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'Local Communities' and the Development Conundrum: Where International Investment Law Meets Human Rights and Businesses

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Abstract

Large-scale investment projects often involve contestation over competing notions of 'development'—from promises of economic growth and integration into global value chains to perspectives that emphasise strong connections between people, territory, culture and way of life. This contestation also echoes diverse theories that have variously conceptualised development as growth, freedom, right or sustainability. This article argues that, in the face of such diversity and complexity, the notion of development that underpins international investment law tends to prioritise economic considerations. In the context of investment disputes, this can marginalise the ideas of development advanced by local actors and indigenous peoples. By connecting human rights and development in immediate terms, ongoing discussions about the right to development can provide an arena to centre 'peoples' as the key actor in development processes. But this normative shift would also require ensuring that the wider frameworks of international economic law recognise and provide space for plural notions of development.

Keywords: foreign investment; international investment law; investor-State dispute settlement (ISDS); right to development; sustainable development

> 'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realized.' Article 1(1), United Nations Declaration on the Right to Development.
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> 'Corporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like.' Edward, First Baron Thurlow (1731-1806), the Lord Chancellor during the impeachment of the head of the East India Company, quoted by William Dalrymple, *The Anarchy: The Relentless Rise of the East India Company* (Bloomsbury, 2019).

I. Introduction

In 2018, the United Nations (UN) Human Rights Council injected new momentum into the debates about the right to development by proposing the elaboration of a legally binding treaty—an instrument first discussed 20 years earlier, during the Non-Aligned Movement summit of Durban.[1] Echoing the 1986 UN Declaration on the Right to Development,[2] the draft covenant calls for the enjoyment of the right to development 'by every individual and all peoples everywhere'.[3] From the principle of sovereignty over natural resources to equality of opportunities and the obligation of private actors to respect human rights, the draft highlights the interdependence and interrelatedness of all human rights, as well as their intersections with economic law and business conduct,[4] while shifting the gaze from the States to the 'peoples'.

These evolutions bring to the fore the complexities surrounding the concepts of 'development' and 'peoples', highlighting questions such as what is development, who should advance it, for whose benefit and how can different visions of development be reconciled? Such broad questions present distinctive legal dimensions. An ambiguous category to start with, the notion of 'peoples'[5] is often invoked in relation to the forgotten, those at the centre of the territories where resources are located yet at the margin of profit, the beneficiaries of the right to development yet victims of corporate misconduct. In international law, however, the concept is often bundled up with ideas of nationhood, and with the State as the expression of the will of the 'people' even though space for democratic decision-making is shrinking in many contexts,[6] and contemporary right-to-development approaches have questioned direct equivalences between States and peoples.[7] Indeed, international instruments on the rights of

[1] UN Human Rights Council, 'The Right to Development', Resolution 39/9 (27 September 2018) para 17(e) (deciding '[t]hat the Working Group at its twentieth session shall commence the discussion to elaborate a draft legally binding instrument on the right to development through a collaborative process of engagement, including on the content and scope of the future instrument'); Final Document of the XIIth Summit of the Non-Alignment Movement (Durban, 2-3 September 1998), https://app.unidir.org/sites/default/files/2020-10/1998_NAM%20Summit%20final%20doc.pdf, para 443 (proposing 'that consideration be given to the preparation of a Convention on the Right to Development as one of the important steps towards effective implementation of the right to development').

[2] United Nations General Assembly, 'Declaration on the Right to Development', Resolution 41/128 (4 December 1986).

[3] See the Draft International Covenant on the Right to Development, A/HRC/54/50 (18 July 2023) art 1 (Draft Covenant).

[4] Ibid, arts 8(5), 11, 13(2) and (4) and 15(2).

[5] There is a vast international law literature on the concept of peoples. See, e.g., James Summer, *Peoples and International Law*, 2nd revised edn (Brill, 2013); Natalie Jones, 'Self-Determination and the Right of Peoples to Participate in International Law-Making' (2021) *British Yearbook of International Law*, https://doi.org/10.1093/bybil/brab004 (accessed 29 August 2024).

[6] On threats to democracy, see International Institute for Democracy and Electoral Assistance (International IDEA), *The Global State of Democracy 2023, The New Checks and Balances*, https://www.idea.int/news/bedrocks-democracy-under-threat-across-globe (accessed 29 August 2024); RS Foa et al, *The Global Satisfaction with Democracy Report 2020* (Cambridge, Centre for the Future of Democracy and Bennet Institute for Public Policy, 2020), https://www.cam.ac.uk/system/files/report2020_003.pdf (accessed 29 August 2024).

[7] Draft Covenant, note 3, art 4. In defining priorities for his mandate, the current UN Special Rapporteur on the Right to Development, Surya Deva, outlined a special focus on 'actors' and 'beneficiaries': UN Special Rapporteur on the Right to Development, Surya Deva, *Reinvigorating the Right to Development: A Vision for the Future*, A/HRC/54/27 (4 August 2023).

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indigenous peoples,[8] as well as international human rights jurisprudence,[9] have considered groups within the State as holders of the right to development. The idea of 'development' is also notoriously subject to ambiguities and contested meanings, in both law and practice.[10]

These complexities are often evident in conflicts around large-scale investments, particularly in sectors such as mining and industrial agriculture. In these settings, different actors (the State, transnational corporations and the peoples affected by the project activities) advance competing visions of 'development', and different claims to right holding as regards development (who the relevant 'peoples' are and who represents them). While, in the name of development, and on behalf of the nation, many States have approved economic activities that compress land rights and harm the environment, those affected have wielded human rights, including the right to development, to contest the projects and their effects. Such disputes engage legal issues at the interface between human rights, responsible business conduct and investment law. How these different bodies of rules construe notions of development and associated right holders will then affect the ways in which the conflicts are legally understood and addressed.

