5. Boundary-work and dynamics of exclusion by law: international investment law as a case study

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1. INTRODUCTION

Large constituencies of contemporary societies are excluded from the benefits brought about by economic globalization. Plenty of data show that the unquestionable winner of globalization is the richest global 1 per cent of the world population, that more people across the globe remain disenfranchised and that the environment is rapidly degrading. Law arguably contributes to the establishment of such inequalities and to effecting environmental degradation. The main thesis expounded in this chapter is that a powerful way to sustain inequalities and realize exclusion is through the construction of *ideational boundaries*. These boundaries are often erected in oblique ways and further crystallized through technical legal skills. The ossification of boundaries makes it difficult for lawyers to discern such 'exclusion by law'. Those who try to pierce the veil, in fact, may be portrayed by their specialized peers as activists, naïve or altogether illiterate. A personal example is illustrative of this dynamic.

When I presented my work on International Investment Law (IIL) in 2017, at a conference hosted at the WTO premises, I compared the rights of investors established by existing international investment agreements with the lack of rights of host countries' domestic constituencies under the same legal regime. I argued that the fact that investors have the rights to bring a claim before an international investment tribunal and that the investment-affected people have no rights to initiate a dispute against investors before the same tribunal spawns

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a 'great asymmetry', which is in itself a violation of the rule of law.[2] The ineluctable question was soon posed: was I not comparing *apples* with *oranges*?

I thought I wasn't. Virtually any investment can affect the rights of domestic actors in multiple domains: from property rights to rights to a healthy and safe environment. If the investor can defend her own rights before an arbitration tribunal, this has implications for the rights of the investment-affected people. Investors and investment-affected people were for me clearly part of the same socio-economic reality. Yet, the apples and oranges question is highly valuable for what it reveals: that there are implicit boundaries, which make it natural to artificially insulate investors from the environment where they operate, while enabling investment lawyers to defend this enclave of justice.[3] How can it be that many sophisticated legal scholars and practitioners alike fail to acknowledge such a striking form of exclusion?

This chapter posits that exclusion is accomplished through the construction of ideational boundaries and that doctrinal legal method can function as a means to crystallize boundaries and (re-)produce exclusion. Critical legal scholarship comes to the rescue in identifying dynamics of exclusion. Within the realm of critical approaches to law, critique of ideology and Third World Approaches to International Law (TWAIL) appear particularly illuminating. In this context, it is also suggested that insights from Science and Technology Studies (STS) scholarship are helpful to gain awareness of the boundary-work that underpins the dynamics of exclusion. It is further contended that critical legal scholarship, by means of exposing contradictions and eroding boundaries, can be instrumental in defying exclusion in practice.

Claiming that doctrinal legal method can produce exclusion does not mean rejecting this method. In fact, critical approaches to law and critical pedagogy are intimately bound up with doctrinal legal analysis.[4] As shown in this chapter, for example, when doing critique of ideology we need to stay close to the

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[2] A. Arcuri, 'The Great Asymmetry and the Rule of Law in International Investment Arbitration', in L. Sachs, L. Johnson and J. Coleman (eds), *Yearbook on IIL and Policy 2018* (OUP, 2019), available at: SSRN: https://ssrn.com/abstract=3152808.

[3] J. Paulsson, 'Enclaves of Justice' (2010) 29 *University of Miami Legal Studies Research Paper*; cf. F. Francioni, 'Access to Justice, Denial of Justice and IIL' (2009) 20 *The European Journal of International Law*, 729, who asks 'whether the far-reaching penetration of foreign investment guarantees into areas of national regulation of public interests should not be counterbalanced by corresponding opportunities for access to justice and the availability of remedies for civil society in the host State of foreign investments', at 729.

[4] A. Anghie, 'Critical Pedagogy Symposium: Critical Thinking and Teaching as Common Sense—Random Reflections' (31-08-2020), in *Opinio Juris blog*, available at https://opiniojuris.org/2020/08/31/critical-pedagogy-symposium-critical-thinking-and-teaching-as-common-sense-random-reflections/.

form and inner rationality of the legal text to espouse its very contradictions. Symmetrically, other chapters in this book show how doctrinal legal analysis is intertwined with 'external perspectives' and that '[t]he internal perspective of extreme formalism denies the undeniable, namely the element of choice in legal decisions'.[5] Such broader understanding of legal doctrinal method can make formalism more permeable to demands of justice, although much will depend on the external perspective chosen. Yet, legal doctrinal analysis, even when understood in a broad sense, falls short of unearthing structural modes of exclusions of the legal system. This is all the more worrying when we confront the reality of the contemporary European and American law schools where law, chiefly taught as legal doctrinal analysis, largely remains 'a discipline and a language that genuflects before the status quo'.[6]

This chapter takes the regime of international investment law as a case study to show how boundaries can be (and have been) erected in ways that reproduce relations of domination. They do so by obfuscating the nexus between investment, economy and society. IIL is an illustrative case as several other legal domains arguably rest on the same artificial boundary between the economic and the non-economic (such as EU common commercial policy or international trade law). The IIL case also shows how critical legal perspectives, by breaking free of doctrinal legal analysis, can contribute to change, possibly paving the way to transformative change in practice.

