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DEVELOPMENT DECISION-MAKING AND THE CONTENT OF INTERNATIONAL DEVELOPMENT LAW

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Abstract: International development law deals with the rights and duties of states and other actors in the development process. As the consensus view of the development process disintegrated during the 1970s and 1980s, the agreement on the content of international development law also began to break down. Today there are two competing idealized views of development. The first, the “traditional view,” maintains that development is about economic growth, which can be distinguished from other social, cultural, environmental, and political development issues in society. The second, the “modern view,” maintains that development is an integrated process of change involving intertwined economic, social, cultural, political, and environmental dimensions. These two views of development lead to different perceptions of the substantive content of development law, of the importance of sovereignty, and of the relationship between national and international law in the law applicable to development.

INTRODUCTION

International development law (IDL) is the branch of international law dealing with the rights and responsibilities of states and other actors in the development process. This means that the content of IDL depends on one’s understanding of the elements involved in the development process and, particularly, of the development decision-making process. By “development decision-making” I mean the way in which individuals, groups, and institutions decide to adopt policies and initiate and implement programs and projects that affect either their own or other people’s social and physical environment.

At this time, there is no general consensus on how the various aspects of development should be dealt with in development decision-making. In fact, this is a hotly debated topic that underlies the dis-

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agreements between: (1) the various stakeholders in contentious development projects and policies; (2) the international economic institutions and their critics; and (3) the different participants in the debate over globalization.¹ While there are many different views expressed in these debates, most views tend to cluster around two idealized visions of development decision-making—the traditional view and the modern view. Part I of this Article briefly discusses the history of IDL. Part II focuses on these two idealized views of development decision-making and the different views of IDL that arise from each view. Finally, Part III considers likely future developments in our understanding of the content of IDL.

I. A BRIEF HISTORY OF IDL

IDL began to emerge as a distinct body of law after World War II. It was inspired by Latin American dependency theorists² and by the experience of the newly independent countries of Africa and Asia, which discovered that despite their political independence, they were locked into unequal and unfavorable economic relations with their former colonial masters that constrained their ability to develop.³

Sympathetic legal commentators realized that the existing international legal order, like the existing economic order, worked to the disadvantage of these countries.⁴ They began to fashion legal arguments, which were based on existing international legal doctrine, to support the goal of making the international economic order more

¹ See, e.g., Daniel D. Bradlow, *The World Commission on Dams' Contribution to the Broader Debate on Development Decision-Making*, 16 AM. U. INT'L L. REV. 1531, 1532–35 (2001) [hereinafter Bradlow, *Dams Debate*] (discussing the positions taken by the different sides in the debates over dams and over globalization).

² See TED C. LEWELLEN, *DEPENDENCY AND DEVELOPMENT: AN INTRODUCTION TO THE THIRD WORLD* 60 (1995) (explaining that in the 1940s, economists from the United Nations Economic Commission for Latin America developed dependency theory to explain underdevelopment, which they saw as being caused by unequal international economic exchanges).

³ See, e.g., Samuel K.B. Asante, *The Concept of Stability in Contractual Relations in the Transnational Investment Process*, in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 234, 244 (Kamal Hossain ed., 1980) [hereinafter LEGAL ASPECTS] (noting that newly independent countries could not repudiate unfavorable agreements immediately upon political independence because of traditional doctrines such as *pacta sunt servanda*, sanctity of contract, acquired rights, and state succession).

⁴ See, e.g., M. SORNARAJAH, *THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 348–49 (1994) (explaining that foreign investors attempted to “internationalize” transnational investment agreements so that international legal doctrines like *pacta sunt servanda* and minimum standards in the treatment of foreign investors would be applicable to their transactions).

equitable and to help developing countries gain greater control over their economic destinies.⁵ Their original focus was on the core issues of international economic law, namely international trade relations and a state's responsibilities towards its foreign investors and their home states. These efforts received international legal recognition in such documents as the United Nations Declaration on Permanent Sovereignty over Natural Resources⁶ and the arbitral awards made in the cases arising from the nationalization of the oil companies in the Middle East.⁷ Their legal arguments also influenced the negotiated compensation agreements that followed the nationalization of key natural resources and other corporate enterprises in developing countries⁸ and Part IV of the GATT, which allowed non-reciprocal trade benefits for developing countries.⁹

However, these legal achievements resulted in only limited economic success. By the mid-1970s, many developing countries still faced substantial barriers to development. Unfortunately, there was no agreement about what these barriers were or what the appropriate legal responses to them might be. Some commentators saw the problems as being imbedded in the structure of the international economic order, so they called for a New International Economic Order (NIEO).¹⁰ Oth-

⁵ See, e.g., Asante, *supra* note 3, at 242 (arguing that the application of the doctrine of *pacta sunt servanda* to transnational investment agreements should be effectively limited by the doctrine of *clausula rebus sic stantibus* under public international law).

⁶ *Declaration on the Permanent Sovereignty over Natural Resources*, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962); see also F.V. GARCIA-AMADOR, *THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT: A NEW DIMENSION OF INTERNATIONAL ECONOMIC LAW* 132-40 (1990) (describing the evolution of the doctrine of permanent sovereignty over natural resources).

⁷ See, e.g., *Kuwait v. Am. Indep. Oil Co.*, 21 I.L.M. 976, 1023 (Arb. Trib. 1982) (holding that stability clauses did not absolutely prohibit nationalization and that states may nationalize foreign-owned property with payment of appropriate compensation); *Saudi Arabia v. Aramco*, 27 I.L.R. 117, 171-72 (Arb. Trib. 1958) (interpreting the concession agreements under Saudi Arabian law and using public international law to fill the gaps in the Saudi Arabian law); NICO SCHRIJVER, *PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES* 175 (1997) (discussing concession agreements involving natural resources in Iran and Dubai); SORNARAJAH, *supra* note 4, at 339-40 (explaining that the host country's law is generally regarded as applicable to the concession agreements in oil concession arbitrations).

⁸ SORNARAJAH, *supra* note 4, at 402-14 (discussing capital importing country approaches to compensation for expropriated property).

