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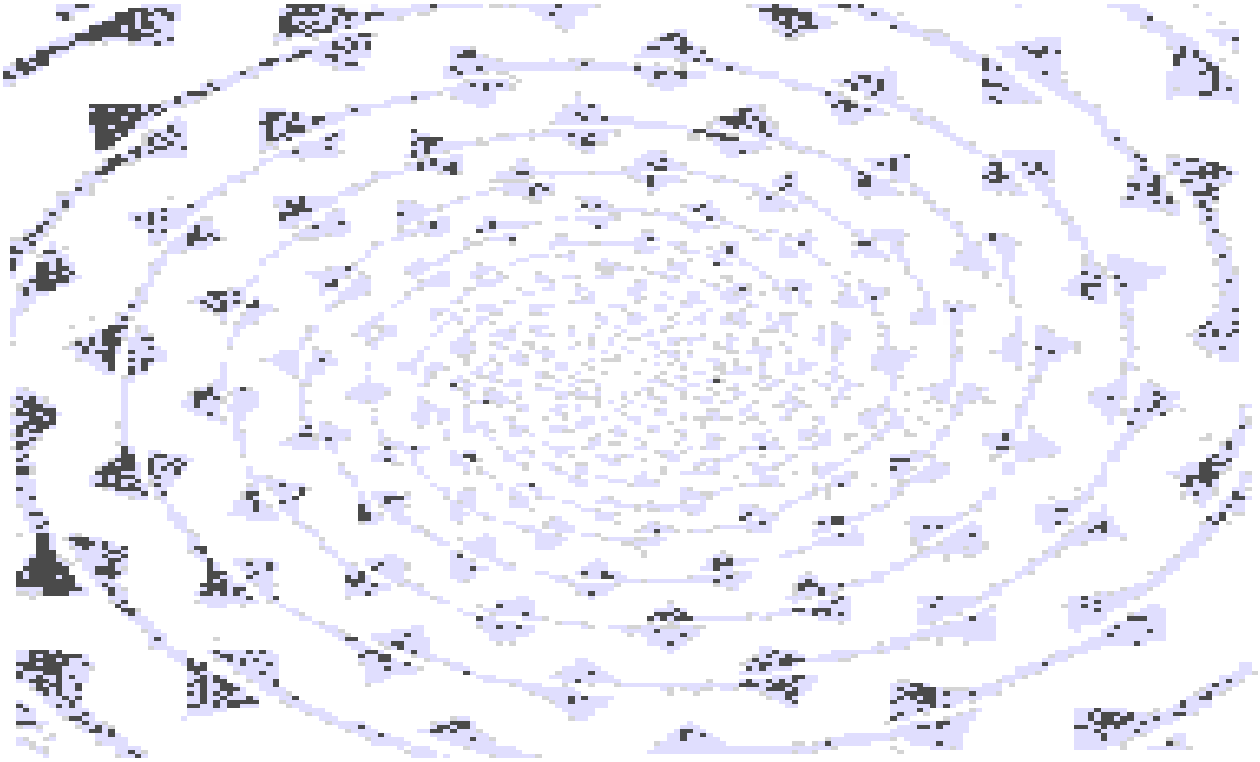

Development in International Law : Conflict of Rhetoric and Norms

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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.

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I. The Place of Development in International Law: An Introduction

The notion of development first emerged as a substantial and polemic subject of debate in international law during the early years of the United Nations. Recently decolonized states challenged the prevailing normative framework of international economic relations and its attendant legal and political doctrines, and proposed an ambitious process of reform. For the states calling for a New International Economic Order (NIEO),[1] it was clear that political independence could only be meaningful if states enjoyed substantial economic self-determination. The latter implied a capacity to promote social, political and economic policies that met their autonomously-defined development goals. These goals were not assessed exclusively, or mainly, in terms of economic growth. To the contrary, newly independent states pursued a very broad notion of self-determination, and focused on redressing historical injustices by asserting their permanent sovereignty over natural resources, by challenging the validity of concessions and contracts concluded prior to independence, and by denouncing the governance of the international economy, established mainly by industrialized nations.

In the early days of the UN, discourse about development was not couched in terms familiar to contemporary observers. In effect, concerns about development in international law could be described as latter-day attempts by metropolitan powers to manage and control colonial territories.[2] Metropolitan states had claimed the right to colonize overseas territories on the basis of their under-development: 'peoples not yet able to stand by themselves under the strenuous conditions of the modern world,' should be placed under tutelage, their development a 'sacred trust of civilization,' in the

[1] Declaration for the Establishment of a New International Economic Order UNGA Res 3201 (S-VI) (adopted 1 May 1974) UN Doc. A/RES/S-6/3201 (NIEO Declaration)

[2] AWB Simpson, Human Rights and the End of Empire: Britain and the Genesis of the European Convention (Oxford: Oxford University Press, 2004) 303 (stating that 'it is quite clear that [the Charter] nowhere states or assumes that there existed a right of peoples to either self-government... There was nothing in the Charter in any way at odds with British colonial policy').

terms of the Covenant of the League of Nations.[3] The UN Charter replaced the League's mandate system, with a trusteeship system 'to promote the political, economic, social, and educational advancement' of colonial peoples and 'their progressive development towards self-government or independence as may be appropriate.'[4] The system would encourage the recognition 'of the interdependence of the peoples of the world', and should 'ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals.'[5] These provisions reflect the uneasy compromise between promoting a freer economic system while still accommodating Empire.

Once the protracted and acrimonious debate over the NIEO concluded in the UN General Assembly, the concerns for development were set aside, to be replaced by the gradual emergence of a managerial version of development discourse, promoted by specialized institutions, under the guise of technical assistance. The highly polarized political ideologies that had characterized development discourse were muted by a number of profound economic and political transitions that culminated with the end of the cold war, and the emergence of (yet another) 'new world order'. What has happened to development in international legal discourse since 1989? In this paper I identify four major discursive trends that emerged by the end of the cold war. My objective is not to produce a thorough taxonomy of the multiple, and infinitely divisible, ideological discourses on development. Rather, I hope to establish a broad typology, at a level of generality that allows for some overarching distinctions to be drawn. It is submitted that each discursive trend can be distinguished along four aspects. First, each discourse about development actually embodies a certain concept of what development – or socioeconomic progress more generally – actually is. Secondly, for any given concept of development there will be some kind of metric used to assess progress. Thirdly, each discourse also promotes a set of ideal roles for the state and regulation, in particular in the way markets are structured. Finally, one should consider the role played by international cooperation under each trend.