2. BOUNDARY-WORK, CRITIQUE OF IDEOLOGY AND TWAIL

Social scientists have long studied how various actors in society, most prominently scientists, have demarcated science from different 'varieties of non-science' for different purposes, including the pursuit of (professional) authority and autonomy.[7] Boundary-work is often done to promote a certain interest; as aptly put by STS scholar Sheila Jasanoff:

> The processes of deconstructing and reconstructing knowledge claims give rise to competition among scientists, public officials and political interest groups, all of whom have a stake in determining how policy-relevant science should be inter-

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5 See the chapters by Eckes and Davies in this volume.

6 M. al Attar, 'Out of Place? Being Anti-Colonial in Law School' (25-06-2021), in *Opinio Juris blog*, available at https://opiniojuris.org/2021/06/25/out-of-place-being-anti-colonial-in-law-school/.

7 T.F. Gieryn, *Cultural Boundaries of Science: Credibility on the Line* (The University of Chicago Press, 1999); T.F. Gieryn, 'Boundary-Work and the Demarcation of Science from Non-Science: Strains and Interests in Professional Ideologies of Scientists' (1983) *American Sociological Review*, 781.

> preted and by whom. All of these actors use boundary-defining language in order to distinguish between science and policy, and to allocate the right to interpret science in ways that further their own interests.[8]

Arguably, in law, similar processes are ongoing. Erecting boundaries within the legal imaginary can be instrumental in making a certain set of actors and interests powerful and others invisible. As in science and in law, boundary-work can also be seen as inevitable. It not only serves the purposes of yielding authority to certain actors while excluding others; it is also instrumental to make problems and issues tractable. The point here is not whether boundary-work is necessary or unavoidable; it is about foregrounding a work that is typically back-grounded (if at all acknowledged).[9]

Foregrounding boundary-work is part and parcel of critical legal approaches. Admittedly, there is some selectivity in this foregrounding. Critical legal approaches tend to be interested in the exclusion of the oppressed as well as the marginalization of the environment. 'Critique of ideology'[10] in international law – with its focus on revealing relations of dominations – appears as a particularly fruitful method to discern processes of exclusion.[11] Ideology deploys several strategies, including universalization, narrativization and rationalization.[12] There is a clear relation between STS and critique of ideology in that the latter channels the attention on the contradictions and points of strain underpinning the construction of boundaries in specific domains of law. Arguably, construing legal regimes of market integration as relatively separate from other domains facilitated the establishment of the current relations of domination, where transnational capital towers above the organization of public life. Critique of ideology does not only expose boundaries; it also offers orientation for imagining alternatives.

Third World Approaches to International Law (TWAIL) are also a pertinent method as, under the broad umbrella of their research agenda, the conceptual boundaries instrumental for producing exclusion in the field of international

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[8] S. Jasanoff, 'Contested Boundaries in Policy-Relevant Science' (1987) 17 *Social Studies of Science*, 195.

[9] See D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016), at 135–40.

[10] By ideology, I follow Susan Marks and refer to the 'ways in which meanings serve to establish and sustain relations of domination and the ways in which words (and other symbolic forms) support inequalities of power'. S. Marks, 'Big Brother Is Bleeping Us – With the Message that Ideology Doesn't Matter' (2001) 12 *European Journal of International Law*, 109, 110.

[11] The link between boundary-work and ideology has already been made in previous scholarship. For example see Gieryn, supra note 7.

[12] Ibid at 112.

law have been lucidly mapped.[13] The accurate description of how the boundary between the 'civilized' and the 'uncivilized' was meticulously, albeit contradictorily, constructed[14] is possibly one of the most illustrative cases of how ideational boundaries can be deployed to produce exclusion. TWAIL may be seen as specific to international law, as it has focused on the colonial encounter in this very legal field. It can be argued, however, that the work of genealogy[15] characterizing the TWAIL enquiry could be relevant in studying not only North–South relations but also new geographies of domination. As Chimni put it:

> We are particularly looking at the problems or prospects under international law of the working class, indigenous peoples, women, and other marginalized sections. Having talked about third world peoples, TWAIL also seeks to extend the (geographical) scope of its understanding by looking at the marginal sections in the First World.[16]

TWAILers have also criticized the 'fabricated bifurcation' of 'distinct economic and non-economic realms',[17] a theme particularly relevant for our analysis, as discussed below.

