the debate from resignation with uncertainty, towards a commitment to formulate expectations, perceptions of risk and mitigation policies publicly and prior to any intervention.

In chapter 8, Philip De Man and Jan Wouters then assess the possibility of improving the framework of negotiations on international investment agreements, in particular from the viewpoint of developing and least-developed capital-importing countries. Again, the issue they address is grounded in the understanding that in the negotiation of investment agreements, States cannot ignore their human rights obligations, including their obligations towards the right to development: this is the position adopted by the Committee on Economic, Social and Cultural Rights,[50] the Sub-Commission on Promotion and Protection of Human Rights (to which the Advisory Committee of the Human Rights Council has now succeeded),[51] and special procedures of the Human Rights Council.[52]

The establishment of an international framework for FDI should support the full realization of human rights and human development. But how then to move towards such a framework in a context in which a web of bilateral investment treaties has already been concluded, largely preempting the establishment of a multilateral approach ? De Man and Wouters analyse the viability of deliberations on a multilateral investment framework in order to mitigate the perverse effects of the negotiation dynamics at the bilateral level. They fully acknowledge the pre-existing situation of an elaborate

[49] See *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 7 April 2008 (UN Doc A/HRC/8/5), paragraphs 56–64.

[50] See, e.g., Statement of the Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization, Seattle, 30 November- 3 December 1999 (E/C.12/1999/9); Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), *The right to adequate food (art. 11),* E/C.12/1999/5, at paras. 19 and 36 ('States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention'); Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4 (2000), para. 39 ('In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health'); Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),* U.N. Doc. E/C.12/2002/11 (26 November 2002), paras. 31 and 35-36 ('States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water').

[51] Sub-Commission on Promotion and Protection of Human Rights, Human Rights as the Primary Objective of Trade, Investment and Financial Policy, U.N. Doc. E/CN.4/Sub.2/ RES/1998/12 (1998); Report of the Sub-Commission on its 50th Sess., U.N. ESCOR, 50th Sess., at 39, U.N. Doc. E/CN.4/Sub.2/1998/45 (1998).

[52] J. Oloka-Onyango & Deepika Udagama, The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights, U.N. ESCOR, 52d Sess., U.N. Doc. E/CN.4/Sub.2/2000/13 (2000); Report of the Special Rapporteur on the Right to food to the 19th session of the Human Rights Council, Olivier De Schutter, Addendum: Guiding Principles on human rights impact assessments of trade and investment agreements, UN Doc. A/HRC/19/59/Add.5 (19 December 2011).

regime of bilateral investment treaties between developed and developing countries, which mortgages the negotiation options of the latter at the multilateral level.

Taking into account what they call this 'duality of parallel negotiations', the authors make a number of suggestions. First, they propose that rules set at the multilateral level (building, ideally, on the General Agreement on Trade in Services (GATS), part of the World Trade Organisation agreements) should focus more modestly on technical issues that support, rather than compete with, ongoing bilateral processes. These include improving the transparency of the domestic regulatory framework for investment in order to ensure that, provided adequate macroeconomic conditions are present, investors will be encouraged to enter the country ; building the capacity of developing country regulators and negotiators ; and providing technical assistance in order to 'improve the general economic infrastructure of host countries as a durable means of ensuring that FDI flows take root in poor countries'. In other terms, a multilateral framework for investment may have to be more modest if it is to succeed, and to steer away from the more contentious issues of investment liberalization and the rights of investors, towards an essentially facilitative and supportive role. This may be a 'second best' solution, in that there still remains a risk that capital-receiving countries shall compete for investment by using the tool of incentives that, ultimately, lead to a sub-optimal solution for all. But it may still encourage countries to improve their macro-economic fundamentals rather than to provide investment incentives that are essentially a means to attempt to compensate, from the point of view of the potential investor, a deficient economic climate.

Second, De Man and Wouters also note that, in order to overcome the current obstacles to further progress on the establishment of a multilateral framework for investment, the issue of investment liberalization (on which developed, capital-exporting countries insist) could be linked to issues developing countries (primarily those who oppose further investment liberalization) care most about: an obvious candidate is the movement of labour. As they note, 'in light of the importance attached to the movement of personnel by India, the staunchest opponent to multilateral rules on FDI flows, the option of conducting parallel negotiations on both issues should thus be given considerable thought'.

Third, the authors consider that a new multilateral framework for investment could include attributing to the Dispute Settlement procedures of the World Trade Organisation a competence to adjudicate investment disputes that arise under existing investment treaties. This, they remark, could reduce the uncertainty resulting from the vagueness of provisions in bilateral investment treaties that are interpreted by arbitral tribunals with a variable composition and that do not result in the gradual formation of a consistent case law: providing greater predictability would be in the interest of investors and host countries alike. Of course, this would represent a significant shift from the existing situation, in which investor-State disputes coexist with State-State disputes. However, as they note, the inclusion of investor-State dispute resolution provisions in the Multilateral Agreement on Investment negotiated under the auspices of the OECD between 1995 and 1998, before the attempt was abandoned under the pressure of civil society, was one of the most contentious aspects of the enterprise, and one that was most fiercely opposed. In addition, as they note, 'excluding investors' standing in dispute settlement proceedings against host countries is likely to be to the benefit of developing countries, which often struggle in finding the necessary resources to defend themselves properly against more potent multinational enterprises'.