⁹ General Agreement on Tariffs and Trade, Oct. 30, 1947, pt. IV, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

¹⁰ See Kamal Hossain et al., *Introduction to LEGAL ASPECTS*, *supra* note 3, at 1. Developing countries had articulated grievances with the prevailing economic order and attempted to shape a new economic order since the 1950s. See *id.* The first attempt to introduce a new economic order was made in 1952, when Chile raised this issue in terms of

ers, while not denying that there were problems with the international order, rejected these calls and argued that the problem was primarily caused by the economic and political policy choices of the developing countries themselves.¹¹ During most of the 1970s and early 1980s, many IDL theorists and practitioners were focused on this debate over the need for a NIEO and its international legal implications.

While those advocating a NIEO did have some legal success,¹² they ultimately failed. The debt crisis of the 1980s eventually overwhelmed demands for a NIEO. Thereafter, the attention of the international community shifted from the international economic order to the internal barriers to, and requirements for, development in individual countries.¹³ This change in focus has generated an intense ongoing debate about the nature of the development process and the barriers to development. This broader debate about development continues to affect IDL. Thus, one's understanding of the content of IDL depends on one's position in this broader development debate.

permanent sovereignty over natural resources in discussions relating to the Draft International Covenant on Human Rights. See Milan Bulajic, *Legal Aspects of a New International Economic Order*, in LEGAL ASPECTS, *supra* note 3, at 45-46. Developing countries formally called for "a new international economic order" at the Non-Aligned Summit in 1973. See Hossain et al., *supra*, at 1.

¹¹ See, e.g., RAVI GULHATI, ECONOMIC DEVELOPMENT INSTITUTE, THE POLITICAL ECONOMY OF REFORM IN SUB-SAHARAN AFRICA: REPORT OF THE WORKSHOPS ON THE POLITICAL ECONOMY OF STRUCTURAL ADJUSTMENT AND THE SUSTAINABILITY OF REFORM 3-4 (1986) (identifying "policy and institutional distortions" as one of the crucial factors in the African economic crisis); WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH 30 (1989) (discussing "deteriorating governance" as a factor behind the African economic decline).

¹² See, e.g., *International Development Strategy for the Third United Nations Development Decade*, G.A. Res. 35/56, U.N. GAOR, 35th Sess., Supp. No. 48, pmb. para. 2, U.N. Doc. A/35/48 (1981) [hereinafter *International Development Strategy*] (recognizing imbalances and inequities between developed and developing countries in the present system of international economic relations and seeking to restructure the existing international economic order); *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, pmb., at 51, U.N. Doc. A/9631 (1975) [hereinafter *U.N. Economic Charter*] (calling for the establishment of a NIEO designed to remove major hurdles to economic development in developing countries); *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974) [hereinafter *U.N. Declaration on NIEO*] (stating that Member States "shall correct inequalities and redress existing injustices" and "make it possible to eliminate the widening gap between the developed and the developing countries").

¹³ See, e.g., WORLD BANK, *supra* note 11, at 23-30.

II. COMPETING VIEWS OF DEVELOPMENT

There was a time when there was a general consensus that development was about economic growth,¹⁴ which, at least analytically, could be treated as a separate problem from other social, cultural, and political issues in society. Today, however, that consensus has broken down. The competing views of development now cluster around two distinct approaches. We can refer to these two views as “the traditional view” and the “modern view.”

The differences between these views of development revolve around a few key issues. The most relevant are: (1) the appropriate role and responsibilities of the state and the other actors¹⁵ in development decision-making; (2) whether development is primarily an economic process or is a holistic process of transformation; and (3) the relationship between international and national regulation in the development process.¹⁶

¹⁴ See, e.g., JAMES WEAVER & KENNETH JAMESON, ECONOMIC DEVELOPMENT: COMPETING PARADIGMS 7–11 (1981). In conventional neoclassical models, human welfare is measured by increases in consumption of goods and services. *Id.* Accordingly, the conventional literature on development economics focuses on removing barriers to economic growth. See, e.g., PIERRE-RICHARD AGÉNOR & PETER J. MONTIEL, DEVELOPMENT MACROECONOMICS 3 (1996). This was reflected in international discourses regarding development. In 1961, the United Nations General Assembly adopted an economic growth rate of five percent in national income as a target for developing countries. *United Nations Development Decade: A Programme for International Economic Co-operation (I)*, G.A. Res. 1710, U.N. GAOR 2d Comm., 16th. Sess., 1084th plen. mtg. ¶ 1 (1961). The Pearson Report noted that some had reached and even exceeded the target. LESTER B. PEARSON ET AL., PARTNERS IN DEVELOPMENT 28 (1970).

¹⁵ This means that a key area of disagreement is the definition of the appropriate legal and other relationships between the following four groups of actors in development decision-making:

- states, which approve development projects and make and implement development policy;
- project sponsors, which may be the private sector, the public sector, or the state itself;
- project contractors, which include those public and private sector institutions that provide the financing, goods, and services for the design, construction, and operation of development projects and for the implementation of development policies; and
- individuals and communities that are directly or indirectly affected, in both positive and negative ways, by particular policies and projects and their representatives.

See Bradlow, *Dams Debate*, *supra* note 1, at 1532–35.

¹⁶ Many observers would consider that another key issue for developing countries is the existing arrangements for the governance of the international economic order. Since this issue relates primarily to the structure and functions of the international economic organizations and forums, it can be viewed more as a problem of international organiza-

The two views of development, and their implications for IDL, are discussed below. As will be seen, one's conception of development influences one's understanding of the content of IDL in three ways. First, it shapes one's view of the substantive content of IDL. Second, it helps define one's view of the relationship between the sovereign and other actors in the development process. Third, it determines the degree to which one views IDL as "international" law as opposed to "transnational" law. Each of these aspects of IDL will be considered separately.

A. *The Traditional View of Development*

Elements of the business community, governments, and international organizations tend to support the traditional view. This approach assumes that development is primarily an economic process that consists of discrete projects (e.g., building a dam, a road, a school, a factory, a mine, or a telecommunications system) and specific economic policies. It recognizes that development has social, environmental, and political implications but argues that these should be dealt with separately from the economic aspects.

The proponents of this view divide decision-making about these projects and policies into two parts. First, there are broad policy issues in which decisions are made through the political process by the government and society in which the policy or project will be implemented. Examples of broad policy issues include: (1) whether the budget should allocate additional resources to health and education or to energy and national defense; (2) whether to build a system of highways or public transport; and (3) whether to promote export-oriented or locally-focused industries.