These four approaches embody important conceptual disagreements in economics and politics, in theory and policy. But each, in its own way, has influenced efforts to enshrine development as a goal of international law. The outcomes of these efforts can be described, at best, as ambiguous, and at worst, as having perpetuated a framework that rendered development less likely. My objective is to provide a tentative explanation why this is so. I argue that there has been a clear gap between the rhetorical efforts to define and implement development policy at the international level, and the normative underpinnings of the international economic order. In order to understand this conflict of rhetoric and norms, it is necessary to describe how the regulatory framework of the

[3] See Covenant of the League of Nations, 108 LNTS 188 (adopted 28 June 1919, entered into force 10 January 1920), Article 22 (League Covenant).
[4] Charter of the United Nations, 1 UNTS XVI (adopted 24 October 1945, entered into force 24 October 1945), Art 76(b) (UN Charter) (emphasis added).
[5] *ib*id., Art 76.

global economy was gradually defined, and how the policy space required for the pursuit of development – however defined – has concomitantly diminished.

The discussion will therefore begin by summarizing the main structural features of the legal ordering of the international economy from 1945 to 1989 (II). It is followed by an assessment of the four main discursive trends that emerged during the early years of the post-cold war era (III). We then take stock of the evolution of the normative structure of international economic relations in the last two decades, contrasting it with the prior arrangements, and with the emerging discourses (IV). We conclude by assessing the role that an increasingly fragmented international law can have in promoting a multidimensional concept of development (V).

II. Development Thinking and International Political Economy, 1945-1989

Despite the accommodation of colonialism reflected in the UN Charter's Trusteeship system, decolonization – and with it, the expansion of UN membership – expanded rapidly after the Second World War. The members of the United Nations – new and old – committed themselves – jointly and separately[6] – to 'friendly relations among nations based on respect for the principle of equal rights and self-determination' and to promoting 'conditions of economic and social progress and development' as well as 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction'.[7]

Decolonization represented a fundamental change in the balance of world power, diluting the influence of industrialized states within UN bodies, and allowing non-aligned states to bargain between the two great blocs. But beyond the balance of political power, post-war decolonization also strained the international economic arrangements by which metropolitan states had enjoyed privileged status in former colonial territories. As the political process of decolonization moved towards completion, the underlying economic tensions remained. Newly independent states sought the recognition of a state's permanent sovereignty over its natural resources,[8] as well as the establishment of a more equitable world economic order.[9] In practice, the postcolonial state sought to reject obligations that predated independence and had been negotiated either by oppressive colonial administrations or by pliant, unrepresentative local élites.

[6] UN Charter Art 56.
[7] ibid., Art 55, paras 1 and 3.
[8] Permanent sovereignty over natural resources, UNGA Res 1803 (XVII) (adopted 14 December 1962). For a detailed account of the debates at the UN General Assembly, see M Bedjaoui, Towards a New International Economic Order (New York: Holmes & Meier, 1979); N Schrijver, Sovereignty Over Natural Resources: Balancing Rights and Duties (Cambridge: Cambridge University Press, 2008) chps 2-4 and I Brownlie, Principles of Public International Law, 5th edn (Oxford: Clarendon Press, 1998), 542-6.
[9] See, above, note 1.

However, disagreement between industrialized states and both communist and newly-independent states made substantive progress on the matter elusive. Using their majority in the UN General Assembly, developing states pursued the adoption of resolutions.[10] These, however, did not settle the difficult legal questions of the day – e.g. minimum customary standards applicable to cases of expropriation[11] – nor did they rebalance developed and developing states' interests in the field of international economic relations.

Meanwhile, developed states used different strategies to protect their own interests from the renewed assertiveness of former colonial territories. This took place in three main areas. First, in the field of trade, the post-war period saw the rapid adoption of the General Agreement on Tariffs and Trade (GATT) in 1947.[12] The GATT promoted the progressive reduction of trade tariffs, through concessions granted in successive multilateral rounds of negotiations. States extended national and most-favoured nation treatment to all other contracting parties, and committed to reduce progressively overall tariff levels, and eliminate other trade restrictions. The number of GATT contracting parties – most of which were industrialized – increased steadily and, by the time the Tokyo round was concluded in 1979, close to a hundred states had taken part in the negotiations.[13] Beyond these general principles, however, a number of exceptions were built into the GATT system. In the original agreement, states could restrict the application of disciplines to specific members, on political grounds.[14] Moreover, exceptions to the GATT disciplines were extended to cover measures 'considered necessary for the protection of (…) essential security interests',[15] and to measures protecting, inter alia, human, animal and plant life and health, as well as intellectual property.[16] Crucially, the GATT allowed the continuation of privileged trade relations between metropolitan states and former colonies,[17] and tolerated restrictions on products for which many developing countries had comparative advantage, such as agriculture[18] and textiles.[19]

[10] Besides the resolutions already mentioned above, n 1 and 8, see also the Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (adopted 17 December 1984).

[11] On the debate around minimum international standards for expropriations see, especially C Lipson, Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries (Berkeley: University of California Press, 1985). See also P Peters, 'Recent Developments in International Development Law', in The Right to Development in International Law, ed. by SR Chowdhury, E Denters and PJIM de Waart (Dordrecht: Martinus Nijhoff Publishers, 1992) 115-8.

[12] General Agreement on Tariffs and Trade, 55 UNTS 194 (GATT); Protocol of Provisional Application, 55 UNTS 308. On the 'provisional' character of the GATT from 1947 to 1995, see AF Lowenfeld, International Economic Law (Oxford: Oxford University Press, 2003) 25-9.

[13] Lowenfeld, *supra* note 12, 56.

[14] GATT, Art XXXV.

[15] GATT, Art XXI.

[16] GATT Art XX. These measures must be applied in a non-discriminatory manner, subject to a necessity test by GATT panels. See Lowenfeld, *supra* note 12, 38.

[17] GATT, Art I.

[18] Although agriculture, before the Uruguay Round, was subject to the GATT, the use of import quotas and subsidies was accepted, producing considerable distortions in trade in agricultural products. See JA McMahon, 'The Agreement on Agriculture', in The World Trade Organization: Legal, Economic and Political Analysis, ed by PFJ Macrory, AE Appleton and MG Plummer (New York: Springer US, 2005) 187-229.