Finally, in chapter 9 Nicolas Hachez and Jan Wouters examine the role of development banks in supporting transborder investment, taking as example the European Investment Bank's practice and how it relates to human rights and to social and environmental concerns. They assess, first, whether the substantive rules applicable to the EIB's activities ensure that the lending practices of the Bank shall contribute to human development. These rules are the applicable rules of the EU legal order and the voluntary human rights, social and environmental principles and standards which the EIB has identified for itself as a guide to its lending operations -- starting with a set of environmental principles adopted in 1996 under pressure from civil society, and at present most visibly expressed in the EIB Statement of Environmental and Social Principles and Standards, most recently updated in 2009. Remarkably, these principles and standards apply also to operations conducted in third countries that benefit from EIB funding, although not without limitation: the position of the Bank that 'for a variety of reasons, including institutional capacity, technological capability, availability of investment funds and consumer ability and willingness to pay, for a particular project the immediate achievement of EU requirements may not be practical and in some cases may not be desirable. When the case arises, it is incumbent on the promoter to provide an acceptable justification to the Bank for a deviation from EU standards, within the framework of the environmental and social principles and standards set out in the Statement. In such cases, provision should be made for a phased approach to higher standards.' Having reviewed the rules and standards applicable to the lending policies of the EIB, the conclusion of the authors is critical: they note that while the volume of lending of the EIB is significant, largely exceeding that of comparable multilateral lending institutions, the substantive accountability standards seem 'off the mark compared to MLIs' best practices, this in several respects ranging from the clarity and comprehensiveness of the applicable standards, to their binding and operational character'. As regards then the procedural accountability principles of transparency, participation and remedies, they too are seen as falling short of what would be required, particularly since the EIB's operations are excluded from review by the Court of Justice of the European Union.

D. CONCLUSION

The chapters collected in part II of this volume examining the links between FDI inflows and the conclusion of international investment agreements led to some key conclusions. Economic growth and human development in general have benefited from the arrival of FDI, and contrary to a widely held assumption, investors do not search to enter into jurisdictions that have 'lower' standards. Theirs is a quest for profitability: what matters is that they have a stable investment framework, a sound business climate, and that the key macro-economic conditions are right. And while low labour costs may be an advantage especially in relatively labor-intensive industries, what really matters is the relationship between the levels of wages and the productivity of labour: therefore, low productivity, for instance because of poor levels of qualification, routinely is seen to offset the 'benefits' of repressed wages. There is, in that sense, no inevitability to the classic 'race to the bottom' scenario between countries seeking to attract investment by resorting to regulatory competition. On the contrary, their reputational brand that the investors seek to protect, and the diffusion by foreign investors of best practices in social and environmental areas, may help provoke a 'race to the top', facilitated by the inflow of foreign capital. The question is, therefore, how the incentives can be aligned in order to maximize the positive impacts of FDI and minimize the potential negative impacts.

Do IIAs help in doing so? The short answer is: not much. FDI inflows are generally dependent on other variables, especially the size of the market in the host country or trade openness ; and although a predictable and safe legal environment does matter to the investor, such predictability can be provided by other means (the more a country's traditional respect for the rule of law is established, the less it shall have to resort to investment treaties that protect the rights of investors). Moreover, if IIAs make any difference, it is especially in the extractive industry where very large investments are made, that are 'sunk' at the early stages of the project, and that are only profitable after a long period of time, leading the investor to be particularly risk-averse.

It would therefore be ill-advised for countries seeking to attract investment to do so by providing incentives in investment agreements, especially where such incentives are designed in a way that could be interpreted as exempting the investor from having to comply with requirements linked to human rights, or to social and environmental considerations. Such incentives are no substitute for the establishment of an attractive macro-economic and business climate, and they may in fact even be counter-productive as regards the immediate aim of attracting investors (let alone as regards the more ambitious aim of human development) if, as a result of entering the country, the investor would be risking its reputation and subject itself to criticism because of the laxity of the standards applied. For this globalized world is also one in which information about poor practices of transnational actors travels fast.

It does not follow, however, that the establishment of a robust regulatory framework in order to channel FDI towards human development goals is not required, as if the market could take care of itself. Governments are notoriously poorly equipped to act in the public interest of their populations, and to decide in accordance with long-term considerations. They may be corrupt, or influenced by narrowly defined interests. They may be myopic and discount the long-term costs of present actions if they can achieve immediate gains. And, perhaps most importantly in this context, they may entertain an unrealistic representation of the real motivations of the investors : they may believe that the investors would not enter the country unless strong concessions are made to them and unless their expectations of profits are fully immune from being reduced as a result of regulatory changes, when in fact what the investors most desire is to invest in conditions that are sound from the macro-economic point of view, and in which their reputation will not suffer -- although if offered certain protections, they will accept them. It is therefore entirely justified to seek to explore which safeguards should be established under the domestic law of host countries in order to ensure that the arrival of FDI shall not negatively affect the rights of the local population, and shall instead contribute positively to human development indicators in the country ; and it is fitting for capital-exporting countries and for agencies such as export credit agencies or multilateral lending institutions to support this effort.

Far from limiting the sovereignty of the countries seeking to attract investment, these tools are used in order to strengthen the bargaining position of these countries: they are a way to support them in making the choices that should benefit their populations most, when these countries could otherwise be tempted to 'signal' their willingness to attract investors by providing far-reaching forms of protection that reduce their policy space, or to offer advantages that will annul, or at least seriously diminish, the benefits they have a right to expect from the arrival of FDI. That is the form that sovereignty takes in the era of globalization: in order to be exercised effectively, it must be shared -- and unless supported by international cooperation, it will not be real.