The second category involves specific project or policy decisions. Examples of these types of decisions include: (1) where a dam should be located and how it should be constructed, or (2) what exactly

tions than of IDL. Therefore, it is treated as outside the scope of this Article. For more information on this issue, see Daniel D. Bradlow, *Critical Issues Facing the Bretton Woods System: The World Bank, the IMF, and Human Rights*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 47 (1996); Daniel D. Bradlow, *Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law?*, 50 *U. KAN. L. REV.* 695 (2002); Daniel D. Bradlow, *Stuffing New Wine Into Old Bottles: The Troubling Case of the IMF*, 3 *J. OF INT'L BANKING REG.* 9 (2001); Daniel D. Bradlow, *"The Times They Are A-Changin'": Some Preliminary Thoughts on Developing Countries, NGOs and the Reform of the WTO*, 33 *GEO. WASH. INT'L L. REV.* 503 (2001); Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 *AM. U. J. INT'L L. & POL'Y* 1 (1993).

should be done to promote local industries. The responsibility of decision-makers in this second category is to evaluate each project in terms of its technical, financial, and economic feasibility. As long as all technical problems can be resolved, the economic and financial benefits exceed its costs, and it is expected to produce the desired rate of return, a project is justified and is treated as developmentally beneficial.¹⁷ The decision-makers' remaining duty is to execute faithfully and efficiently their contractual obligations in regard to the project.

The traditional view allows the specific decision-makers to treat broad policy and other issues, particularly social and environmental issues, as externalities. These issues are perceived as the prerogative of the society or state in which the project is being built.¹⁸ This means that the specific decision-maker's operating assumption is that the society or state in which the project is located will decide how it wishes to manage its own environment and to share the costs and benefits of the project among the various stakeholders. Specific decision-makers can treat these assumptions as background facts during the project negotiations and as fixed variables in their own planning.

To the extent that various other project stakeholders wish to be involved in the project's broader decision-making process, they will need to consult with the government because it has decision-making authority over the broad social, political, environmental, and cultural implications of the project. They will only need to consult with specific decision-makers if they are interested in technical issues related to the design, construction, or operation of the project.

While specific decision-makers may feel the need to consult with others before making any particular project decision, the range of people with whom they need to consult is limited. Because they are only responsible for technical and financial issues, they only need to

¹⁷ See generally WARREN C. BAUM & STOKES M. TOLBERT, *INVESTING IN DEVELOPMENT: LESSONS OF WORLD BANK EXPERIENCE* 418–68 (1985) (discussing factors to be considered in project cost-benefit analysis).

¹⁸ This view is reflected in a number of official documents. See, e.g., Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944, art. IV, § 10, 60 Stat. 1440 ("The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned."), available at <http://www.worldbank.org>; ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES*, art. II, para. 11 (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (advising multinational enterprises to "[a]bstain from any improper involvement in local political activities.") [hereinafter *OECD GUIDELINES*].

consult with experts on these issues before making their decisions. The only aspects of a project that would require a broader consultative process involve issues regarding the social and environmental externalities that are the responsibility of the government and not the specific decision-makers.

Decision-making under the traditional view is likely to be "top-down." This makes it easy to identify to whom the different participants in the project are accountable. Project sponsors and contractors are only accountable to three groups: (1) government regulators for their compliance with the applicable regulations; (2) those who hired them for the performance of their contractual obligations; and (3) their owners or shareholders for their management of the enterprise.¹⁹

Specific decision-makers will only be accountable to those adversely affected by their decisions in the following two situations: (1) when they have a direct contractual relationship with persons and have failed to perform their contractual obligations, and (2) when the sponsors or contractors have committed a tort against these other stakeholders.

The state, as the party with decision-making responsibility for the broader social and environmental aspects of the project, is accountable to the beneficiaries and those harmed by the project or policy. Accountability is imposed on the state through the political system and through whatever administrative or judicial procedures exist for private actors to challenge governmental decisions.

Another consequence of the traditional view is that it places some constraints on the topics that are open for negotiation in any development transaction. Because the broad social, political, and environmental decisions are the prerogative of the state, they are outside the scope of the negotiations between the project or policy sponsor and the other specific decision-makers. These negotiators can treat the social, environmental, and political parameters of the project or policy as fixed, and the parties must negotiate the terms of their transaction within these parameters. In the case of foreign specific decision-makers—foreign corporations, consultants, and financial institutions—this process is consistent with their legal obligation to obey the law of their host state and to refrain from interfering in its internal affairs.²⁰

¹⁹ See HARRY G. HENN & JOHN R. ALEXANDER, *LAW OF CORPORATIONS* 717-43 (3d ed. 1983) (describing the management structure of corporations and noting that the board of directors' primary obligation is to the corporation's shareholders).

²⁰ See, e.g., SORNARAJAH, *supra* note 4, at 151-62 (explaining that the territoriality principle provides the basis for the host state's jurisdiction over foreign investors).

B. *The Traditional View of Development and IDL*

1. The Substantive Content of IDL

According to the traditional view of development, IDL focuses on international economic law issues. IDL addresses those legal aspects of international trade, finance, and investment that deal with the specific challenges facing developing countries. In other words, the traditional view of development conceives of IDL as the branch of international economic law that deals with the specific problems of developing countries.²¹ This means that the focus of IDL is on those aspects of international trade, investment, and finance law of most interest to developing countries.

While there may be general agreement among all proponents of the traditional view about the types of issues addressed by IDL, there is disagreement about the actual doctrines that form its content. These differences of opinion reflect the different perceptions of the proponents and opponents of the NIEO.

The NIEO had a number of objectives. It sought to:

- (1) ensure that each state could control economic activity within its own borders;
- (2) provide developing countries with more stable incomes for their primary commodity exports and greater assured access to technology, international finance, and investment;
- (3) enhance the role of developing countries in the governance of the international economy by promoting the United Nations as the forum for discussion of development issues; and
- (4) impose new obligations on the capital exporting countries to act in solidarity with developing countries.²²

The opponents of the NIEO contend that IDL should not create special rights for some states and special responsibilities for other states.²³ They maintain that, at least from a legal perspective, all states

²¹ See F.V. GARCIA-AMADOR, *supra* note 6, at 35–36 (identifying two basic elements of IDL as being the states' duties and responsibilities to cooperate for development and rights in development, including preferential treatments in trade and development assistance); ASIF H. QURESHI, *INTERNATIONAL ECONOMIC LAW* 338 (1999) (noting that IDL deals with an area of international economic law that can be a matter of controversy between developing and developed countries).