The second major development of the period was the establishment of the Bretton Woods institutions – the International Bank for Reconstruction and Development (IBRD)[20] and the International Monetary Fund (IMF)[21] – in 1944. The IMF was originally created to promote international monetary cooperation and thereby facilitate international trade, in a manner that would avoid the monetary instability that was held responsible for the economic volatility and tensions of the interwar period.[22] The Bretton Woods monetary system was based on three main principles: a pegged, but adjustable exchange rate; the possibility of imposing capital controls to restrict monetary flows; and the possibility for the IMF of extending balance of payment financing to countries facing currency exchange risk due to persistent trade imbalances. In practice, however, none of these aspects operated as expected, and the IMF's mandate was substantially reviewed in the 1970s, a process precipitated by the US government decision to suspend convertibility of its currency to gold in 1971.[23] In 1978, the revised IMF Articles Agreement entered into force and removed the requirement of states to maintain the fixed exchange rate. However, the stability of the international monetary system remained a central concern, and states were required under Article IV(1), inter alia, to seek growth without inflation, to avoid policies that cause 'erratic disruptions' of international monetary markets, and to avoid manipulating exchange rates to gain competitive advantage over other members. Since the 1980s the IMF's role as a lender of last resort and monitor of the international monetary system allowed it to condition access to credit to compliance with specific economic and policy performance criteria. Though the IBRD and other World Bank group (WB) institutions originally focused on project finance, after the debt crises of the 1980s the World Bank began structural adjustment lending in tandem with the IMF, thereby reinforcing the conditional aspect of structural adjustment plans (SAPs).

A third aspect of the post-war economic order was the regulation of foreign direct investment. This regulatory field proved to be slower to evolve, and was bilateral in nature. The first bilateral investment treaty (BIT) was only signed in 1959, and by the end of 1989, the UN Conference on Trade and Development (UNCTAD) estimated that 385 such treaties had been adopted.[24] Not only was the number of international investment agreements relatively limited until the 1990s, but the rules of customary international law regarding the minimum standard of treatment for foreign investors

[19] Textiles have been subject to trade restrictions at least since the 1930s. In the context of the GATT, a number of special arrangements regarding international trade in cotton textiles were applied from 1961 to 1973, and a Multi-fibre arrangement was applied from 1974 to 1994. See, M Shahin, 'Textiles and Developing Countries', in The World Trade Organization: Legal, Economic and Political Analysis, ed. by PFJ Macrory, AE Appleton and MG Plummer (New York: Springer US, 2005) 412-415.
[20] Articles of Agreement of the IBRD, 2 UNTS 134.
[21] Articles of Agreement of the IMF, 2 UNTS 39.
[22] BJ Eichengreen, Globalizing Capital: A History of the International Monetary System (Princeton: Princeton University Press, 2008), 43-89.
[23] *i*bid, pp. 136-142. See also, Lowenfeld, *supra* note 12, 624-627.
[24] UNCTAD, Bilateral Investment Treaties 1959-1999 (New York: United Nations Publications, 2000) 1.

remained extremely contentious.[25] Due to these uncertainties, capital-exporting states pursued a number of different, but converging, strategies: the establishment of investment guarantee agencies, the use of international arbitration clauses in host-state agreements, the creation of ICSID, as well as the adoption – under the auspices of the UN Conference on International Arbitration (UNCITRAL) – of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[26] The evolution of these strategies for investor protection was gradual, incremental and never quite universal.

In short, what emerged from these arrangements was a global economy based on a regulated system of exchange in which different models of markets and of governments could coexist. This regime of 'embedded liberalism' was, according to Ruggie, a 'form of multilateralism (…) compatible with the requirements of domestic stability'.[27] Although the general legal framework could be described as economically liberal, it could hardly be considered radically so. Trade, investment and monetary policies were less liberalized from the 1950s to the 1970s, with the incomplete and flexible rules at the international level affording considerable policy space to States, allowing them to pursue their own policy objectives.[28]

This regime began to unravel after a number of consecutive shocks. The abandonment of fixed exchange rates by the US, the oil shocks, the debt crisis all contributed to a change in thinking in Western capitals. A profound reformulation of the mandates of international financial institutions (IFIs) was initiated, promoting further liberalization of trade and investment. These IFIs intervened more explicitly in national macro-economic policies, advancing a particular vision of efficient markets, and of the role of the state. By conditioning loans the IFIs redesigned national policies and pushed for more liberalized economies, focused on inflation targeting and fiscal austerity. Seen in this context, the collapse of the Soviet system in 1989 only accelerated and deepened transformations that were already under way.

[25] RD Bishop, JR Crawford and WM Reisman, Foreign Investment Disputes: Cases, Materials, and Commentary (The Hague: Kluwer Law International, 2005), 2-6. See also Brownlie, supra note 8, 524-530.
[26] 330 UNTS 3 (adopted 10 June 1958 entered into force 7 June 1959) (New York Convention).
[27] JG Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 International Organization 379, 399. See also, R Gilpin and JM Gilpin, Global Political Economy: Understanding the International Economic Order (Princeton: Princeton University Press, 2001) 148-195 (noting the coexistence of American, Japanese and European models of capitalist economies).
[28] This has been called the 'Bretton Woods compromise', one of three options in the international political economy trilemma. See, D Rodrik, 'Governance of Economic Globalization', in One Economics, Many Recipes - Globalization, Institutions and Economic Growth (Princeton: Princeton University Press, 2007) 200.

III. Rhetorical and Ideological Shifts of the Post-Cold War Era

1. Neoliberalism: 'There Is No Alternative' and the 'End of History'

As seen, the demise of 'real communism' and the crises in the periphery of the global economy, led many observers to pronounce an end to ideologies and the rivalries of economic models. According to this narrative, western-style market economies could out-produce planned economies, deliver greater individual freedom and deeper international stability. The obvious consequence of this simplifying account was that there were no longer credible alternatives to the triumphant model of advanced industrialized nations. Francis Fukuyama famously espoused the view that history had reached its end: 'What we may be witnessing is not just the end of the Cold War (…) but the end of history as such: that is, (…) the universalization of Western liberal democracy as the final form of human government'.[29] Thomas Friedman famously claimed that although, under Cold War circumstances states could opt between 'the Mao suit, the Nehru jacket [and], the Russian fur', under globalization there was only the 'Golden Straitjacket'.[30] Different models of capitalist economic governance were not seen as equally efficient, and convergence was expected to be forced upon them through market discipline. This line of thought was also markedly indifferent to issues of equity, for it was nourished by the belief that aggregate growth automatically translates into rising standards of living for all participants.

The closest there was to a formalized version of these beliefs was the 'Washington Consensus'. The expression, coined by John Williamson,[31] referred to a list of economic reforms urged upon Latin American countries that described the conventional wisdom in the 'economically influential bits of Washington' and was 'an attempt to summarize the common core of wisdom embraced by all serious economists'.[32] 'Washington Consensus' policies – privatization, strong price stability, fiscal austerity, deregulation, and liberalization of trade and investment – were aggressively pursued by the IFIs through structural adjustment lending.