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[13] A. Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal*, 1; M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP, 2015). For example, Sornarajah has emphasized how neoliberal ideology is limiting the system in reaching its alleged goals: 'Neoliberalism has ensured that the aim of liberalization and protection of property rights enhances its philosophy of individualism on the theory that such notions will lead to trickling down of wealth. The result of adoption of these policies based on this view has been wide and growing disparities in wealth', at 390–1; see also K. Miles, 'International Investments Law: Origins, Imperialism and Conceptualizing the Environment' (2010) 21 *Colorado Journal of International Environmental Law and Policy*, 1.

[14] Anghie (1999) supra note 13. See also N. Tzouvala, *Capitalism as Civilisation: A History of International Law* (CUP, 2020).

[15] In this regard, Chimni noted: 'Please do not accept the basic conceptual infrastructure of international law at face value. My simple advice is to do a genealogy of the fundamental doctrines that you use. Once you try and trace back what the doctrinal framework or practices that we see now meant, and you work yourself backwards through the centuries and get to the source of these ideas, they suddenly start to become more transparent, more clear in their framing whereas now centuries of superimposed practices tend to conceal or veil their central core. I would suggest doing historical analysis of any subject you are researching.' At https://voelkerrechtsblog.org/articles/on-history-geography-and-radical-change-in-international-law/.

[16] Ibid.

[17] J. Linarelli, M. Salomon and M. Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP, 2018).

At this point, it should be noted that doctrinal legal analysis does not have an intrinsic bias for establishing exclusion. The problem with this type of analysis is that it has limits when it comes to articulating exclusion and its alternatives. Let us take the field of international law, where it could be argued that the discourse on fragmentation and de-fragmentation is part of a doctrinal legal method that could possibly yield more inclusivity. Questions pertaining to the fragmentation of international law engage mainly with conflicts of laws and regime interaction and have been lucidly explored in the literature.[18] However, the discourse on fragmentation is not only mainly concerned with *lex lata*, resting within the boundaries of positive law, but also tends to be anchored into its archetypal distinctions. Consider, for instance, the following question underpinning the analysis in the field of IIL by Professor van Aaken: 'Can an investment tribunal accept arguments of non-investment law issues, e.g. human rights, […] when there are no direct references to human rights […] in the investment treaty?' In such passage it is implied that human rights are 'non-investment issues',[19] a distinction widely echoed by other (investment) scholars.

A critical approach would start by taking issue with the conceptual boundary that human rights are 'non-investment issues'. It may well be the case that the majority of investment treaties implicitly assume that human rights or rights to sustainable development are non-investment issues. But should these rights be treated as non-investment issues? By challenging the boundaries and the inner rationality of *lex lata*, critical approaches break free of its constructed boundaries. This is not to say that a positivistic legal approach is necessarily unimportant for more inclusive law. The point, however, is that doctrinal legal analysis (even of a progressive kind), such as the fragmentation discourse, tends to remain fastened to positive law. For example, we can agree that different interpretations of the law are plausible and, yet, interpretation itself remains framed by positive law (for example, in international law, interpretation occurs on the basis of the Vienna Convention on the Law of Treaties). In other words, legal doctrinal analysis is on the leash of positive law. It follows that legal doctrinal method is not only unlikely to expose the normalization of injustice by positive law, it is likely to reproduce it.

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[18] See for example, A. van Aaken, 'Fragmentation of International Law: The Case of IIL' (2008) 17 *The Finnish Yearbook of International Law*, 91.

[19] Van Aaken, supra note 18, recognizes the problem of boundaries when, later in her article, she concedes: 'Of course, regimes cannot be precisely defined: environmental issues and trade issues may also be viewed under the human rights heading (are, e.g., TRIPS and biological diversity or compulsory licensing for life saving drugs trade or human rights issues?)', at 21.

The stickiness of doctrinal legal analysis to existing relations of domination can be discerned, for example, in what I label the 'linkage curse'. In the context of international trade law, attempts at inclusivity have been made in the so-called linkage, where non-trade values have been linked to so-called trade values. Andrew Lang has poignantly argued that the distinction made between 'trade' and 'non-trade values' by scholars engaged in the so-called trade–linkage debate has a constitutive function, which undermines its contestatory function. As he put it:

> the linkage debate tends to reproduce and reconstitute precisely the kind of trade regime which it (simultaneously) subjects to contestation. By treating such categories as 'trade values' and 'non-trade values' as self-evident and natural, linkage discourse calls forth an image of the liberal trade project in which environmental, human rights, or labour issues find no natural place - these values are by definition excluded from the conception of the liberal trade project on which the debate rests.[20]

What the trade–linkage analysis exemplifies is the power of framing of legal doctrinal analysis. The naturalization of certain framings numbs critique. In the next two sections, it is shown how critical legal scholarship, even if applied in a bric-à-brac style, has the potential to expose exclusion and orient change.