²² See, e.g., WORLD BANK, *supra* note 11, at 23–30. See generally GARCIA-AMADOR, *supra* note 6.

²³ See Grossman & Bradlow, *supra* note 16, at 12–14.

are equal and their rights and duties do not vary according to their level of development. These NIEO opponents add that this legal equality does not preclude states from voluntarily agreeing to assume different obligations depending on their level of development.²⁴ The position of the opponents is that IDL should be seen as merely the part of international economic law that deals with the international economic relations of developing countries.²⁵

2. Sovereignty and IDL

The proponents and opponents of the NIEO agree that the state is the key subject of IDL. Both are concerned with the rights and duties of states and attach great importance to the concept of state sovereignty. This agreement over the importance of sovereignty is not surprising given that its proponents are primarily motivated by their interest in achieving economic independence or self-determination for the developing countries. Similarly, its opponents base their position on classical principles of international law, of which the state is the key subject.²⁶ Consequently, they share their opponents' interest in upholding the principle of state sovereignty. One example of their shared concern with state sovereignty is that both acknowledge the significance of the principles of a state's permanent sovereignty over its natural resources and self-determination.²⁷

The importance both sides attach to state sovereignty is consistent with their adherence to the traditional view's contention that a sovereign state retains final decision-making authority over the non-economic aspects of development. However, while both sides recognize that a sovereign state should have substantial influence over the

²⁴ Examples of obligations that wealthier countries have voluntarily assumed with respect to poorer countries are generalized systems of preferences and foreign aid programs, such as the U.S. GSP Program and the Millennium Challenge Account. See also GARCIA-AMADOR, *supra* note 6.

²⁵ For a discussion of opposing views on NIEO, see generally LEGAL ASPECTS, *supra* note 3.

²⁶ See generally IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (4th ed. 1990) (identifying the principles of the sovereignty and equality of states as the fundamental doctrine of the law of nations).

²⁷ See Bulajic, *supra* note 10, at 262-63 (noting that the right to economic self-determination and permanent sovereignty over natural resources is regarded as fundamental in international law and that the principle of sovereign equality in states' economic relations emanates from and is applied to the right to self-determination without controversy); see also sources cited *supra* note 6 (referring to the Declaration on the Permanent Sovereignty over Natural Resources and its evolution from the principle of self-determination).

economic aspects of development, they disagree about the extent of that influence. Proponents of the NIEO argue that under international law the sovereign has almost plenary powers,²⁸ while opponents contend that international law imposes certain constraints on the state's economic power.²⁹

The two sides also differ on the relative weight they assign to state sovereignty in their economic relationships with private actors. The proponents of the NIEO believe that state sovereignty is the most important legal protection that economically and politically weak developing countries have against undue interference by the richer Northern countries. Thus, these proponents insist on the state's ability to submit all economic activity within its borders to its exclusive jurisdiction. This can be seen, for example, in their advocacy of compulsory licenses and in their view that compensation for nationalized property need only be appropriate under the circumstances and should be determined by the domestic law of the host state.³⁰

However, the opponents of the NIEO argue that there are certain international legal standards that constrain the state's ability to treat foreign property owners in any way that it wishes.³¹ Moreover, they

²⁸ See *Report of the Secretariat on the Outstanding Issues in the Draft Code of Conduct on Transnational Corporations*, U.N. Commission on Transnational Corporations, U.N. Doc E/C.10/1984/S/5 (1984), reprinted in 23 I.L.M. 602 (1984) [hereinafter UNCTC Report] (reporting that proponents considered the principle of permanent sovereignty over natural resources and economic activities well-recognized in international law and U.N. resolutions); Elsa Kelly, 'National Treatment' and the Formulation of a Code of Conduct for Transnational Corporations, in LEGAL ASPECTS, *supra* note 3, at 148–52 (examining developing countries' attempt to ensure states' power over transnational corporations, including "full exercise by the host country of its permanent sovereignty over all its wealth, natural resources and economic activities").

²⁹ See UNCTC Report, *supra* note 28 (stating that some States insisted on including a reference to international law in paragraph 6 of the Draft Code on Transnational Corporations to qualify the States' sovereign power over foreign investors).

³⁰ See also SORNARAJAH, *supra* note 4, at 402–14; S.R. Chowdhury, *Legal Aspects of the Charter of Economic Rights and Duties of States*, in LEGAL ASPECTS, *supra* note 3, at 88 (discussing developing countries' rejections of independent international tribunals to resolve investment disputes); Kelly, *supra* note 28, at 143–44 (explaining that, from the perspective of developing countries, Article 2.2 of the U.N. Economic Charter is regarded as upholding a principle of appropriate compensation under the domestic law of the expropriating state).

³¹ The opponents' position is reflected, for example, in the following provisions of the OECD Guidelines: (1) "Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject to international law." OECD GUIDELINES, *supra* note 18, art I. ¶7, and (2) "Governments adhering to the Guidelines set them forth with the understanding that they will fulfil [sic] their responsibilities to treat enterprises equitably and in accordance with international law and with their contractual obligations," *id.* art. I ¶ 8. See also Bulajic, *supra* note 10, at 230–31 (noting

deny that sovereignty can shield the state from all outside intervention in its internal economic affairs. Whenever the state treats foreign investors in ways that are incompatible with international legal standards, other states may demand compensation for the injury to their nationals and seek to hold the state accountable for its actions.³²

The opponents also disagree with the proponents of the NIEO over the validity of taking the level of a state's development into account when deciding on its rights and responsibilities. The opponents argue that all states are equal and should be treated equally. Additionally, they argue that the level of a state's development is not relevant to its status as a sovereign state under international law. Furthermore, they contend that justice requires that all states be treated equally, so that the same rules should apply in the same way to all states. This position is consistent with the basic international legal principle that all states are, formally, co-equal sovereign states.³³

The proponents, on the other hand, argue that, in fact, all states are not equal and that the application of the same pre-NIEO international legal standards to two countries at different levels of development will produce very different results. Consequently, they advocate that justice requires the law to account explicitly for the differences in situations of countries, which inevitably leads to developing countries obtaining more favorable treatment.³⁴

3. The Relationship Between National and International Law

The adherents of traditional IDL draw a sharp distinction between national and international development law. For them, IDL

opponents' adherence to certain minimum international standards in treating foreign investors and their properties).