Taking a socio-legal approach, this article argues that the international rules governing foreign investment embody a notion of development that tends to prioritise economic considerations, against the rights of 'peoples' who articulate development in different terms. Whilst informed by postcolonial and subaltern studies, the exploration is not limited to the Global South. Long applied to the formerly colonised, the concept of development has evolved into framings that, in integrating sustainability concerns, have expanded to all geographies and socio-economic spheres. The article also argues that although more recent investment treaties have superficially integrated the notion of sustainable development, they present broad continuity with earlier investment treaties in the fundamentals of the economic model they promote. These patterns marginalise other notions of development advanced by local actors and indigenous peoples in the context of investment projects and disputes. Operationalising the right to development, then, not only requires clarifying its normative implications, such as through a legally binding instrument, but also ensuring that the wider body of international economic law, including rules on cross-border investment, safeguards space for plural ideas of development.

As contemporary international investment law (IIL) scholarship presents a growing interest in the notion of 'local communities', a few definitional points help better capture our perspective on a key relationship explored in this article, that of local communities and development.[11] The idea of 'local community' is found in some international legal

[8] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UN General Assembly Resolution 61/295 (13 September 2007), arts 3, 20 and 23.

[9] *African Commission on Human and Peoples' Rights v Republic of Kenya*, African Court on Human and Peoples' Rights, Judgment (26 May 2017), https://www.escr-net.org/sites/default/files/caselaw/ogiek_case_full_judgment.pdf (accessed 29 August 2024) paras 207–211 (affirming the right to development of the Ogiek in Kenya).

[10] See, for example, Celine Tan, 'Beyond the "Moments" of Law and Development: Critical Reflections on Law and Development Scholarship in a Globalized Economy' (2019) 12:2 *Law and Development Review* 285; Fleur Johns, 'From Planning to Prototypes: New Ways of Seeing Like a State' (2019) 82:5 *Modern Law Review* 833; Deval Desai and Andrew Lang, 'From Mock-up to Module: Development Practice between Planning and Prototype' (2022) 33 *Law and Critique* 299.

[11] See, for example, Nicolás M Perrone, 'The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?' (2016) 7:3 *Transnational Legal Theory* 383; Lorenzo Cotula, 'Land, Property and Sovereignty in International Law' (2017) 25:2 *Cardozo Journal of International and Comparative Law* 219; Lorenzo Cotula and Mika Schröder, Community Perspectives in Investor-State Arbitration, *International Institute for Environment and Development* (2017) http://pubs.iied.org/pdfs/12603IIED.pdf (accessed 29 August 2024); Nicolás M. Perrone, 'Local Communities, Extractivism and International Investment Law: The Case of Five Colombian Communities' (2022) 19:6 *Globalizations* 837–853; Ximena Sierra-Camargo, 'The 'Consultas Populares' in Colombia: Restrictions on

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instruments, such as the Rio Declaration and the Convention on Biological Diversity,[12] as well as in national legislation.[13] However, it raises significant sociological complexities. Indeed, social groups often share a common relationship to a place and to the positive or negative impacts of an investment project. At the same time, they often also reflect diverse interests and aspirations. These may be partly linked to the differentiated socio-economic backgrounds of the members and the porous, overlapping and changing identities of both individuals (from farmers to small landholders, workers and activists) and organisations (from environmental associations to trade unions and human rights defenders). Against this background, this article defines local communities very broadly to refer to 'a group of people who are connected to a particular locality and do not have the power to exercise governmental authority'.[14]

Meanwhile, the notion of indigenous peoples is recognised in international law and associated with specific legal rights and safeguards, such as free, prior and informed consent (FPIC), that are enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[15] the International Labour Organisation (ILO) Convention on the Rights of Indigenous and Tribal Peoples in Independent Countries,[16] and a growing body of international jurisprudence.[17] In these ways, the notions of local communities and indigenous peoples differ. In addition, investment projects and disputes present an extreme diversity of issues and situations. However, investment disputes involving indigenous peoples and local communities often present recurring features, which engage how 'development' is constructed and through what process. Examples include claims of inadequate consultation; concerns about substantial and irreversible impacts on lands, livelihoods, cultures and ways of life; and the constrained options for redress and accountability.

Following these remarks, the remainder of the article is organised as follows. Section II explores the contestation over the idea of development, by examining a few influential paradigms of development (development as growth, freedom, right and sustainable development) to illustrate the plurality of notions of development and the tensions that can arise between them. Section III examines how examples of contestation over these different notions of development have surfaced in concrete investment disputes. The section discusses a selection of *amicus curiae* submissions or applications made by community-based actors, or organisations supporting them. The focus is not on the specific circumstances or outcomes of each case, nor on the effectiveness of *amicus curiae* submissions as such, but on the ways in which *amicus* arguments articulated or critiqued

Mechanisms for Citizen Participation in Foreign Extractive Projects from the Perspective of the Capitalocene' (2022) 19:6 *Globalizations* 865–875; Ibironke Odumosu-Ayanu, 'Local Communities, Indigenous Peoples, and Reform/Redefinition of International Investment Law' (2023) 24:4–5 *Journal of World Investment & Trade* 792.