Under a neoliberal account of development the main value pursued is the expansion of individual and collective utility. By definition, a social arrangement that promotes improvements of overall utility is efficient. However, utilities are not comparable across individuals, so much effort was put into defining efficiency in ways that avoided such comparisons. The most stringent concept of efficiency is the notion of 'Pareto optimality' – a situation in which no individual's welfare can be increased without

[29] F Fukuyama, 'The End of History?' (1989) 16 National Interest 3.
[30] TL Friedman, The Lexus and the Olive Tree: Understanding Globalization (New York: Anchor, 2000) 101.
[31] J Williamson, Latin American Adjustment How Much Has Happened? (Institute for International Economics,U.S., 1990).
[32] J Williamson, 'Democracy and the "Washington Consensus"' (1993) 21 World Development 1329, 1334.

reducing the utility of someone else. 'Pareto improvements' are changes in the distribution of utility whereby at least one individual becomes better-off, without anyone else becoming worse-off. [33] Economists have tried to relax this stringent criterion by allowing losers to be compensated for losses by those who win in any given change of circumstances. Under Kaldor-Hicks efficiency,[34] for instance, a situation is considered an improvement if those made better off could compensate eventual losers, even if they do not, in reality, do so. This relaxing of efficiency requirements was instrumental in allowing income (at the individual scale), and the domestic product (at the national scale), to become the most widespread proxies for the measurement of welfare.

Insofar as neoclassical economic theory assumes rational actors with full information, it concludes that markets – if let to themselves – will 'naturally' achieve welfare maximizing allocations of resources. Therefore, an efficient social arrangement is one in which the state's intervention in the market is restricted. The state's function is to provide a cost-effective system for the protection of property, the enforcement of contracts, the provision of a stable monetary medium and the maintenance of social peace and security. Taxation, governmental expenditure and debt should be commensurate to the minimal role of the state. Regulation should be kept at a minimum, to avoid regulatory capture and to ensure that markets could 'get the prices right,' i.e. self-regulate through price signals. Law, in this context, is seen as one of many social institutions the efficiency of which ought to be assessed and improved. This has been done, for instance, by providing rankings of business friendly regulatory environments – as the World Bank does through its Doing Business Reports[35] – or by using conditionality in SAPs to promote tax cuts.

The primary focus of international cooperation is on the avoidance of economic conflicts between states – preventing trade and monetary frictions from escalating into broader conflict –, and ensuring a 'level playing field' for economic actors worldwide: i.e. ensuring the non-discriminatory access to resources and to markets. Recourse to intergovernmental settlement of disputes to guarantee respect for the emerging general framework of economic rules was envisaged. This includes the GATT dispute settlement mechanisms, the use of diplomatic protection for state-to-state investment arbitration, as well as commercial and investment arbitration. The widespread use of conditionalities, though not a dispute settlement technique, can certainly be said to be a technique of enforcement of monetary and financial standards.

[33] AK Sen, Development as Freedom (Oxford: Oxford University Press, 2001) 117.
[34] E Screpanti et al, An Outline of the History of Economic Thought (Oxford: Oxford University Press, 2005) 286.
[35] See A Santos, 'Labor Flexibility, Legal Reform and Economic Development', (2009) 50 Virginia Journal of International Law 43.

2. Human Development

The 'economic efficiency' concept of development has always had opponents. In the 1970s, for instance, the ILO had sponsored 'basic needs' and 'redistribution with growth' approaches to development that considered the satisfaction of a set of fundamental needs as an indicator of the level of development. [36] Simultaneously, theoretical developments since John Rawls' Theory of Justice – including Amartya Sen's and Martha Nussbaum's development of the 'capabilities' approach to human welfare[37] – produced the intellectual underpinnings for a number of innovative approaches to the conceptualization and measurement of development. These efforts resulted in a renewed interest in process, agency and institutions.

It is in this context that the United Nations Development Program (UNDP) decided to establish a rival concept of development based on the capabilities approach that would provide a simple metric and a richer concept of development. In 1990, the UNDP produced its first Human Development Report (HDR), defining development as the 'process of enlarging people's choices'[38] and introducing the human development index (HDI). This multidimensional approach to development focused on distinguishing three aspects of well-being that all persons had reason to value: the capability to lead a long and healthy life; the capability for acquiring knowledge and putting it to productive use; and, command over material resources. The HDI aggregated the income, health and education dimensions into a composite, single figure. Though these three dimensions of development were explicitly considered constitutive aspects of human development, the UNDP did not consider them as an exhaustive account of what multidimensional development meant: on the contrary, focusing on the three dimensions in its Human Development Index was a pragmatic concession to the limitations of measurement techniques and of the available data. Regardless of its limitations,[39] the HDI gave increased visibility to the difference between social dimensions of development and economic dimensions. At the same income level, states could achieve very different results in terms of the expansion of essential capabilities, such as health or education: growth in income did not automatically translate into greater levels of development.

Within a human development approach, institutions and law play a crucial role in establishing an appropriate context for human flourishing: '[t]he goal of human development is to create an enabling environment in which people's capabilities can be enhanced and their range of choices expanded'.[40] In the human development paradigm,

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[36] See UN Department of Economic and Social Affairs, World Economic and Social Survey 2010 - Retooling Global Development (New York: United Nations Publications, 2010) 16-18.
[37] MC Nussbaum and AK Sen, The Quality of Life (Oxford: Oxford University Press, 1993).
[38] UNDP, Human Development Report 1990 (New York: Oxford University Press, 1990) 9.
[39] The UNDP recognized that the HDI lacked a 'freedom' dimension, representing the enjoyment of basic rights. It also acknowledged that by providing a single index, distributive considerations were obscured. These shortcomings have led the UNDP to adopt additional indicators, produce inequality-discounted indices, and data at a finer level of disaggregation.
[40] UNDP, *Human Development Report* (New York: Oxford University Press, 2000) 23. Other reports have focused on additional aspects of institutional reform that are linked to human development, such as democratic governance and

the role of the state is seen as a compromise between the need to free the forces of the market while still providing essential services, safety nets, and the protection of fundamental rights. However, the capabilities approach provides no blueprint for social justice, nor does it settle the substantial questions involving the choice between focusing on efficiency or equity improvements for instance.[41]

With respect to international cooperation, the Human Development Reports have called upon the international community to reduce global inequality and marginalization by improving the ethos of official aid, by moving forward on debt forgiveness, and increasing market access of the poorer countries.[42] This policy agenda obviously requires a high-level of international cooperation among states, as well as among states and non-state actors such as multinational corporations (MNCs). An example of international cooperation called for by the concept of human development is the adoption of the Millennium Development Goals (MDGs).[43]

3. Sustainable Development: Environmental Limits to Growth Strategies

Though it has long been known that the careful management of land, water, ecosystems and exhaustible resources is essential for the long-term survival of societies and species, international interest in this issue was sparked only relatively recently.[44] The Stockholm Conference on the Human Environment[45] was the first major conference on the environment and many of the central features of contemporary environmental regimes were to be affirmed there. But it was with the 1987 'Brundtland Report'[46] that the term 'sustainable development' was first defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. This concept relies on two interrelated ideas: that of needs, and 'in particular the essential needs of the world's poor', and that of 'limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs'.[47] This report greatly influenced the preparation and outcomes of the 1992 UN Conference on Environment and Development, held in Rio de Janeiro. The Rio

participatory processes in development policy. See respectively, the 2002 (Deepening Democracy), 1993 (Citizen's participation in Democracy) and 1991 (National and International Strategies for Development). See UNDP, Human Development Report (New York: Oxford University Press, 1991, 1993, 2002).