³² See, e.g., SORNARAJAH, *supra* note 4.

³³ See generally BROWNLIE, *supra* note 26; Grossman & Bradlow, *supra* note 16, at 1 (stating that international law has traditionally viewed states as co-equal autonomous actors); see also OECD, *Declaration by the Governments of OECD Member Countries and Decisions of the OECD Council on International Investment and Multinational Enterprises*, in INTERNATIONAL INVESTMENT ¶ II.1 (rev. ed. 1984) (declaring that Member States should give another Member State or its nationals "national treatment," which is "consistent with international law and no less favorable than that accorded in like situations to domestic enterprises"). The Declaration further states "[t]hat Member countries will consider applying "national treatment" in respect of countries other than Member countries." *Id.* ¶ II.2.

³⁴ See Hossain et al., *supra* note 10, at 5-6 (stating that in NIEO instruments, developing countries attempt to seek legal protection from coercive forces and affirmative action to remedy prior disadvantageous conditions); Kelly, *supra* note 28, at 150 (explaining that from developing countries' standpoint, states may give preferential treatment to their nationals in seeking to achieve certain national economic and developmental goals).

deals with the international economic relations of developing states, and national development law includes these aspects of the law that deal with the social, economic, environmental, and political aspects of development.³⁵

C. *The Modern View of Development*

The modern view of development tends to be held by non-governmental organizations, civic organizations, and progressive elements in governments, corporations, and international organizations. It posits that the economic aspects of development cannot be separated from its social, political, environmental, and cultural aspects and that development should be seen as a holistic, integrated process.³⁶ From this perspective, development projects and policies should be treated not so much as discrete economic events but as episodes of social, economic, and environmental transformation that are part of an ongoing process of change. This means, for example, that to fully assess the desirability of a particular project proposal it is necessary to account for all the ways that the project or policy will affect its social and physical environment and how these impacts will evolve over the life cycle of the project. Without all this information the decision-makers cannot be confident that they understand the economic, financial, environmental, social, cultural, and political consequences of their decisions. They also cannot accurately assess the costs and benefits of any proposed project or policy, thereby increasing the risk that they will approve projects or policies that will produce less benefits and cause more harm than expected.

The modern view of development has evolved in response to the mounting empirical evidence that, in too many cases, governments and project sponsors mistakenly followed policies and constructed (and continue to construct) developmentally harmful projects.³⁷ It is also, in part, a consequence of two other factors in human affairs.³⁸

³⁵ See generally sources cited *supra* notes 20–21.

³⁶ See generally Bradlow, *Dams Debate*, *supra* note 1 and sources cited therein (discussing multidimensionality of development in the modern view).

³⁷ See, e.g., RAYMOND F. MIKESSELL & LARRY WILLIAMS, *INTERNATIONAL BANKS AND THE ENVIRONMENT* (1992) (discussing several case studies in which poor assessments of projects costs have resulted in excessive environmental costs).

³⁸ A third important factor is improvement in information and communication technology. This technology enables business, investors, and NGOs around the world to quickly learn about and react to developments around the world. See, e.g., Grossman & Bradlow, *supra* note 16, at 11. This factor receives less attention in this Article because, to date, it has had less direct impact on IDL than the other two.

The first is our growing recognition of the limits on the ability of the environment to maintain the human societies that we have created and the resulting importance attached to accounting adequately for the environmental impacts of development activity.³⁹ The second factor is the increasing influence of international human rights law and forums around the world. The evolution of international human rights law and the establishment of forums in which to enforce this law⁴⁰ have educated governments and international organizations about their responsibilities towards those individuals affected by their actions. It has also raised awareness among people about their rights and increased their willingness to take steps to oppose development projects and policies that they believe will harm them.

There are several consequences that follow from this view of development, which can be seen most clearly in the case of projects. First, development decision-makers have greater and more complex responsibilities than those assigned to them by the proponents of the traditional view of development. According to the modern view of development, these decision-makers are responsible both for the performance of their specific project functions and for the impact of these functions on the other stakeholders in the project and on the project's physical environment. This means that it is no longer seen as acceptable for them to treat social and environmental costs as externalities. They are now expected to internalize these costs and account for them in their project planning. It is thus not prudent, in an economic or risk management sense, for project decision-makers to rely on government decisions relating to environmental and social matters without making their own independent assessment of these matters.

Second, the proponents of this view of development attach great importance to consultations between project decision-makers and all those who will be affected by the proposed project. The reason is that the project decision-makers can only be confident that they have accurately assessed the costs and benefits of the project if they understand how those who will be affected by it will react to the resulting changes in their social and physical environment. This information can only be uncovered through consultation with all parties that will

³⁹ See DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY*, at v-vi (1998) (noting that "human economic activity threatens to surpass the ecological limits of the biosphere (if it has not already done so in certain instances)").

⁴⁰ See generally GUIDE TO INTERNATIONAL HUMAN RIGHTS (Hurst Hannum ed., 3d ed. 1999) (describing the different international forums in which human rights cases are addressed).

be affected by the project or with those having the ability to influence how the affected parties will respond.

The emphasis on consultations has two important implications. First, the consultation process can only produce the desired result if the project decision-makers provide the affected people with adequate information about the project. Unless these people have sufficient information to understand the project's potential impact, they cannot know with any confidence how they will respond. The need for consultation, therefore, necessarily leads to a demand for disclosure of information.⁴¹

Another implication is that consultations inevitably politicize the project because both the disclosure of information and the actual consultations become part of the project sponsor's efforts to secure the affected stakeholders' support. If the affected people do not support the project, the project decision-makers cannot be confident that they will act in the best long-run interests of the project and that the project will be sufficiently sustainable to produce the expected developments. The modern view therefore highlights the need to consult groups traditionally excluded from power such as women and indigenous people. It also may require decision-makers to take a position on a domestic political issue. The result is that the consultation process becomes an important arena of contest between supporters and opponents of the project.