[12] Rio Declaration on Environment and Development (3-14 June 1992), A/CONF.151/26, principle 22 (referring to 'indigenous people and their communities, and other local communities'); Convention on Biological Diversity (14 June 1992), art 8(j) (referring to 'indigenous and local communities').

[13] Cotula and Schröder, note 11, 10–11.

[14] Ibid, 10.

[15] UNDRIP, note 8.

[16] Convention No. 169 on the Rights of Indigenous and Tribal Peoples in Independent Countries (27 June 1989).

[17] See, for example, *Kichwa Indigenous People of Sarayaku v Ecuador*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (27 June 2012); *Saramaka People v Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (28 November 2007); *Sawhoyamaxa Indigenous Community v Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (29 March 2006); *Yakye Axa Indigenous Community v Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (17 June 2005); *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (31 August 2001). See also Sergio Puig, *At the Margins of Globalization: Indigenous Peoples and International Economic Law* (Cambridge: Cambridge University Press, 2021); Ksenia Polonskaya, 'Indigenous Peoples in International Investment Law: Time for a New Dispute Resolution Procedure' (2023) 24:4–5 *Journal of World Investment & Trade* 691.

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particular development visions or pathways. Section IV discusses the ways in which the notions of development have been juridically articulated in the legal frameworks that govern foreign investment, focusing on IIL and some relevant evolutions in a business and human rights (BHR) context. The analysis highlights the dominance of the development-as-growth paradigm in IIL, although more recent investment treaty-making has superficially taken up some elements from sustainable development thinking. This dominance can structurally marginalise worldviews that align with other notions of development. The concluding Section V summarises key findings and outlines the changes required for the governance of foreign investment to reflect and advance a 'peoples' centred right to development.

II. Development: A Contentious Concept in Search for Legal Force

Originating from the old French word *desveloper/développer* ('unfurl, open out'), development suggests a movement that brings out the potential of a resource, a hidden gem yet to be revealed similar to the image of a chemical transformation induced in the photographic process. Beyond its inherently hopeful connotations, however, this unveiling journey has never been smooth. The change is often punctuated by violence because the resources 'revealed' in the process are not always shared by all and the actors of development are not necessarily its beneficiaries.[18] Development is as much welcomed as it is imposed, enjoyed as it is suffered and celebrated as it is resisted. The notion of development has historically been associated with Empire, the colonised, the foreign, the former Third World,[19] now designated as the 'Global South' sometimes evading geographies and yet distinct from the 'Global North', the 'First World', the industrialised and the developed. More recently, however, the evolving notion of development has extended its relevance to the Global North, creating parallels in framings and practices that cut across North and South.

Like the idea of modernity, development assumes a departure from a pre-existing State ('underdevelopment'), and the promise of progress towards a better reality.[20] As such, development projects an optimistic vision of the future and captures the aspirations of those who hope for better lives, and of States wishing to 'lift their population out of poverty'.[21] But it also rests upon judgments informed by hierarchies and negative categories (the poor, the unattended, the needy and the uneducated), and by some form of implied superiority that can perpetuate oppression. The social dislocation and environmental harm inflicted by

[18] Wendy Harcourt, 'Reflections on the Violence of Development' (2022) 65:2 *Development* 116.

[19] The term Third World was coined by the French demographer, anthropologist and historian, Alfred Sauvy, in an article published in the Magazine *L'Observateur*, on 14 August 1952. The 'Tiers Monde' referred, in an allusive manner, to the 'Tiers état' (Third Estate), that is all those who, at the time of the French Revolution, were not members of the two first estates, the nobles and the clergy. In the context of the Cold War, it meant to describe the non-aligned with the Communist Bloc or the Capitalist powers. It denounced, as in the French Revolution, the exploitation of the weakest.

[20] Leïla Choukroune and Paraul Bhandari (eds), *Exploring Indian Modernities, Ideas and Practices* (Cham: Springer, 2018).

[21] The World Bank has been particularly keen on this metaphor, for example discussing the Chinese 'miracle' having lifted 800 million people out of poverty. See World Bank, 'Lifting 800 Million Out of Poverty – New Report Looks at Lessons from China's Experience' (1 April 2022), https://www.worldbank.org/en/news/press-release/2022/04/01/lifting-800-million-people-out-of-poverty-new-report-looks-at-lessons-from-china-s-experience (accessed 29 August 2029) However, the World Bank now also acknowledges the rise of inequalities and deepening of forms of poverty: World Bank, *Poverty and Shared Prosperity 2022: Correcting Course* (Washington DC: World Bank, 2022), https://openknowledge.worldbank.org/server/api/core/bitstreams/b96b361a-a806-5567-8e8a-b14392e11fa0/content (accessed 29 August 2024) 1–6.

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extractivism, forced industrialisation and massive urbanisation on land, the environment and peoples highlight the dark side of development.

These complexities have fuelled contestation over meanings of development, with reverberations not only in intellectual discussions but also in development policies and practices, and, importantly—for the exploration in this article—in investment processes as well. Paving the way to the analysis of contestation over the meanings of development in investment processes, this section provides a brief review of the multifaceted and ever-evolving ideas of development and their translations in international law, focusing on selected, illustrative and 'paradigmatic' notions that have regularly emerged, directly or indirectly, in large-scale investments disputes.