[41] Sen, *supra* note 33, 287 (stating that '… [the] diagnosis [that a society is unjust] does not have to rest on a belief that some unique pattern of distribution of food, or of income, or of entitlements, among all the people in the country, will be maximally just, trailed by other exact distributions').

[42] UNDP (2000), *supra* note 40, 119-121.

[43] United Nations Millennium Declaration, UNGA Res 55/2 (adopted 18 September 2000) UN Doc. A/RES/55/2.

[44] According to the 2005 UN Environment Programme Register of International Treaties and Other Agreements in the Field of the Environment, available at <http://www.unep.org/law/PDF/register_Int_ treaties_contents.pdf>, 153 treaties concerned with environmental protection had been adopted in the period 1921-1989, most of which were adopted since 1969. After 1990, another 119 treaties were adopted.

[45] Declaration of the UN Conference on the Human Environment, UNGA Res 2657/XXV (adopted 16 June 1972).

[46] World Commission on Environment and Development, Our Common Future (World Commission on Environment and Development, 1987) (Brundtland Report).

[47] ibid, p 54.

Declaration[48] reaffirmed the principles established in Stockholm, and further developed them by, e.g. formalizing the principle of 'common but differentiated responsibilities'. It also established a number of new principles, including the precautionary approach to environmental protection and the requirement of environmental impact assessment, among others. Moreover, it called for the establishment of a world economic order that would lead to economic growth and sustainable development in all countries.

Taken together, these principles could be read in two ways. In the weak version, sustainable development requires only that economic growth 'meet the needs of present and future generations', i.e. does not deplete stocks and flows of resources on which the next generation will depend on for its survival. In the strong version, development is progress in the restructuring of productive relations in a manner that stabilizes, and ideally reconstitutes, essential ecosystems – global public goods – on which continued human existence depends.[49] In either version, a great deal of scientific uncertainty exists as to what are the 'tolerable levels' of resource depletion, or the exact levels of ecosystem resilience and carrying capacity. This uncertainty informs both the pricing mechanisms used, and the environmental goals that states are expected to achieve: the precautionary approach would require that scientific uncertainty be seen as a reason to err on the side of caution, opposing risky innovations or overly-optimistic predictions about the consequences of societal choices.

Unsurprisingly, measurement issues have been a central difficulty in the sustainable development field. Attempts at pricing goods in an uncertain future, or at defining the preferences of future generations are bound to be contentious exercises even at the purely academic level, but even more so at the policy-level. Given these difficulties, the international coordination of national policies will unavoidably be a task of extreme complexity. Attempts to coordinate responses to environmental challenges are, therefore, quite sophisticated as one can readily deduce by observing the processes set in motion by the negotiations of a post-Kyoto commitment period, or the establishment of the European Union's emissions trading scheme.

Within this strand of development thinking, the role of the state is to set incentives for individuals and firms to adapt production and consumption structures in a manner that respects the environmental constraints of the economy, and guarantees a level of distributive justice not only among current social groups, but also between generations.[50] In the weak version, this might imply the need to correct market prices to ensure they reflect the cost of depleting environmental resources. In the stronger

[48] Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), Annex I - Rio Declaration On Environment and Development (UN Doc. A/CONF.151/26 (Vol. I)).

[49] For articulations of the stronger versions, see HE Daly, Steady-State Economics (London: Earthscan, 1992); Tim Jackson, *Prosperity without Growth: Economics for a Finite Planet* (London: Earthscan, 2009).

[50] See, Brundtland Report, 49, 54. ('It could be argued that the distribution of power and influence within society lies at the heart of most environment and development challenges', and 'even the narrow notion of physical sustainability implies a concern for social equity between generations, a concern that must logically be extended to equity within each generation')

version, this would involve setting upper limits to the use of environmental goods and services, based on the best scientific evidence, and enforcing such limits by a mix of market-based mechanisms and governmental regulation.

International cooperation is absolutely central: by definition, the environmental risks currently faced cannot be addressed on a unilateral level, but require collective action. However, given the considerable divergence of views on the exact extent of the risks, or of the appropriate response to them, international cooperation must play a two-pronged role. On the one hand, it should promote a common understanding of the global challenges faced by the community of states, and seek to reach agreement on environmental targets and corresponding enforcement strategies. On the other hand, it must acknowledge the important differences between states: their historical contribution to resource depletion or to pollution, their highly divergent capability for intervention, and the variety of risks to which individual states are exposed. The interplay of these aspects is the reason for a principle of common but differentiated responsibilities in international law.[51]

Issues of compliance and dispute settlement are particularly challenging. The Kyoto protocol, for instance, seeks to ensure emissions reductions, but also establishes a clean development mechanism in order to grant carbon credits to states that invest in cost-effective emissions reductions abroad.[52] This approach acknowledges that states have different natural capacities for transformation and, consequently, that some states will not be able to meet their target solely by effecting reductions within their own territories. This 'pragmatic approach' to compliance is not beyond reproach, but it is difficult to see what would be gained by eschewing it in favour of the more traditional enforcement mechanisms.

4. Rights-based Approaches: Indivisibility of Rights and the Right to Development

The end of the cold war led to a revival of both collective rights – such as the right to development, or the rights of indigenous peoples –, and economic, social and cultural rights. The period was also marked by a renewed interest in the conceptual aspects of international human rights law, a theme that had been frequently neglected.[53] The end of the bipolar world system might have eliminated the ideological incentives to distinguish between categories of rights,[54] but 'freedom from want' had become no less

[51] Christopher D. Stone, 'Common but Differentiated Responsibilities in International Law', (2004) 98 American Journal of International Law 276-301.
[52] Kyoto Protocol to the United Nations Framework Convention on Climate Change (U.N. Doc FCCC/CP/1997/7/Add.1), Art 12 (Kyoto Protocol).
[53] P Alston, 'Making Space for New Human Rights: The Case of the Right to Development', (1988) 1 Harvard Human Rights Yearbook, 7-15 (noting the criticism from international law scholars who considered human rights lawyers as lacking in rigor, depth or sophistication).
[54] See DJ Whelan, Indivisible Human Rights: A History (Philadelphia: University of Pennsylvania Press, 2010).

salient an issue. To the contrary, the need to pursue social, cultural and economic development for all was a political goal in search of an organizing rhetoric, and human rights provided a very powerful medium in which to articulate these concerns.