3. DISCIPLINING EXCLUSION: THE CASE OF IIL

The main hypothesis of this chapter is that that laws and legal practices can be constructed so as to include certain interests and stakeholders as 'naturally' part of this system and exclude others as 'naturally' extraneous to it. The regime of IIL is taken as a case study. The boundaries erected in the field of IIL have arguably the effect of marginalizing the public interest and, thus, are instrumental in (re-)producing relations of domination.

Exclusion in IIL is mainly observable in a loud absence. At a formal level, exclusion is discernible in the absence of procedural and substantive rights of investment-affected communities under bilateral, regional or sectoral investment treaties. Looking at positive law, the scope of investment treaties has been traditionally limited to the protection of foreign investments. This focus is reproduced in so-called new generation investment treaties, which are allegedly more inclusive than old agreements. For example, in the Preamble of the 2012 US Model BIT we read: 'Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment.' This line reflects the norm in investment law, where the protection of investors is its

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[20] A. Lang, *World Trade Law after Neoliberalism: Re-imagining the Global Economic Order* (OUP, 2011), at 538.

core business. The substantive and procedural rights specified in treaties are all to the benefits of the foreign investors. As is well known, the substantive rights are typically articulated in the National Treatment, Most Favoured Nation, Fair and Equitable Treatment clauses and the like. The procedural rights are the rights entrusted on foreign investors to initiate an international dispute, in the form of investor–state arbitration, against the host state, without even the duty of exhausting domestic legal remedies. These rights are exceptional in the landscape of international law. No other actor is entrusted with such expansive substantive and procedural rights, backed by a relatively powerful enforcement system. Interestingly, the question of including substantive and procedural rights for investment-affected communities in international investment agreements is hardly discussed, *as if* it is *normal* not to include such rights.[21]

3.1 Legal Doctrinal Analysis as a Mechanism to Ossify Exclusion

TWAIL scholars have long criticized the emphasis on positive law, arguing that such emphasis enables a process of depoliticization and the divorce of international economic law and human rights.[22] Echoing this scholarship, it is here contended that much of the exclusion realized through the body of IIL may ossify in relatively oblique ways, starting with mainstream scholarship nurturing doctrinal legal analysis, which normalizes thinking about IIL within *the bound of positive law*.

The boundaries fostered by the focus on positive law are sustained by legal scholarship because as lawyers we mainly study and observe the bodies of law as they are shaped through time. Hence, in our imaginary, IIL is easily reduced to the ensemble of treaties, establishing rights for foreign investors. This is illustrated by a review of the literature by an authoritative scholar in the field, Stephan Schill. Here, the comprehensiveness of Sornarajah's *The International Law of Foreign Investment*, which includes a discussion of 'the regulation of multinational enterprises by a code of conduct under discussion in the UN in the late 1970s and 1980s', is presented as a deviation from the mainstream, or somewhat passé: 'As circumscribed by this literature, IIL was no longer the broader perspective still taken by Sornarajah, but the substantive and procedural aspects of the law applicable to and within investor–state

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[21] It is interesting to note that the 1976 Ministerial Declaration on International Investment and Multinational Enterprises adopted by the OECD included both rights and obligations for investors. The joint consideration of rights and obligations of investors has disappeared from the Guiding Principles.

[22] B.S. Chimni, 'Critical Theory and International Economic Law', in J. Linarelli (ed.), *Research Handbook on Global Justice and International Economic Law* (Edward Elgar Publishing, 2013), at 251.

arbitration under international investment treaties.'[23] Interestingly, questions relating to the accountability of transnational corporations have become the subject-matter of another domain: that of Business and Human Rights (BHRs). While meeting occasionally at conferences, colleagues specializing in BHRs tend to constitute a different epistemic community than the one formed by investment lawyers.[24]

When scholars debate how human rights relate to the world of investment law, boundaries are often reproduced. Well-known scholar José Alvarez calls most interactions of the investment treaties with human rights norms or even with approaches such as global administrative law 'boundary crossing',[25] implicitly positing that it is natural that human rights are outside the regime of IIL. While Alvarez could be seen as taking a rather conservative stance on the investment treaties–human rights relationship, more 'progressive' scholars also rely on the distinction between 'investment' and 'non-investment' issues. On the one hand, this boundary could be considered descriptively accurate. In the end, there is a set of investment treaties operationalized by a cluster of well-defined actors/epistemic communities (arbitrators, consultants, investment lawyers, academics, and so on) within the context of international law. On the other hand, the treatment of these boundaries as self-evident, also by more 'progressive' scholars advocating for the 'de-fragmentation' of IIL, is likely to perpetuate some problems that these boundaries pose. Most particularly, the attention of the scholarship studying the relationship between human rights and investment treaties through the lenses of (de-)fragmentation has been focused on interpretation.[26] This approach has yielded important achievements, such as the progressive – albeit minimal[27] – application of human rights law in investment arbitration. Yet, the major exclusion realized by the current system of international investment treaties – that is, the exclusion of

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[23] S.W. Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of IIL' (2011) 22 *European Journal of International Law*, 875, at 885.