The modern view of development requires a more participatory form of decision-making than the traditional view. This means that project decision-makers, who insist on a top-down form of decision-making, are unlikely to obtain all the information they need to anticipate and assess all project impacts.⁴²

Another consequence of the modern view of development is that it has begun to blur the boundaries of the scope of the project sponsors' or contractors' responsibility. The modern view requires all project sponsors and contractors to take into account the impact of the project

⁴¹ See generally JACKSON B. BATTLE ET AL., ENVIRONMENTAL DECISIONMAKING: NEPA AND THE ENDANGERED SPECIES ACT (2d ed. 1994) (describing the need for adequate information and consultation in environmental decision-making).

⁴² See, e.g., WORLD BANK, THE WORLD BANK PARTICIPATION SOURCEBOOK 3-4 (1996), available at <http://www.worldbank.org/wbi/sourcebook/sbhome.htm>. The Bank currently advocates stakeholder participation that involves all parties concerned, such as the poor and socially disadvantaged, NGOs, private sector organizations, local and national government officials, and Bank staff. See *id.* at 6-7. For examples of participatory development, see *id.* at 17-120 (reviewing development projects with participatory approaches in fifteen countries).

and how it will evolve over the life cycle of the project. Since all aspects of the project are seen as interconnected, the sponsors and contractors cannot easily divide responsibility amongst themselves. This interconnection makes it harder to identify the geographic or temporal limits of their responsibility. In fact, under the modern vision of development, any attempt to draw boundaries around the project sponsors' and contractors' responsibilities is a question of judgment, which requires debate and consultation.

The case of a dam illustrates the significance of the difference in perceptions of responsibility between the two views of development decision-making. Under the traditional view of development, the scope of the specific decision-makers' responsibility is limited to their direct contributions to the dam itself and its immediately surrounding areas. The duration of their responsibilities is limited to the time of their involvement in the dam project and for a defined period thereafter. On the other hand, the modern view holds the dam's decision-makers responsible for the dam's social, economic, cultural, political, and environmental impact on the whole river basin—and all who depend on it—and for the duration of the dam's construction, operation, and decommissioning. Their responsibility may also continue during the period in which the environment and the affected people adapt to the decommissioning of the dam.

The modern view does not show the same respect for the concept of sovereignty as the traditional view. According to the modern concept of development, the sovereign is only one actor in the development drama, and there is no clear justification for international organizations, foreign corporations, financial institutions, and NGOs to give its opinions greater weight than those of other actors. In fact, the case for deferring to the sovereign's opinions is particularly weak when these opinions conflict with the expressed interests of those who will be most directly affected by the project.

D. The Modern View of Development and IDL

1. The Substantive Content of IDL

The modern view of the substantive content of IDL differs in two important ways from the traditional view. The first is that modern IDL is as concerned with the legal rules and procedures that result in development policies and projects that are economically, environmentally, socially, and legally sustainable as it is with the rights and responsibilities of the developing and industrialized states towards each

other and to other actors in the international economy. Thus, the modern IDL view treats the state as only one of many actors in the development process. This can be seen, for example, in the Declaration on the Right to Development (DRD), which is an important document for modern IDL.⁴³

The second difference is that for the proponents of the modern view, the substantive content of IDL includes not only traditional, international economic law issues, but also those international environmental and human rights law principles and documents that are relevant to its holistic view of the development process. Thus, the proponents consider the following as part of IDL: the Universal Declaration on Human Rights,⁴⁴ the major United Nations Human Rights Conventions,⁴⁵ the DRD, the Stockholm Declaration,⁴⁶ the Rio Declaration on Environment and Development (the Rio Declaration),⁴⁷ and such key multilateral environmental agreements as the climate change and biodiversity conventions.⁴⁸

The modern view's expansion of the scope of IDL does not imply any diminution in the importance of the international economic law issues that are at the core of the traditional view of IDL. Instead, this expansion should be seen as an effort to change the content of applicable international economic law principles. For example, under the

⁴³ *Declaration on the Right to Development*, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/128 (1986) ("All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community.")

⁴⁴ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

⁴⁵ Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1456 [hereinafter CRC]; Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 19 I.L.M. 33 (1980) [hereinafter CEDAW]; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; *see also Vienna Declaration and Programme of Action*, U.N. World Conference on Human Rights, U.N. Doc. A/CONF.157/24, pt. 1 (1993), *reprinted in* 32 I.L.M. 1661 (1993).

⁴⁶ Declaration of the U.N. Conference on the Human Environment, June 16, 1972, U.N. Doc. A/Conf. 48/14, *reprinted in* 11 I.L.M. 1416 (1972).

⁴⁷ Rio Declaration on Environment and Development, June 14, 1992, U.N. Conference on Environment and Development, Doc. A/CONF.151/5/Rev. 1, *reprinted in* 31 I.L.M. 874 (1992) [hereinafter Rio Declaration].

⁴⁸ United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 (1992) [hereinafter Climate Change Convention]; Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992) [hereinafter Biodiversity Convention].

traditional view of IDL, the primary obligation of a foreign investor is always to act in conformity with the law of the host state.⁴⁹ Under the modern view, the foreign investor may be required to act in conformity with the “best international practices” in the industry, even if these standards exceed or contradict those stipulated in the law of the host state.⁵⁰

2. Sovereignty and IDL

The modern approach to IDL acknowledges the importance of sovereignty but adopts a narrow interpretation. In fact, this approach, with its holistic view of development, views very few issues as being within a sovereign state’s exclusive jurisdiction.⁵¹ Its view of sovereignty is derived from its concern with human rights and environmental issues.⁵² The practical effect of modern IDL’s limited view of exclusive sovereign jurisdiction can be seen, for example, in the efforts of the international community to deny financing to projects, such as the Sardar Sarovar dam in India⁵³ and the Ilisu dam in Tur-

⁴⁹ See, e.g., OECD GUIDELINES, *supra* note 18.

⁵⁰ See, e.g., Bradlow, *Dams Debate*, *supra* note 1.

⁵¹ See generally INTERNATIONAL ECONOMIC LAW WITH A HUMAN RIGHTS FACE (Friedl Weiss et al. eds., 1998) [hereinafter IEL WITH A HUMAN RIGHTS FACE].