A. Development as growth: Empire, modernity and capitalism

Development is historically and intuitively associated with ideas of wealth; the greater a country's ability to produce material goods, the more developed it is deemed to be. Understandings of wealth have often been intertwined with assumptions about the 'modernity' of social and cultural constructs as well. During the colonial era, socio-economic transformations were imposed and their proceeds were transferred to the colonisers. In 1788, the political theorist Edmund Burke powerfully articulated this fact in his impeachment speech against the leader of the East India Company: 'I impeach him in the name of the people of India, whose laws, rights and liberties he has subverted, whose properties he has destroyed, whose country he has laid waste'.[22] For many around the world, then, development was first synonymous with foreign subjugation to support enrichment, industrialisation and consumption in the colonial power. It was Empire, it was foreign induced, it was Kipling's 'white man's burden'.[23] This same Empire was generating and protecting flows of human and capital resources, including foreign investment to 'develop' its possessions; gunboat diplomacy and foreign-induced development went hand in hand. There was, as described by M Sornarajah, 'an outward flow of loot and an inward flow of capital to acquire land'.[24]

After independence, many development policies have been explicitly articulated in terms of economic growth—that is, the expansion of material output that would sustain positive changes in the country's standards of living, thereby complementing political with economic independence. Complex systems of metrics were developed to gauge and rank this wealth of nations, including the Gross Domestic Product (GDP) and Gross National Income (GNI), with additional precision derived from the adoption of a per capita approach (total divided by population). Evolving development ideas and practices also reflected changing assumptions about specific forms of economic growth, exemplified by a significant and recurring emphasis on industrialisation (the process of shifting the economy from reliance on raw materials to manufacturing), and public policies that would promote industrial transformation, such as varying combinations of import substitution and export promotion.

This vision of development-as-growth was embedded in international trade and investment treaties as early as 1948, with the stillborn Havana Charter featuring a

[22] William Dalrymple, *The Anarchy: The Relentless Rise of the East India Company* (London: Bloomsbury, 2019) 308–309.

[23] From the term the British novelist and poet Rudyard Kipling had coined, in an infamous poem, 'The White Man's Burden'. See the text of the poem available at: https://sourcebooks.fordham.edu/mod/kipling.asp (accessed 29 August 2024).

[24] See M Sornarajah, 'Resistance to Dominance in International Investment Law' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Law and Policy* (Cham: Springer, 2021) 2145.

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chapter on 'Economic Development and Reconstruction'. In 1959, the first Bilateral Investment Treaty (BIT), concluded between the Federal Republic of Germany and Pakistan, affirmed that the promotion of foreign investment increases 'the prosperity of both the States'.[25] This formulation codifies assumptions not just about development but also about the role of private enterprise as the engine of economic growth. Indeed, protecting projected commercial returns as a means to promote cross-border investment has long been a main justification for investment treaties and the investor-State-dispute-settlement (ISDS) mechanism.[26] Meanwhile, limited scholarly and doctrinal encounters with international development law allowed evolutions in IIL to crystallise an artificial separation between relations that involve institutionalised economic actors on the one hand and the people who should be at the centre of the economy on the other. The more recent rise of sustainability discourses in IIL, primarily based on hortatory language, nudging and guidelines that obscure the absence of enforceable rights and obligations, only partly qualifies the fundamental tenets of growth-centric development.

B. *Development as freedom*

The mixed track record of the development-as-growth paradigm (with economic successes not automatically translating into diffuse improvements in living standards) and greater recognition of the multidimensional nature of poverty (often associated with lack of voice as much as low income, for example) prompted new ideas about development that emphasise 'freedom'. This evolution happened parallel to mainstream economic thinking and never replaced the central focus on the economic dimensions. However, it highlighted distinctive aspects and correlated with evolutions in international law.

Freedom was first freedom from Empire and oppression. However, in the work of Nobel-prize economist Amartya Sen it evolved to encompass a wider range of 'human capabilities' that sustain well-being and quality of life. Sen conceptualised development 'as a process expanding the real freedoms that people enjoy'—that is, their ability to live healthy, fulfilling lives that realise their potential as human beings.[27] Sen contrasted this notion with 'narrower views' that equated development with 'the growth of national product, or with the rise in personal incomes, or with industrialisation, or with technological advance, or with social modernisation'.[28] In this multidimensional framing, while growth in material output can indeed enhance living standards, it does not necessarily do so. Meanwhile, non-economic change, such as a stronger voice in decision-making, can have a significant bearing on quality of life.

In international law, framing development as freedom resonates with human rights across the civil, political, economic, social, cultural and environmental spheres, as these rights protect and advance freedoms that are inherent to human dignity. Development-as-freedom has been critiqued for neglecting the ways in which power structures constrain individual agency and freedom and overlooking the role of collective action in advancing

[25] Havana Charter for an International Trade Organization (24 March 1948), https://www.wto.org/english/docs_e/legal_e/havana_e.pdf (accessed 29 August 2024). Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (25 November 1959), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1732/germany—pakistan-bit-1959- (accessed 29 August 2024), third preambular paragraph.

[26] Stephan W Schill, Christian J Tams and Rainer Hofmann, *International Investment Law and Development: Bridging the Gap* (Cheltenham: Edward Elgar, 2015).

[27] Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999) 3.

[28] Ibid.

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social change.[29] To some extent, however, the framing can also resonate with international law constructs that are collective in nature and emerged from collective struggles, such as the right to self-determination, whereby all peoples can freely determine their political status and pursue their economic, social and cultural development.