[24] The recently constituted International Economic Law Collective (IEL Collective) provides an interesting example of an institution trying to pull together different communities of scholars; see activities of IEL Collective at https://warwick.ac.uk/fac/soc/law/research/centres/globe/ielcollective/.

[25] J.E. Alvarez, '"Beware: Boundary Crossings" – A Critical Appraisal of Public Law Approaches to IIL' (2016) 17 *The Journal of World Investment & Trade*, 171.

[26] U. Kriebaum, 'Human Rights of the Population of the Host State in International Investment Arbitration' (2009) 10 *The Journal of World Investment & Trade*, 653; B. Simma, 'Foreign Investment Arbitration a Place for Human Rights?' (2011) 60 *The International and Comparative Law Quarterly*, 573.

[27] See S. Steininger, 'What's Human Rights Got to Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration' (2018) 31 *Leiden Journal of International Law*, 33.

those who are negatively affected by investments – is hard to tackle through interpretation. Interpretation can help to enhance the *defensive rights* of states, at best. However, interpretation cannot do much in relation to the unheard voices of those affected by investments. In the absence of enforceable rights of the affected communities and corresponding enforceable obligations of the investors, interpretation can aspire at best to constrain some of the excesses of investment treaties. The problem again is that interpretation is a strategy, which is limited by the bounds of *lex lata*. Using a metaphor, it is like having a football game where only one team can score. Enhancing the ability of the referee to detect fouls committed by the scoring team (for example, through the use of VAR) or strengthening the non-scoring team's defence will not fix the unfairness of the game's main rules. Interpretation can open some 'windows' but the main door remains shut.

Drawing on Luhman and Teubner's systems theory, Schneiderman has shed light on some problematic implications of conceiving IIL as an autopoietic 'sub-system' of international law.[28] Human rights norms would be 'irritants' that can be considered only in the sub-system's own terms. In identifying different responses to human rights norms on the part of the actors within the field of IIL, Schneiderman notes the shared problem of the 'insistence on structuring encounters with the outside normative universe on IIL's own terms – the terms of their interaction cannot be dictated, in other words, by actors operating from *outside* of the system'.[29]

Law curricula may reinforce the *normalization* of conceiving of IIL as the law to protect foreign investors only. The core of many courses in IIL, international arbitration or international economic law, offered in prestigious universities in the EU, US and Australia, is positive law concerning international investment treaties, without for instance a contextual study of domestic cases concerning the violations of rights of investment-affected communities independent from ISDS (Investor–State Dispute Settlement).[30]

Arguably, boundary-work extends into practice through the work of lawyers and consultants, who have a clear interest in the surgical separation of noble

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[28] D. Schneiderman, 'On Suffering and Societal Constitutionalism: At the Border of International Investment Arbitration and Human Rights', in T. Kahana and A. Scolnicov (eds), *Boundaries of Rights, Boundaries of State* (CUP, 2016), available at SSRN: https://ssrn.com/abstract=2710233, emphasis added.

[29] Ibid, at 6 of the ssrn version.

[30] This observation relates mainly to western curricula; here important exceptions exist, such as the course on International Trade, Investment & Human Rights by Tara Van Ho, Anil Yilmaz and Jessica Lawrence at the University of Essex. Moreover, several courses include critical readings on the history and political economy of the system. Yet, in a Master's/LLM in International Economic Law, a course on human rights, if offered, is more likely to be an elective.

technical legal issues from the more political work, which has become somewhat 'vulgar'.[31] Take for example, the public hearing in *Vattenfall v Germany*. In the opening statements made by the claimant's lawyer, we hear that

> it is appropriate to point out *what the case is not about*, […] this case is not about the use of nuclear energy, we are not taking any views in this legal case whether nuclear energy is to be preferred over any other energy, preference of a particular energy source does not form part of international law […] this case is not about the safety of atomic energy.[32]

In a move that appears merely technical – placing preferences about energy sources outside the realm of law – the lawyer is in fact excluding the popular will from the realm of the visible. The lawyer goes on by characterizing the public debate in Germany in these terms: 'that is all politics'; 'in this conference room, however, we are dealing with international law and the ECT [Energy Charter Treaty]; Germany has talked about perceptions, but public perceptions is not a valid defence in this case.' The rhetoric of the conference room and a legal landscape pure of politics operate as effective methods of exclusion.