⁵² See *Declaration on the Right to Development*, *supra* note 43, art. 6.1 (stipulating States’ duty to cooperate in promoting universal human rights “without any distinction as to race, sex, language or religion”). There are specific U.N. conventions that cover human rights of women, see generally CEDAW, *supra* note 45, and children, see generally CRC, *supra* note 45. The U.N. Commission on Human Rights has also created a Draft United Nations Declaration on The Rights of Indigenous Peoples, 34 I.L.M. 541, 546 (1995). For child labor, see International Labor Organization Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor, June 17, 1999, 38 I.L.M. 1207. In addition to these formal efforts, international civil society has reacted to business practices that fail to incorporate human rights considerations. See, e.g., Peter Malanczuk, *Globalization and the Future of Sovereign States*, in IEL WITH A HUMAN RIGHTS FACE, *supra* note 51, at 58–59 (giving examples of international protests against Shell for disregard of human rights of minority rights activists in Nigeria and against Nike for unfair labor practices including use of child labor in developing countries); see also Grossman & Bradlow, *supra* note 16, at 3 (explaining that the United Nations’ recognition of protection of human rights as an international obligation provides the basis of international organizational supervision over human rights).

⁵³ In 1992, in reaction to strong international criticism against the Sardar Sarovar project, the World Bank conducted a review and imposed conditionality on the remaining loan to ensure adequate resettlement and economic rehabilitation of the affected people and environmental protection. In 1993, the Bank formally canceled the remaining loan. See World Bank, Operations Evaluation Dep’t, Learning from Narmada, Precising No. 88, at <http://wbldn0018.worldbank.org/oed/oeddoclib.nsf/e90210f184a4481b85256885007b1724/12a795722ea20f6e852567f5005d8933> (May 1, 1995). For a detailed review of the Sardar

key,⁵⁴ that are seen as impairing the human rights of those adversely affected by these projects. It can also be discerned in the approach of the Bretton Woods Institutions to good governance, in environmental matters, and in the debates in the WTO over labor rights.⁵⁵

It is important to recognize that modern IDL's narrow approach to sovereignty also applies to the international economic aspects of IDL. This necessarily follows from its holistic view of development, which means that IDL sees the environmental, human rights, and economic aspects of international transactions as being too intertwined to be treated separately.⁵⁶ Thus, modern IDL does not see any subset of the issues relating to regulation of foreign investors as being exclusively within the jurisdiction of the host state. In this regard, it shares the view of the proponents of traditional IDL who contend that international law requires certain minimum standards in the treatment and behavior of foreign investors. However, the holders of the modern view of IDL differ from the traditionalists in their view of the contents of these standards. They argue that these standards address a broader range of issues than the state's treatment of foreign investors. From their per-

Sarovar Dam project, see BRADFORD MORSE & THOMAS R. BERGER, *SARDAR SAROVAR: THE REPORT OF THE INDEPENDENT REVIEW* (1992).

⁵⁴ The export credit agencies of developed countries refused to give export credit support unless Turkey satisfied four conditions designed to address international concerns about the project's adverse impacts on human rights and the environment. See J. McCrystie Adams, Comment, *Environmental and Human Rights Objections Stall Turkey's Proposed Ilisu Dam*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y 173, 175-76 (2001). The conditions include the creation of an internationally acceptable resettlement plan, the establishment of an upstream water treatment plant, the maintenance of downstream water flow, and the protection of archeological sites. See *id.* at 176.

⁵⁵ See, e.g., POL'Y DEV. & REV. DEP'T, INT'L MONETARY FUND, *REVIEW OF THE FUND'S EXPERIENCE IN GOVERNANCE ISSUES* 5-9 (2001) (explaining that IMF regards good governance as an important condition to effectively attain the objectives of IMF-supported projects and promotes it through prior consultations with states seeking assistance), available at <http://www.imf.org/external/np/gov/2001/eng/gov.pdf>. For details of World Bank's strategies regarding good governance through development assistance, see e.g., POVERTY REDUCTION & ECON. MGMT. NETWORK, PUB. SECTOR GROUP, WORLD BANK, *REFORMING PUBLIC INSTITUTIONS AND STRENGTHENING GOVERNANCE* (2000), available at <http://www1.worldbank.org/publicsector/civilservice/Reforming.pdf>; see also Friedl Weiss, *Internationally Recognized Labour Standards and Trade*, in *IEL WITH A HUMAN RIGHTS FACE* *supra* note 51, at 79-81 (identifying the use of trade sanctions against states that fail to protect labor rights as a key issue in debates on international trade and labor standards).

⁵⁶ See Rio Declaration, *supra* note 47, princ. 4 ("In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."); U.N. Conference on Environment and Development, Agenda 21, ¶ 23, U.N. Doc. A/Conf. 151/26 (1992) ("Economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development.").

spective, these standards should address environmental and social issues as well as economic issues such as the investor's responsibility to the host state and its citizens and the state's responsibility to the other stakeholders in the investment or business transaction.

It is interesting to note that the modern view of IDL has an expansive view of the applicable regulatory framework for particular activities. The traditional view of IDL saw regulation as essentially a national function in which states would pass laws and regulations to govern particular forms of conduct in their jurisdictions. The modern view of IDL seems to see the "effective" regulatory framework for a particular sector as being derived from a greater variety of sources. The first, and still the most important, is the laws and regulations of the country in which the project is located. These will be supplemented by the international treaties to which that state is a signatory. In addition, project sponsors and contractors will need to refer to various sources that, while not binding or even directly applicable to the sponsor or contractor, give guidance on what constitutes best practice for the particular activity being undertaken by the sponsor or contractor. These sources include: international organizations such as the World Bank⁵⁷ and the International Finance Corporation (IFC);⁵⁸ industry associations such as the International Organization for Standardization (ISO);⁵⁹ and individual corporate codes of conduct.⁶⁰ The

⁵⁷ See Gerhard Loibl, *The World Bank Group and Sustainable Development*, in IEL WITH A HUMAN RIGHTS FACE, *supra* note 51, at 513, 520–26 (discussing the Bank's operational policies and procedures relevant to environmental protection and sustainable development). For a comprehensive list of Bank's operational policies, see WORLD BANK, OPERATIONAL MANUAL, TABLE OF CONTENTS, <http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf> (last visited Apr. 16, 2004).

⁵⁸ For a list of relevant guidelines, see International Finance Corporation, Environmental, Health and Safety Guidelines, at <http://www.ifc.org/ifcext/enviro.nsf/content/EnvironmentalGuidelines> (last visited Apr. 16, 2004). Projects supported by IFC are also subject to relevant parts of the Bank's Operational Manuals. See International Finance Corporation, Safeguard Policies (listing relevant Bank operational policies), at <http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/Safeguardpolicies> (last visited Apr. 16, 2004).