The right to development, as well as the place of rights in development had of course deeper roots. As mentioned, the UN Charter, and the Universal Declaration of Human Rights (UDHR) contained early statements of the link between rights and development. The Declaration recognizes the right of all individuals to 'a social and international order in which the rights and freedoms set forth in [the] Declaration can be fully realized,'[55] an entitlement to the ordering of both national and international institutions in a manner consistent with the pursuit of all rights. The drafting of the Covenants on human rights[56] reinforced these positions.[57] The Teheran Proclamation confirmed the indivisibility of rights and stated that the 'achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development'.[58] But it was the adoption of the Declaration on the Right to Development in 1986[59] that represents the most explicit articulation of a 'human rights concept' of development.

The Declaration defines development as a right of individuals and peoples. It is the right of these subjects to 'participate in, contribute to and enjoy' all human rights.[60] The issue of individual agency is quite central: 'the human person (…) is the central subject of development and should be the active participant and beneficiary of the right'.[61] The right also implies 'the inalienable right [of peoples] to full sovereignty over all their natural wealth and resources'.[62] The primary duty-bearer is the territorial state, but all States have the duty to cooperate in order to (i) create national and international conditions favourable to the realization of the right;[63] (ii) promote development and remove obstacles to its realization;[64] and (iii) formulate international development policies with a view to its full realization.[65] In a way, the declaration is simply a consolidation of a number of separate instruments on the rights of individuals, peoples and states to self-determination, to the progressive realization of all rights, and to an

[55] Universal Declaration of Human Rights, UNGA Res 217 A (III) (adopted 10 December 1948) Art. 28 (UDHR).
[56] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
[57] ICESCR, Article 1(1). (recognizing the right of '[peoples to] freely determine their political status and freely pursue their economic, social and cultural development').
[58] Final Act of the International Conference on Human Rights (adopted 13 May 1968) UN Doc A/CONF. 32/41, recital 13.
[59] UN General Assembly Resolution 41/128, Declaration on the Right to Development, of 4 December 1986 (UN Doc. A/RES/41/128).
[60] Declaration on the Right to Development, Art 1(1).
[61] ibid, Art 2(1).
[62] ibid, Art 1(2).
[63] ibid, Art 3(1).
[64] ibid, Art 3(3).
[65] ibid, Art 4(1).

international environment that does not restrict the realization of rights.[66] Despite considerable criticism of the declaration,[67] the right to development has been unanimously reaffirmed by consecutive UN Conferences.[68] As Alston suggested in 1988, for economic, social and cultural rights – and a fortiori for 'solidarity rights' – to be taken seriously, human rights scholarship had to rise to the occasion and provide the adequate conceptual tools to render them operational, clear, and, as far as possible, enforceable.[69] To a great extent, this process has already taken place. A new typology of state obligations – distinguishing obligations to respect, protect and fulfil – was proposed.[70] The notion of progressive realization of economic, social and cultural rights was also clarified by the concept of 'minimum core obligations,'[71] duties that should be implemented immediately, such as the adoption of policies to ensure rights. Finally, the identification of a subset of transversal 'human rights principles' – non-discrimination, participation and accountability – and their widespread use in different contexts has resulted in a renewed focus on 'rights as process': entitlements to equal participation in the formulation and implementation of policies that affect individuals, and the capacity to challenge such policies.

Development, under this human-rights based conception, implies the increased realization of all rights, over time. It refers to the possibility of individuals enjoying their rights more, both as a process – being capable to meaningfully influence the policies of development that affect their lives – and as an outcome – benefiting from higher standards of welfare through the provision of rights and the effects of a more equitable economic growth. Scarcity of resources, far from being an excuse for inaction, is the main reason for emphasizing groups experiencing greater social vulnerability and disempowerment.

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[66] SR Chowdhury and PJIM de Waart, 'Significance of the Right to Development: An Introductory View', in The Right to Development in International Law, ed. by SR Chowdhury, E Denters and PJIM de Waart (The Hague: Martinus Nijhoff Publishers, 1992) 7-23.

[67] For critical reactions, see Alston, *supra* note 53, 4-7.

[68] The Declaration was adopted by 146 votes to 1 (US) with 8 abstentions. It has been argued that the hesitations of the abstaining states and the US were dropped by their endorsement of Principle 3 of the Rio Declaration of 1992. See AE Boyle and D Freestone, 'Introduction', in International Law and Sustainable Development: Past Achievements and Future Prospects, ed. by AE Boyle and D Freestone (Oxford: Oxford University Press, 1999) 12-3. For additional reassertions of the right, see also, the Vienna Declaration and Programme of Action (adopted in 12 July 1993) UN Doc A/CONF.157/23), para 10; Millennium Declaration, UNGA Res 2/55 (adopted 18 September 2000) UN Doc A/RES/55/2, paras 11 and 24; and, 2005 World Summit Outcome*, UNGA Res 1/60* (adopted 15 September 2005) UN Doc A/RES/60/1, paras 24(b) and 123.

[69] Alston, *supra* note 53, 29-38.

[70] The typology, originally proposed in 1983, was adopted by the Committee of the ICESCR, in its General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) (adopted 14 December 1990) UN Doc E/1991/23. See, O De Schutter, International Human Rights Law: Cases, Materials, Commentary (Cambridge: Cambridge University Press, 2010) 242-253.

[71] Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations, para. 10. See also AR Chapman and S Russell (eds), Core Obligations: Building a Framework for Economic, Social and Cultural Rights (Antwerp: Intersentia, 2002).

Obvious difficulties arise, however, with the issue of measurement. Although progress has been made in the establishment of human rights indicators,[72] and in developing a conceptual framework for their establishment and use,[73] these efforts are still in their infancy. The crucial question of measuring progress is further compounded by the incommensurability of different rights, and the impossibility of aggregation. This problem, however, is a problem for all multidimensional approaches to measurement which involve incomparable variables.

A 'rights-based approach' to development focuses on the predominant role of the state in setting the conditions under which individuals will be able to flourish freely. In this conception, the state is the instrument through which individual development is made possible. Regulation is the main instrument through which the obligations to respect, protect and fulfil are accomplished. This by no means suggests the predominance of the direct provision, by the state, of goods and services. Nor does it reduce markets to a minor role in the satisfaction of human needs and aspirations. Material prosperity is achieved through the interplay of the market with individuals seeking their own self-realization under conditions that ensure their dignity.