3.2 Rationalization and Narrativization

It is worth emphasizing that while the reduction of IIL to the set of international investment treaties containing ISDS has been 'normalized', these treaties were in themselves an important *deviation* from some of the cornerstones of contemporary international positive law.[33] In this context, two major deviations are worth noting. First, these treaties entrusted a sub-set of private actors – foreign investors – with strong and enforceable rights against the state. This is a departure from state-centrism and arguably also from the universal aspiration to justice of the international law system as imagined in the post-Second World War order (think for example of the Preamble of the

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[31] The word 'vulgar' comes from Latin vulgus, which means (common) people. The history of this word may itself bear witness to the marginalization of common people.

[32] The public hearing can be watched at: www.youtube.com/watch?v=7Sv81ebnxAc.

[33] One counterargument that can be made to the reasoning in this section is that IIL is a development of the customary rule on the protection of aliens and in this sense is not a deviation from the main system of international law. Yet, such counterargument is limited. First, the protection of aliens remained state-centric. Second, 'aliens' as legal category was not limited to foreign investors, even if in practice foreign investors may have constituted a substantial portion of aliens.

UN Charter, where it states: 'We the Peoples of the United Nations determined […] to employ international machinery for the promotion of the economic and social advancement of *all* peoples'). Within the system of international law, the human rights regime is the other notable regime where individuals are entrusted with justiciable rights vis-à-vis the state. However, the two regimes are hardly comparable, as the main beneficiaries of the human rights regime are human beings qua humans; here we read the same universality underpinning '*all*' the peoples referred to in the UN Charter. True, also within human rights some groups are entitled with special rights (for example, minorities). But these subgroups earned that protection because of overwhelming evidence of their marginalized role in society and its effects on their opportunities. By contrast, in investor–state arbitration, the principal subject protected is transnational capital (albeit ultimately owned by *some* people). Moreover, human rights are arguably less enforceable than investor rights. Second, even within the category of private actors able to challenge states, the eradication of the customary rule on the exhaustion of domestic legal remedies is unique to investment treaties. These features make treaties with investor arbitration clauses a rather exceptional category within international law.

These striking deviations from the contemporary system of international law needed justification for the investment treaty regime to be normalized, as a system 'walling in' investors and 'walling out' other economic actors and, more generally, other human beings.[34] To justify a system that greatly departs from common principles and alleged values of international law, several narratives according to which IIL is a means to promote the public interest have been articulated. Two in particular are worth of note: the development narrative, according to which IIL spurs development; and the rule of law narrative, where the system promotes the rule of law.[35]

4. EXPOSING CONTRADICTIONS, DEFYING BOUNDARIES

Let us now go back to the demarcation of investment law as the legal regime of treaties protecting foreign investors. This boundary ensuring that the interests

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[34] I am borrowing the metaphor of walling in/out from Harm Schepel; see H. Schepel, 'A Parallel Universe: Advocate General Bot in Opinion 1/17' (*European Law Blog*, 7 February 2019) available at https://europeanlawblog.eu/2019/02/07/a-parallel-universe-advocate-general-bot-in-opinion-1-17/#_ednref1.

[35] For an in-depth analysis and critique of these narratives see A. Arcuri and F. Violi, 'Public Interest and IIL: A Critical Perspective on Three Mainstream Narratives', in J. Chaisse, L. Choukroune and S. Jusoh (eds.), *Handbook of IIL and Policy* (Springer, 2021), at 1–27.

of those potentially affected by the investments are left out or marginalized may be meaningful only if the narrative that such regime benefits the rest of society is plausible.

A rich body of research has questioned these narratives and established overwhelming evidence of their frailty. It is beyond the scope of this chapter to offer a fair overview of this scholarship.[36] It suffices to mention that the development narrative is hardly credible, not only because of the mixed evidence concerning the claim that investment treaties attract FDIs,[37] but most importantly because FDIs do not per se promote development; much depends on the type of FDIs and on various circumstances of the host countries.[38] The 'ecostructural theory of foreign investment dependence'[39] and the theory of immiserizing growth, backed up by a wealth of data, show that FDIs can even have perverse effects.[40] In relation to the rule of law narrative, several scholars have shown, from different perspectives, the contradictions of a system professing to promote the rule of law but in practice thwarting it, or at best bending it to the neoliberal credo.[41]

The mounting evidence that investment treaties do not lead to development, nor to better rule of law, disrupts its justificatory narratives. The exposure of the contradictions underpinning such narratives in turn contributes to erode the boundaries of IIL, as a law devoted only to the protection of foreign investors. In a sense, this boundary has long been contested. Sornarajah's oeuvre bears

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[36] For an overview see Arcuri and Violi (2021), supra note 35.

[37] C. Bellak, 'Economic Impact of Investment Agreements' (2015) Vienna University of Economics and Business, Department of Economics Working Paper.