Enshrined in the 1945 UN Charter and the two foundational human rights covenants—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[30]—self-determination has emerged in international law as a right of all peoples, including those subjected to colonial rule, oppression and occupation.[31] The International Court of Justice articulated these characteristics in its advisory opinions on *Western Sahara*,[32] *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*,[33] *Chagos Archipelago*,[34] and *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*.[35] Self-determination includes peoples' sovereignty over natural resources—another important legal avenue for collective struggles since independence.[36] Affirmed in the United Nations General Assembly Resolution 1803 of 1962[37] and the human rights covenants,[38] this right connects control over natural resources not just to the State but also to groups within the State.[39]

Meanwhile, the UNDRIP affirms the right to self-determination of indigenous peoples, entitling them to 'freely pursue their economic, social and cultural development', and their development priorities and strategies, through their 'political, economic and social systems or institutions'.[40] In giving effect to these provisions, indigenous peoples may decide to prioritise visions and trajectories of development that, drawing on indigenous knowledges, cultures, livelihoods and ways of life, can depart considerably from the development-as-growth paradigm.

C. Development as a human right

The human right to development further foregrounds the relationship between development and rights. Initial conceptualisations of this right owe much to thinkers and

[29] Bhupinder Chimni, 'The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels' (2008) 1:1 *Law and Development Review* 1.

[30] Article 1(2) of the United Nations Charter and article 1 of both ICCPR and ICESCR.

[31] United Nations General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, Resolution 1514 (XV) (14 December 1960) para 2; United Nations General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Resolution 2625(XXV) (24 October 1970). See generally Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995).

[32] *Western Sahara*, ICJ Advisory Opinion (16 October 1975), https://www.icj-cij.org/case/61 (accessed 29 August 2024) para 59.

[33] *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion (9 July 2004), https://www.icj-cij.org/case/131 (accessed 29 August 2024).

[34] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ Advisory Opinion (25 February 2019), https://www.icj-cij.org/case/169/advisory-opinions (accessed 29 August 2024) paras 144–161.

[35] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, ICJ Advisory Opinion (19 July 2024), https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf (accessed 29 August 2024) paras 230–243.

[36] Ibid, para. 240.

[37] United Nations General Assembly, Permanent Sovereignty over Natural Resources, Resolution 1803 (XVII) (14 December 1962).

[38] Article 1(2) of the ICCPR and the ICESCR.

[39] For a discussion of this point, see Lorenzo Cotula, 'Reconsidering Sovereignty, Ownership and Consent in Natural Resource Contracts: From Concepts to Practice' (2018) *Yearbook of International Economic Law* 143.

[40] UNDRIP, note 8, arts 3, 20 and 23.

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practitioners from Africa,[41] and emerged as part of a wider movement in the 1960s and 70s, whereby developing countries claimed a New International Economic Order (NIEO) that would fundamentally shift relations with wealthier countries, including their former colonisers. The right to development was first recognised in 1981 in the African Charter on Human and People's Rights, which provides: 'All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'.[42] The UN Declaration on the Right to Development, adopted by the General Assembly in 1986, affirms the right to development as 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'.[43] The right to development was reaffirmed in subsequent international instruments and declarations, including the Rio Declaration on Environment and Development,[44] the Vienna Declaration,[45] the UNDRIP[46] and the Paris Agreement.[47]

These normative instruments outline an encompassing, multifaceted notion of development. As noted by the UN Special Rapporteur on the right to development, Surya Deva, the 1986 Declaration identifies four interlinked 'facets' of development (economic, social, cultural and political) and three 'elements' concerning the ability of human beings to 'participate in', 'contribute to' and 'enjoy' development.[48] The Special Rapporteur also highlighted the strong connections with the principles of self-determination, intersectionality, intergenerational equity and fair distribution.[49] This multidimensional framing and the focus on individuals and groups, not just States, are evident in the 1986 Declaration, which defines development as 'a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and all individuals on the basis of their active, free and meaningful participation in development and the fair distribution of benefits resulting therefrom'.[50] Over the years, international human rights jurisprudence has clarified that groups within a State hold the right to development and that this right is violated, for example, when States evict those groups without consultation, causing adverse impacts on their economic, social and cultural development.[51] Through its emphasis on multidimensionality and on voice and well-being, development-as-right presents significant points of contact with development-as-freedom.

[41] Since its first mention by Father Louis-Joseph Lebret, the coordinator of Senegal's first post-independence plan, in a 1959 article, the right to development has been a central field in Francophone legal research and teaching, with a series of major publications in which Senegalese jurists played a great part, notably through the work of Kéba Mbaye. See Charles Becker, Pierre-Paul Missehoungbe and Philippe Verdin, *Le Père Lebret, un Dominicain économiste au Sénégal (1957-1963)* (selected texts) (Paris: Karthala, 2007); Kéba Mbaye, 'Droit et Développement en Afrique Francophone de l'Ouest' (1967) 0–1 *Revue Sénégalaise de Droit* 23; James Thuo Gathii, 'Africa and the Radical Origins of the Right to Development' (2020) 1 *TWAIL Review* 28.

[42] African Charter on Human and People's Rights (27 June 1981) art 22.

[43] UN General Assembly, United Nations Declaration on the Right to Development, Resolution 41/128 (4 December 1986) art 1(1). See Yuefen Li, Daniel Uribe and Danish, 'Challenges and Potential to Revamp the Normative Framework on the Right to Development' (2022) 65:2–4 *Development* 136.