A rights-based approach to development calls two forms of international cooperation: on the one hand, states are required to create a 'rights-enabling environment' at the international and domestic levels; on the other hands, they are required to remove the obstacles to the full realization of human rights, including the right to development. Both forms of cooperation require that states exercise a considerable degree of due diligence, assessing the human rights impacts – domestic and international – of their policies ex ante and ex post.

IV. Evolution of regulatory frameworks since 1989

Every attempt to go beyond the 'neoliberal' approach to development involved conciliating the requirements of a market economy with those of a polity seeking to realize a given conception of the social good: expansion of capabilities, sustainability, or the full realization of rights. The different discursive trends discussed have not resulted in a coherent framework of rule-making, policy assessment, and remedial action at the international level. To the contrary, the regulatory underpinning of the global economy is mostly indifferent to these other objectives.

[72] See, generally, Office of the High Commissioner for Human Rights, Report on Indicators for Promoting and Monitoring the Implementation of Human Rights (adopted of 6 June 2008) UN Doc HRI/MC/2008/3.
[73] T Landman and E Carvalho, Measuring Human Rights (London: Routledge, 2009).

1. Macro-Economic Adjustment: Accelerated Transition to 'Efficient' Models

'Few branches of economics have wielded as much influence on the world of policy as development economics'.[74] Rodrik notes that paradoxically the most stunning examples of poverty reduction have taken place in those countries that followed heterodox, context-sensitive development policies. The 'Washington consensus' policies signally failed to produce the expected results, but were upheld as correct policies nonetheless. In part this was due to the heuristic nature of policy decisions at the international financial institutions and in national policy-making circles: even if caveats and qualifications growth models – the 'ifs' and 'buts' of economic inquiry – had been known, decision-makers required a simple framework with which to operate.[75]

With the end of communist rule the IFIs presided over 'one of the most important economic transitions of all time', to disastrous effect.[76] 'Shock therapy' with no concern for sequencing and pace of reform, and little sensibility to the value of institutions in a market economy. Despite this and other failures, the core policies were maintained. When these policies failed to spur growth, and eventually led to greater political instability and deterioration of human rights,[77] an augmented set of 'Washington consensus' policies were proposed, to little effect.[78]

This naturally raises questions as to whether the policy reforms proposed constituted violations of the mandates of the international financial institutions, or of other obligations in international law applicable to the IFIs. There is a vast literature on the subject,[79] and it would be beyond the scope of this [contribution] to analyse them in detail. In general, human rights issues have been excluded from the work of these institutions on the ground that they are a 'political matter' that their Articles of Agreement prohibit them from considering. Though international law has not moved in the direction of lifting the 'political issue' exception, it is questionable whether the exclusion of human rights and political sustainability considerations could ever have been justified under this provision.[80]

[74] D Rodrik, 'Diagnostics Before Prescription' (2010) 24 Journal of Economic Perspective 33-44.
[75] ibid., p. 40.
[76] JE Stiglitz, Globalization and its discontents (New York, W.W. Norton, 2003) 133.
[77] MR Abouharb and DL Cingranelli, Human Rights and Structural Adjustment (Cambridge: Cambridge University Press, 2007) chaps 7-8.
[78] D Rodrik, 'Fifty Years of Growth (and Lack Thereof): An Interpretation', in One Economics, Many Recipes - Globalization, Institutions and Economic Growth (Princeton: Princeton University Press, 2007) 17.
[79] See, S Skogly, The Human Rights Obligations of the World Bank and the International Monetary Fund (London: Routledge, 2001); M Darrow, Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law (Oxford: Hart Publishing, 2006); A McBeth, International Economic Actors and Human Rights: Global Rules for Global Players (London: Routledge, 2009) chap 5.
[80] See IMF Articles of Agreement, Article V(3)(a): 'The Fund shall adopt policies on the use of its general resources (…) in a manner (…) that will establish adequate safeguards'. It could be argued that ensuring political and social stability might be part of the 'safeguards' for the repayment of loans. See, McBeth, supra note 79, 178-9.

2. Setting the Ground Rules of International Economic Relations

If relatively little changed regarding the rules governing international monetary and financial matters, the same cannot be said of the areas of trade and investment. In the field of trade, the Marrakesh Agreements of 1994[81] established the World Trade Organization (WTO) as a permanent forum for trade negotiations, and as the secretariat for a number of multilateral agreements negotiated during the Uruguay Round. Despite a reference in the preamble to raising standards of living, ensuring employment and promoting sustainable development, the operative provisions of the agreements, reflect little increased concern for these issues. In practice, the Marrakesh Agreements expanded the reach of international trade law into sectors – such as trade in services, or intellectual property – that had escaped discipline until then. The WTO pursues the same logic of progressive removal of trade barriers through negotiated rounds. Importantly, the WTO introduced a comprehensive and streamlined dispute settlement mechanism to which states have had increasing recourse.[82]

At the level of investment promotion and protection, the 1990s saw a spectacular growth in the number and geographic coverage of international investment agreements (IIAs).
According to UNCTAD, 'the IIA universe at the end of 2009 consisted of a total of 5,939 agreements, including 2,750 BITs, 2,894 DTTs [Double Taxation Treaties] and 295 other IIAs'.[83] This compares to less than 400 agreements in 1990. Beyond the issue of international regulation of investment, UNCTAD has also recorded, in the period 1992-2009, it has recorded 2748 changes in national policy, of which 89 percent were classified as further liberalizing investment.[84]

A number of other risk-mitigation strategies were strengthened. First, the increased availability and use of political risk insurance – by private, public and multilateral agencies – created an important 'safety net' for investors.[85] Investor-state arbitration became commonplace, freeing corporations from the need to lobby their governments to obtain diplomatic protection. Recourse to arbitration has been rendered ubiquitous not only through the entry into force of more IIAs, but also through the signing of host-state agreements with arbitration clauses, and by the success of the ICSID convention.[86]

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[81] Marrakech Agreement Establishing the World Trade Organization (adopted 15 April 1994) 1867 UNTS 3.
[82] For a comparison between the GATT and WTO dispute settlement, see, Lowenfeld, *supra* note 12, pp 150-155 and 161-183. For a recent empirical examination of the WTO dispute system, see JF Colares, 'A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development' (2009) 42 Vanderbilt Journal of Transnational Law, 383-439.
[83] UNCTAD, World Investment Report 2010 - Investing in a Low-Carbon Economy (New York: United Nations Publications, 2010), 81.
[84] ibid., 77 (calculations by the author).
[85] JM DeLeonardo, 'Are Public and Private Political Risk Insurance Two of a Kind? Suggestions for a New Direction for Government Coverage' (2005) 45 Virginia Journal of International Law 737.
[86] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965) 575 UNTS159 (ICSID Convention). As of 10 January 2010, 144 countries had ratified the Convention, and