[38] J. Pohl, 'Societal Benefits and Costs of International Investment Agreements' (2018) OECD Working Papers on International Investment No. 2018 (1), at 19. See also J. Bonnitcha, L. Poulsen and M. Waibel, *The Political Economy of the Investment Treaty Regime* (OUP, 2017).

[39] A. Jorgenson, 'The Sociology of Ecologically Unequal Exchange, Foreign Investment Dependence and Environmental Load Displacement: Summary of the Literature and Implications for Sustainability' (2016) 23 *Journal of Political Ecology*, 328; see also A. Jorgenson et al. 'Foreign Investment Dependence and the Environment: An Ecostructural Approach' (2007) 54 *Social Problems*, 371. See also, M. Long, P. Stretesky and M. Lynch, 'Foreign Direct Investment, Ecological Withdrawals, and Natural-Resource-Dependent Economies' (2017) 30 *Society & Natural Resources*, 1261.

[40] P. Shaffer, 'Immiserizing Growth: A Research Agenda' (2016) P. Q-Squared Working Paper No. 66.

[41] D. Schneiderman, *Constitutionalizing Economic Globalization* (CUP, 2008); G. Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' in S.W. Schill (ed.), *IIL and Comparative Public Law* (OUP, 2010), at 642; M. Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart Publishing, 2018); A. Arcuri supra note 2.

witness to this. Not only has he included the discussion of legal frames for the responsibility of multinational corporations in his sophisticated book, but he has taken issue with positivist legal analysis as an apt analytical frame,[42] and has shown in many ways the contradictions of some of the arguments instrumental in sustaining the system of investment arbitration, as lucidly illustrated by the following passage:

> Efforts have been made to dismiss resolutions asserted in connection with the New International Economic Order as 'soft law' or as *lex ferenda*. They are supposed to have only a hortatory significance. But, this area is governed by rules that are built up through arbitral awards and the writings of publicists, in themselves the weakest sources of law. In that context, the relegation of instruments collectively made by states to a status inferior to that of the views of individual arbitrators and writers is merely an expression of a preference for certain views the impact of which on the law cannot be significant.[43]

It is worth recalling that investment law finds its origin in colonial violence, such as when the Dutch East India Company (VOC) was conferred exceptional rights so that its investments could be duly protected.[44] Writing the genealogy of investment law, where its colonial pedigree has been magisterially exposed, is probably one of the foundational acts of contestation of the boundary-work made to realize the enclave of justice for foreign investors and transnational capital.[45]

The mushrooming of critical literature on investment treaties can be seen as generating the pieces of the puzzle exposing the massive incongruity on which the regime rests and can be read as having started to erode the fortress's walls. Academic research challenging the investment law walls has been taken up by NGOs contesting the investment regime and mobilizing public opinion against the regime.[46] Critical academics have been invited by policy-making circles to articulate their critiques before extra-academic publics.[47] Can, then, the

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[42] M. Sornarajah, *The International Law on Foreign Investment* (CUP, 2012), at 63.

[43] See Sornarajah above note 42, at 83.

[44] Miles, supra note 13.

[45] See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2004) and Sornarajah (2015) and Miles (2010) supra note 13.

[46] See for instance several reports by the Corporate Europe Observatory, which make reference to the work of Prof. Van Harten.

[47] Several academics have been invited to public debates together with representatives of public institutions, such as the EU Commission, or to act as expert before parliamentary committees; e.g. Public Debate: Does the EU's 'Investment Court System' Put an End to ISDS? (2015), with Prof. G. Van Harten and R. Scheigelmilch from the European Commission, available at: www.youtube.com/watch?v=QXE-LlMorTQ; or Investor-state dispute settlement (ISDS) in EU Law and International Law, debate

exposure of contradictions and the erosion of ideational boundaries produce change?

This question is hard to answer empirically. Yet, some developments in international investment treaties ought to be noted. Some countries resolved to withdraw from the regime (South Africa, Indonesia, Tanzania, among others). Such resolve may have been facilitated by the realization of the hollow core of the regime of investment treaties. The boundary in this case imploded, making room for imagining new legal geometries for regulating transnational capital. Other reforms – such as the inclusion of investors' obligations into the treaty text – may also be interpreted as enabled by new imaginaries. IIL as a regime only protecting the investors became untenable. In this case, we may be witnessing a certain juggling with the boundary. On the one hand the boundary appears defied as the behaviour of the investor gains a role in the treaty text, entailing that IIL is also about the conduct of investors. On the other hand, the de facto unenforceability of such obligations (as new treaties do not grant rights to initiate disputes against foreign investors) may suggest the stickiness of the boundary, by which it is still unconceivable to use investment arbitration as a mechanism to enforce rights of the people vis-à-vis investors.[48] Other reform proposals and processes may also reflect an ambivalent relationship with the set boundary.[49]