[44] Rio Declaration, note 12, principle 3.

[45] Vienna Declaration and Programme of Action (25 June 1993), https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action (accessed 29 August 2024) para 10.

[46] UNDRIP, note 8, art 23.

[47] Paris Agreement (12 December 2015) 11th preambular paragraph.

[48] UN Special Rapporteur on the Right to Development, Surya Deva, *Reinvigorating the Right to Development: A Vision for the Future*, UN Doc A/HRC/54/27 (4 August 2023) paras 8–22.

[49] Ibid.

[50] United Nations Declaration on the Right to Development, note 43, 2nd preambular paragraph.

[51] *African Commission on Human and Peoples' Rights v Republic of Kenya*, note 5, paras 207–211; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African

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In a broader sense, ideas about putting human rights and well-being at the centre of development are also reflected in diverse and wide-ranging approaches that have emerged in different parts of the world. This includes conceptualising development as 'happiness', following the example of Bhutan's Gross National Happiness Index, and the idea of *buen vivir* ('living well') as a social philosophy informing the relation between humans and nature, which has been advanced by indigenous communities in Latin America and has been explicitly affirmed in some national constitutions.[52]

D. Development as sustainable development

The growing and increasingly evident pressures on the global climate and the environment have prompted new shifts in development theory and practice, connecting notions of development to ecological concerns. The 1992 Rio Declaration was a key turning point in this process, as the right to development came to be understood as related to the 'environmental needs of present and future generations',[53] and complemented by international treaties protecting biodiversity and the global climate. Subsequent multilateral conferences further clarified this notion of sustainable development and, in 2015, the UN General Assembly's adoption of a set of Sustainable Development Goals (SDGs) established a global development vision that cuts across social, economic, and environmental objectives.[54] Sustainable development also made its way into the rulings of international courts, with pronouncements variously framing it as a concept,[55] a principle[56] or a tool affecting the interpretation of other norms.[57]

According to the Rio Declaration, this holistic integration of social, economic and environmental dimensions involves placing human beings 'at the centre of concerns for sustainable development',[58] moving away from approaches that treat people as passive beneficiaries, or victims, of development processes. Sustainable development also connects to rights framings, as reflected in the numerous references to human rights, including the right to development, in the General Assembly Resolution that adopted the SDGs.[59]

Commission on Human and Peoples' Rights, Communication 276/2003, https://www.escr-net.org/sites/default/files/Endorois_Decision.pdf (accessed 29 August 2024) paras 269–298.

[52] Milan Thomas and Yangchen C Rinzin, 'Your Questions Answered: What is Bhutan's Gross Happiness Index?', *Asian Development Blog*, https://blogs.adb.org/blog/your-questions-answered-what-bhutan-s-gross-national-happiness-index (accessed 29 August 2024); Eduardo Gudynas, 'Buen Vivir: Germinando Alternativas al Desarrollo' (2011) 462 *América Latina en Movimiento* 1, https://gudynas.com/publicaciones/articulos/GudynasBuenVivirGerminandoALAI11.pdf (accessed 29 August 2024); Constitution of Bolivia (7 February 2009), http://www.gacetaoficialdebolivia.gob.bo/app/webroot/archivos/CONSTITUCION.pdf (accessed 29 August 2024) art 306.

[53] According to principle 3 of the Rio Declaration, '[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.

[54] United Nations General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development', Resolution 70/1 (25 September 2015).

[55] *Case Concerning the Gabčikovo-Nagymaros Dam (Hungary v Slovakia)*, ICJ (25 September 1997) para 140.

[56] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ (20 April 2010) para 177.

[57] *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (6 November 1998), WT/DS58/AB/R, para 153. For a discussion, see Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 *European Journal of International Law* 377.

[58] Rio Declaration, note 12, principle 1.

[59] United Nations General Assembly, 'Transforming Our World', note 54, paras 3, 7, 8, 10, 19, 20, 29, 35, 67 and 74(e).

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At the same time, this anthropocentric approach risks neglecting the intrinsic value of nature.[60] Furthermore, the broad, malleable concept of sustainable development has raised questions about its effectiveness in meaningfully integrating ecological considerations into development processes—particularly because translating sustainable development into operational rules has often resulted in provisions that lack the legal bite of arrangements responding to economic considerations.[61] Meanwhile, international instruments have highlighted the central role of private investment in advancing sustainable development,[62] echoing the identification of business as the engine of development in prevailing development-as-growth models and underpinning a 'private turn' in development aid.[63]

Despite all the limitations, the emergence of the concept of sustainable development has moved development discourses towards a more holistic understanding of the relationship between humans and nature. Further shifts in ideas and practices have outlined alternative ways to articulate this relation, including through concepts that are more fully grounded in non-Western constructs and more fundamentally depart from development framings, such as the above-mentioned notion of *buen vivir*.[64] In addition, it is now clear that the concept of development is not absolute but often preceded by *some* adjective or specifier—as illustrated by the notion of 'climate-resilient development', featured in the Paris Agreement.[65]

Importantly, the concept of sustainable development has extended the development discourse from the South to the North. Its framing is not limited to developing countries and, unlike the prior Millennium Development Goals (MDGs), the SDGs are explicitly articulated as 'global in nature and universally applicable'.[66] Many of the problems the SDGs seek to tackle—from poverty to inequality and unsustainable consumption—are highly relevant to 'developed' as well as 'developing' countries. These evolutions have reconfigured development problems as cutting across North and South.