The widespread acceptance of the New York Convention[87] also contributed to this trend by making arbitral awards more easily and more independently enforceable. UNCTAD has compiled the number of 'known' arbitrations, and has observed a swift rise in the number of arbitrations since the mid-1990s, with the total number of proceedings initiated at over 350.[88]

3. Is the 'Golden Straitjacket' unravelling?

If the 1990s was an era of neoliberal euphoria, the first signs of discontent began at the turn of the millennium. Deep social unrest and suspicion were stirred by multiple regional crises. Corporate scandals and asset bubbles in the world's largest economies stimulated further opposition to the predominant model, and emerging markets began seeking independent paths. This, in turn, led to a blockage of negotiations on further liberalization.[89] Since 1999, the IFIs started to recognize shortcomings in their policy advice and have sought to promote nationally-owned strategies focused on poverty-reduction and more sensitive to distributive considerations.[90]

The momentum for ever greater liberalization of the world economy has apparently waned. This does not, however, imply a movement towards an economic order in which states would see their policy space increase. On the contrary, the global economy will continue to operate within a largely liberalized legal framework.

V. Making Sense of Development Imperatives through International Law

What conclusions can one draw, from this complex set of normative and discursive processes, regarding how to reconcile multifaceted development discourses with the legal framework of the global economy? Because the concept of development is imprecise, there have been multiple attempts to deal with aspects of development through law. The explosion of development-relevant legal regimes – in the form of semi-autonomous systems disciplining different aspects of economic, political and social relations –, has led to the concomitant operation of contradictory enforcement

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an additional 11 have only signed it. After 1989, 55 States ratified it, with 40 of those having done so in the first decade.

[87] See, supra, note 26. As of August 2010, the convention had been ratified by 144 states. The 1990s were the decade in which more states became parties, with 40 new ratifications; the last decade has seen 24 ratifications.

[88] UNCTAD, *supra* note 83. The figure refers only to known arbitrations.

[89] On the stalling of the Doha round negotiations, see McBeth, *supra* note 79, 92-6. On the failed negotiations for a multilateral investment agreement within the OECD, see J Wouters, P De Man and L Chanet, 'The Long and Winding Road of International Investment Agreements: Toward a Coherent Framework for Reconciling the Interests of Developed and Developing Countries?' (2009) 3 Human Rights & International Legal Discourse 269-272. Finally, on investment negotiations in the WTO, see V Mosoti, 'Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between' (2005) 26 Northwestern Journal of International Law & Business 95.

[90] McBeth, supra note 79, 191-4.

mechanisms resulting in legal uncertainty and unequal dispute settlement opportunities.

Conflicts between international obligations are not easily settled.[91] Not only have 'law-making treaties' been concluded in ever greater numbers and in an expanding set of subject-matters, but also 'new' regulatory regimes – unanchored in traditional public international law – have arisen, creating ever more specialized, semi-autonomous spheres of authority. It is not just that two broad systems, such as human rights law and international economic law, might impose conflicting obligations. Conflicts have become more common between specialized subsystems – e.g. IMF provisions might impose obligations incompatible with the WTO framework –,[92] or within specialized subsystems – as when two different agreements within the WTO system conflict.[93] The potential for conflict creates uncertainty, and can incite actors to exploit the diverse dispute settlement opportunities strategically.[94] For instance, though both regional human rights systems and investment agreements provide individuals considerable access to international adjudication, the costs of non-compliance are incomparable. As investment arbitration awards tend to be more costly in material and reputational terms, it is arguable that states are incentivized to disregard the least costly violation, i.e. human rights.[95]

Until a clearer set of conflict rules are developed, hopes must be pinned on improved rule-making. However, states with locked-in advantages are unlikely to bargain them away. Even assuming willingness to negotiate better rules, there would still be difficulties regarding both the concept and implementation of additional exceptions to existing regimes. Additional 'social' or 'human rights clauses' in investment and trade agreements, insofar as they may create space for reasoned adjudication of conflicts of norms, might be a welcome addition to the current regimes. However, increasing the scope of exceptions will still leave two important questions unanswered: what kind of balancing techniques should be used by adjudicators faced with normative conflicts? And which adjudicators should perform the interpretive task of assessing the necessity and proportionality of measures justified on the grounds of human rights or environmental protection? The inclusion of such clauses does not determine the efficiency or impartiality of adjudicatory bodies. Moreover, evolving standards such as those of human rights or environmental protection may be difficult to reconcile with the

[91] International Law Commission, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, Report by the Study Group of the ILC (adopted 13 April 2006) UN Doc. A/CN.4/L.682.
[92] DE Siegel, 'Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements' (2002) 96 American Journal of International Law 561.
[93] D Coppens, 'WTO Disciplines on Export Credit Support for Agricultural Products in the Wake of the US – Upland Cotton Case and the Doha Round Negotiations' (2010) 44 Journal of World Trade 369.
[94] Martti Koskenniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education', European Journal of Legal Studies, 1 (2007).
[95] See Inter-American Court on Human Rights, Sawhoyamaxa Indigenous Community v. Paraguay, Series C, No. 146, Judgment of 29 March 2006, paras 137-141 (opposing the right of an indigenous community to ancestral land, to the claim that investors are protected under a BIT. Though the judgment affirmed the priority of the indigenous community's right to land, the state has so far not complied with the ruling).

predictable environment that economic actors seek. Improved norms without better adjudication would be an empty promise.

The place of human rights norms in the debate over fragmentation and hierarchy of international law remains contentious. Human rights norms are applicable to an extremely wide variety of circumstances and social relations, probably more so than any other sub-system of international law. As cross-cutting principles of social ordering applying in most domains of law-making, they enjoy a certain intuitive appeal as moral principles. They are also among the core principles to which the United Nations are dedicated, a fact reflected in the increased profile of human rights within the organization. The primacy of the UN Charter over other international obligations,[96] and UN members' commitment to promoting 'conditions of economic and social progress and development' as well as 'universal respect for, and observance of, human rights,'[97] can all be seen as preliminary evidence of an emerging constitutional order. As Dinah Shelton has argued, '[p]erhaps the most significant positive aspect of this trend toward normative hierarchy is its reaffirmation of the link between law and ethics, in which law is one means to achieve the fundamental values of an international society. It remains to be determined, however, who will identify the fundamental values and by what process.'[98]

[96] UN Charter, Art 103.
[97] ibid, Art 55.
[98] D Shelton, 'Normative Hierarchy in International Law' (2006) 100 The American Journal of International Law 323.