The above analysis shows that there is a realm of plausibility vis-à-vis the hypothesis that critical academic work may contribute to challenging the dynamics of exclusion entrenched in legal institutions. This short chapter is, then, not only a critique of doctrinal legal analysis, as a method through which certain structures of exclusion could be realized, but the articulation of

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at the EU Parliament, with Prof. M. Koskenniemi, Prof. H. Schepel and C. Brown (Deputy Head of the Legal Affairs of DG Trade, European Commission), available at: www.youtube.com/watch?v=OkqUYFoRG8U; Dr K. Tienhaara from Regnet at the ANU College of Asia and the Pacific gave evidence on investor-state dispute settlement to the Senate Committee for Foreign Affairs Defence & Trade on 6 August 2014, expert evidence available at /www.youtube.com/watch?v=8LC3z4L7Tgc.

[48] It may be counterargued that the reason behind not introducing enforceable obligations for investors is a legal one, as consent is needed. This argument is weak. For concrete proposals on how to include enforceable obligations for investors, which address the question of consent, see A. Arcuri, F. Violi and F. Montanaro, 'Proposal for a Human-Rights Compatible International Investment Agreement: Arbitration for All' (2018) UN Forum on Business and Human Rights, available at www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx.

[49] Processes and proposals to be considered include the UNCITRAL reform process. For a discussion of the deficiencies of the current UNCITRAL reform process see A. Arcuri and F. Violi, 'Human Rights and Investor-State Dispute Settlement: Changing (almost) Everything, so that Everything Stays the Same?' (2019) 13 *Diritti Umani e Diritto Internazionale*, available at SSRN: https://ssrn.com/abstract=3459961.

an argument that exclusion/inclusion are in flux. Structures are mutable and critical legal scholarship could become part and parcel of a praxis for change.

5. CONCLUSIONS

In the dystopic film Code 46 by Michael Winterbottom, the world is divided into an 'inside' and an 'outside', where only people in the former have rights. In international law, ISDS is a paradigmatic case contributing to the realization of such dystopic socio-legal architecture, whose main foundation is an act of 'othering'. In walling off all human beings other than foreign investors, ISDS creates a legally gated community and erases local communities from the landscape of justice. As 'the slums and the gated communities are a profoundly united reality, perpetuating and reinforcing each other's existence',[50] so are the enclaves of justice for foreign investors intertwined with the slums of (in)justice for the local people. In reinforcing each other's existence, the 'gated community and slums of justice' cannot but perpetuate inequalities and injustice. The erection of an artificial boundary by which IIL is and should *only* be about investors' rights could be seen as a mechanism to neutralize an otherwise highly uncomfortable cognitive dissonance. This boundary enables lawyers to maintain that international economic law is not about human rights or the protection of the environment – other legal regimes are for those purposes. Through the erection of such boundary, human rights and sustainable development are invoked only as defensive strategies, confined to play at best a marginal role.

In taking IIL as a case study, this chapter has shown not only that the system is sustained by the erection of ideational boundaries, but that such boundaries can become subject to contestation. Critical legal scholarship, such as critique of ideology and TWAIL, has arguably played a role in the eroding the boundary-work of doctrinal analysis and in countering the rule of law and development narratives in the field of IIL. The mounting evidence about the contradictory foundation for legally insulating investors can be seen as producing some change, as several states have started to withdraw from investment treaties and salient reform processes of ISDS are ongoing. This is not to be naïve. Change or resilience of the current investment treaty regime is likely to depend on geopolitics and on questions related to the interests of powerful

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[50] S. Deneulin and R. Maconachie, 'Gated Communities Lock Cities into Cycles of Inequality' (*The Conversation*, 31 October 2014) available at: http://theconversation.com/gated-communities-lock-cities-into-cycles-of-inequality-33516. In this context, it is interesting to note that a recent case concerns the conflict between a corporation wanting to build gated communities in Croatia and the people resisting it. See *Elitech B.V. and Razvoj Golf D.O.O. v Republic of Croatia* (ICSID Case No. ARB/17/32).

actors. And this may also explain the so far dismal results of the current reform process under the aegis of UNCITRAL WG III.[51] But to reduce all explanations to public choice or geopolitics may also become a self-fulfilling prophecy.

As lawyers, as academic lawyers, we may want to deceive ourselves a little, and believe that our rhetoric occasionally contributes to shape reality. It is in this spirit that this chapter contends that disclosing the ideologies (and genealogies) underpinning the dynamics of exclusion of certain legal regimes may in its own way facilitate a much needed change.

[51] See Arcuri and Violi (2019), supra n 49 and J. Kelsey, G. Van Harten and D. Schneiderman, 'Phase 2 of the UNCITRAL ISDS Review: Why "Other Matters" Really Matter' (2019) in Osgoode Legal Studies Research Paper 2019, available at https://digitalcommons.osgoode.yorku.ca/all_papers/328/.