III. International Investment and Development: Complex Relations and Contested Understandings

A. *Approaching complexity*

A brief review of the prevailing paradigms has highlighted the plurality of ideas and visions of development. The previous section explored the ways in which such diverse notions of development emerged and crystallised within a wider historical unfolding of ideas and actions. In practice, those diverse notions coexist, overlap and compete in contemporaneous processes. Broad development paradigms such as those outlined in the previous section often provide the canvass for different groups to articulate their more granular understandings and critiques of development specific to a given place and time.

[60] See UN Special Rapporteur on the Right to Development, note 7, paras 13, 20, 27, 28, 45, 64 and 65 (highlighting the interface with environmental dimensions and the right to a clean, healthy and sustainable environment).

[61] Lorenzo Cotula, 'Environmental Protection' in Thomas Cottier and Krista Nadakavukaren Schefer (eds), *Elgar Encyclopaedia of International Economic Law* (Cheltenham: Edward Elgar, forthcoming).

[62] See, for example, United Nations General Assembly, 'Transforming Our World', note 54, paras 39–53.

[63] Gamze Erden Türkelli, 'Official Development Assistance (ODA), Aid Dynamics, and Sustainable Development' in Walter Leal Filho et al (eds), *Partnerships for the Goals: Encyclopedia of the UN Sustainable Development Goals* (Cham: Springer 2021) 825; Celine Tan, 'Private Investments, Public Goods: Regulating Markets for Sustainable Development' (2022) 23 *European Business Organization Law Review* 241–271; Celine Tan, 'Audit as Accountability: Technical Authority and Expertise in the Governance of Private Financing for Development' (2022) 31:1 *Social and Legal Studies* 3.

[64] Eduardo Gudynas, note 52.

[65] Paris Agreement, note 47, art 2(1)(c).

[66] United Nations General Assembly, 'Transforming Our World', note 54, paras 55 and 67.

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Exemplifying this process of contestation over 'development', large-scale investments can bring competing visions of development directly into the contest. For example, corporations often legitimise their commercial activities through narratives of growth, job creation and integration into global value chains. Many States promote economic growth and modernisation by reallocating resources from 'backward' to industrial-scale activities. Meanwhile, indigenous peoples and local communities advance heterogeneous, evolving visions and interests that, beyond the extreme diversity of contexts, often emphasise strong connections to territory, social identity, culture and way of life. In effect, large-scale investment projects become arenas for contestation over the meaning of development, as this notion has very practical implications for the types of investments that should be promoted, by whom, where, on what terms and for whose benefit.

As shown in a socio-legal study of a mining investment dispute,[67] conflicts that arise from such contestation are difficult to address not just because of the sheer complexity of their factual fabric but also because of the fundamentally different and incommensurable values at play. While monetary metrics can measure costs and benefits from a business' perspective, questions of recognition (for example, those related to social identity and connection to territory) are inherently non-monetary in nature.[68] In turn, the association between competing notions of development and certain norms of international law means that contestation over development can translate into tensions between legal rules, such as those on the protection of foreign investment and those protecting indigenous peoples' rights in the face of 'development' projects and business activities.

B. When investment disputes crystallise contestation over development

In the context of investor-State arbitrations under international investment treaties, several *amicus curiae* submissions have, in different ways, crystallised arguments about competing visions of development. By reviewing those submissions, this section connects notions of development to actors in investment processes, with particular attention to local communities and indigenous peoples or organised groups supporting them. We have already stressed the heterogenous and porous nature of the ill-defined category of 'local communities', now in vogue in international law scholarship. While 'local communities' indeed belies highly heterogenous groupings and often porous social identities, it also offers a shorthand for the collective interests that are rooted in a particular locality and not institutionalised in governmental structures.[69] Often invisible in the positivistic practice and scholarship of IIL, the mobilisation of grassroots activists has influenced public perceptions of ISDS as an unbalanced system favouring foreign investors.[70] Over the past 20 years, these advocates—from residents to peasants and indigenous peoples, from rights defenders to trade unionists, sometimes supported by research or non-governmental organisations—have also approached the ISDS system to highlight human rights issues, particularly through *amicus curiae* submissions. In so doing, they have stressed the ways in which contestation over development can sustain investment disputes.

It is worth recalling that the *amicus curiae* mechanism is itself the product of contestation. The Canadian Union of Postal Workers' made a submission in the 2003 *United Parcel Service of American Inc (UPS) v Canada* arbitration,[71] and third-party interventions by 'friends of the

[67] Lorenzo Cotula and Nicolás M Perrone, 'Seeing Santurbán Through ISDS: A Sociolegal Case Study of *Eco Oro v. Colombia*' (2024) 37 *Leiden Journal of International Law* 440.

[68] Ibid.

[69] Cotula and Schröder, note 12, 10.

[70] See, for example, public debates surrounding the recent release of the civil society-led 'Global ISDS Tracker': https://www.globalisdstracker.org (accessed 29 August 2024).

[71] *United Parcel Service of American Inc. (UPS) v Canada*, ICSID Case No. UNCT/02/1.