⁵⁹ ISO introduced a series of quality management standards (ISO 9000). See International Organization for Standardization, ISO 9000 and ISO 14000 in Plain Language, at http://www.iso.org/iso/en/iso9000-14000/basics/general/basics_4.html (last visited Apr. 16, 2004). ISO has created a series of environmental management standards (ISO 14000) to address the following issues: environmental management systems, environmental auditing and related investigations, environmental labels and declarations, environmental performance evaluation, and life cycle assessment. See ISO, Technical Committee 207, What is ISO 14000?, at <http://www.tc207.org/faq.asp?Question=2> (last visited Apr. 16, 2004).

⁶⁰ See, e.g., Levi Strauss & Co., Social Responsibility/Global Sourcing & Operating Guidelines, at <http://www.levistrauss.com/responsibility/conduct/guidelines.htm> (last visited Apr. 16, 2004) (outlining the corporate guidelines that take account of environ-

sum of all these different sources can be considered the effective regulatory framework for a particular project, because actors who fail to act in conformity with the best practices established by this collection of laws, regulations, guidelines, and examples of good conduct risk incurring reputation and moral damages, if not legal liability.⁶¹ This framework informs the modern view of IDL's position on the rights and responsibilities of foreign investors and other actors in the development decision-making process.

3. The Relationship Between National and International Law

As we saw above, the traditional view of IDL is based on a strict delineation between national and international law. In contrast, the modern approach to IDL focuses on transnational legal issues in which the boundary between national and international law is blurred and there is a dynamic interaction between these two bodies of law.

III. THE CURRENT STATE OF IDL AND ITS LIKELY FUTURE EVOLUTION

There is a certain irony in the way IDL has evolved. Its early proponents were interested in helping developing countries strengthen their control over their economic futures. The proponents of the modern approach to IDL are in some ways working to undo the gains made by the traditional approach. While they recognize the importance of protecting state sovereignty in a world of economically and politically unequal states,⁶² they are also seeking to enhance the power of non-state actors in the development process.

ment, labor, and human rights issues in business partners and the host country); Nike, Compliance: Code of Conduct, at <http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=compliance&subcat=code.shtml> (last updated Jan. 2004) (establishing minimum age limits for workers in its footwear (18 years) and apparel, accessories, and equipment businesses (16 years)); Shell Oil Co., Our Policy and Principles, at <http://www.countonshell.com/welcome/policies/policies.html> (last visited Apr. 16, 2004) (providing information on Shell's corporate policy regarding business principles, health and environment, and sustainable development).

⁶¹ Good examples of sectors where the regulatory framework has been effectively globalized are the hydro sector and the mining sector. See, e.g., WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING (2000) <http://www.dams.org//docs/report/wcdreport.pdf>.

⁶² See Oscar Schachter, *The Erosion of State Authority and Its Implications for Equitable Development*, in IEL WITH A HUMAN RIGHTS FACE, *supra* note 46, at 31, 43–44 (concluding that the present state-based structure still constitutes the general framework of governance in international relations but noting increasing influence of non-state actors); see also Rio Declaration, *supra* note 47, princ. 2 (“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their

In one important respect, the seeming incompatibility between these two approaches is more apparent than real. Both approaches share an interest in empowering the poorer and weaker actors in the international economic order. In addition, they are both interested in creating incentives for the richer and stronger actors to be more responsive to the needs of weaker stakeholders and to surrender some of their control over the international economic order. They differ, however, on whom should benefit from these efforts and whom should be targeted for help. The traditional approach sees the problem primarily in terms of states as beneficiaries and targets. The modern approach prefers to focus on individuals and communities as the beneficiaries and relatively powerful states, corporations, and international organizations as the targets.

The current global climate suggests that the future is likely to be more favorable to the modern approach than to the traditional approach for three reasons. First, the phenomenon of globalization is weakening the de facto control that states have over the economic and political affairs of their countries. It is also creating conditions that empower private non-state actors, both commercial enterprises and non-governmental organizations representing civil society. This suggests that IDL principles that rely too heavily on exclusively state-based approaches to resolving development issues risk being overtaken by events.

Second, there is growing concern around the world about environmental issues and about the sustainability of our current approach to economic development. This suggests that approaches to IDL that do not take into account the need to promote environmental responsibility and sustainable development are likely to be viewed as out of step with the needs of our time.

Third, the dramatic developments in telecommunications that have taken place over the past twenty years make it increasingly difficult for key decision-makers to control the flow of information about their activities and, therefore, the responses to these activities. This means that states and large corporations cannot maintain exclusive control over those activities for which they are presumably responsible. This breakdown in control challenges legal thinkers to design new approaches to regulation and to holding actors accountable for the con-

own resources"); Climate Change Convention, *supra* note 48, pmbl. (“[r]eaffirming the principle of sovereignty of States in international cooperation to address climate change”).

sequences of their actions.⁶³ Therefore, an approach to IDL that focuses too much on the state and its powers and responsibilities risks being found wanting in its proposed solutions to developmental problems.

For these reasons it is likely that, in the future, legal thinkers and policy-makers will find the pure traditional approach to IDL unsatisfactory. This does not mean, however, that a new consensus about the content of IDL and the best approach to IDL issues is likely to emerge in the short term. Such agreement is unlikely to appear in the absence of prior agreement on appropriate development decision-making. While most participants in the development process now accept that there are links between the economic, environmental, and social aspects of development, they do not necessarily agree with the conclusions the modern view of development draws from this starting point.

This suggests that the future debates about development and IDL will focus on what conclusions to draw from the intertwining of all aspects of development and the various legal consequences thereof. There will also be debates about how these issues should affect international trade and economic relations between developing countries and the former colonial powers and with international economic organizations. Consequently, it is safe to conclude that while the direction of the future evolution of IDL is clear, and the scope of its content is discernible, the precise contours and content of IDL are very hard to define and its evolution even harder to predict. The only thing that can be said with any confidence is that IDL will provide many interesting and important challenges for lawyers specializing in IDL for many years to come.

⁶³ See Grossman & Bradlow, *supra* note 16, at 12–14 (explaining that advances in information technology have enabled non-governmental actors to share information and spread activities across borders and thus undermine states' authority to regulate and sanction their activities).