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court' have since become more popular.[72] Subsequent international legal instruments have provided clearer rules on the conditions under which arbitral tribunals may accept *amicus curiae* submissions.[73] These rules generally recognise that the 'non-disputing party' (the *amicus*) can 'assist the Tribunal in deciding the dispute by providing a perspective different from that of the parties'.[74]

In *Glamis Gold v USA*, a Canadian mining company argued that the USA breached its investment protection obligations by expropriating rights to a gold mine and denying the company fair and equitable treatment. The mining land was situated near the traditional reservation of the Quechan Indian Nation, an indigenous people. In a submission to the arbitral tribunal, the Quechuan Indian Nation argued that the mining project was damaging a sacred site and challenging their religious beliefs. They noted:

> The manner in which this sacred area and the Tribe's interest in it will be portrayed in this arbitral process is of great concern for native peoples worldwide, who are similarly attempting to protect their irreplaceable sacred places and ensure religious freedom. This is because NAFTA proceedings have obtained a high profile in international law and politics [...]. The tribe wants to ensure that the sensitive and serious nature of indigenous sacred areas is properly taken into account in this and all future international proceedings.[75]

The clash of religious beliefs, conceptions of territory, property rights and environmental concerns points to fundamental differences in underlying ideas of development as a practice of resource extraction that can generate material wealth on the one hand, and a system of interconnectedness between people, nature, territory and spiritual beliefs on the other. Besides prompting novel jurisprudential approaches to the long-lasting controversy surrounding the 'minimum standard of treatment', the case played a part, as intended by the Quechuan people, in denouncing the risks and limitations of IIL and ISDS.

In *Bernhard von Pezold v Zimbabwe*, the arbitral tribunal rejected an *amicus curiae* application from indigenous groups in the context of Zimbabwe's land reform programme. The case relates to the seizure of large timber plantations, which had been expropriated without compensation in the context of measures to 'fast-track' land reform. The arbitral tribunal held that the land seizure and the government's encouragement of 'illegal' settlements constituted a breach of applicable investment treaty provisions on expropriation and fair and equitable treatment. However, for the communities that had applied to make the submission, the land reform question directly connects the present to colonial-era dispossession:

> We were dispossessed of our land and territory on racial grounds, and we were treated, and in many ways still are treated, as sub-human species by the very whites who openly have done their best to destroy our culture, our history, and our ability to gain decent livelihoods from our own land, our own labour and our own natural resources.[76]

[72] Fernando Dias Simões, 'Public Participation: Amicus Curiae in International Investment Arbitration' in Chaisse et al (eds.), note 24.

[73] For example, art 15(1) of the UNICITRAL Arbitration Rules and the UNCITRAL Transparency Rules; article 37(2) of the 2006 ICSID Arbitration Rules; and Article 67 of the 2022 ICSID Arbitration Rules.

[74] ICSID 2022 Rules, article 67.

[75] Quechuan Indian Nation, Application for Leave to File a Non-Party Submission (19th August 2015), https://www.italaw.com/sites/default/files/case-documents/italaw8854.pdf (accessed 29 August 2024).

[76] Phineas Zamani Ngorima, Regent Chief of the Ngorima People, quoted in Corporate Europe Observatory, Transnational Institute and Friends of the Earth, *Red Carpet Courts: 10 Stories of How the Rich and Powerful Hijacked*

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Alongside the racialised dimensions of the dispute,[77] this quote also highlights the linkages between land, history, livelihoods and culture, with land potentially connecting to different visions of development—from large-scale plantations to smaller-scale farms where growers primarily rely on their own and their families' labour.

Visions of development were also at play, at least implicitly, in *Biwater v Tanzania*, a turning point in the process that enabled non-disputing parties to make submissions in investor-State arbitrations.[78] In the early stages of the proceedings, an amendment to the Arbitration Rules of the World Bank-hosted International Centre for Settlement of Investment Disputes (ICSID) came into effect, which included specific provisions regarding non-disputing parties. Although the *amici* were not granted access to the case documents and to the hearing, the arbitral tribunal not only allowed the *amici*'s participation but acknowledged the importance of their input as well.[79] The development dimensions partly relate to the roots of the case: Tanzania had received US$140 million from the World Bank and other international financial institutions to upgrade its water and sewer infrastructure on condition that it would appoint a private company to operate the services. The claimant was the service operator and the dispute hinged on contract termination as the government accused the company of having failed to deliver. Arrangements for the provision of essential public services reflect assumptions about the roles of States and businesses in development processes,[80] with water privatisation schemes having attracted extensive critique over the years, including on human rights grounds (right to water).

In *Bear Creek v Peru*, the Association of Human Rights and Environment of Puno, a grassroots group, alongside a respected BHR expert, made an *amicus* submission that was accepted by the arbitral tribunal, while a separate brief from an academic institution was rejected.[81] Issues related to the prior consultation (*consulta previa*) of the indigenous Aymara people impacted by a proposed mining project featured prominently in the factual fabric of the case. The protests and unrest generated by the prospective mine eventually led to the termination of the project. In international human rights law, consultation and FPIC arrangements are partly intended as legal arrangements to ensure that any investments respond to the development priorities and strategies of affected indigenous peoples.[82] While the majority of the arbitral tribunal placed the duty to consult squarely on the State, the dissenting opinion of arbitrator Philippe Sands highlighted the expectations private investors have to fulfil, in terms of responsiveness to the aspirations of indigenous peoples. Referring to the preamble of ILO Convention 169 on Indigenous and Tribal Peoples, he noted:

> This preambular language offers encouragement to any investor to take into account as fully as possible the aspirations of indigenous and tribal peoples. Establishing conditions of transparency and trust are a vital pre-requisite for the success of a

Justice (2019), https://www.tni.org/files/border-timbers-and-von-pezold-vs-zimbabwe.pdf (accessed 29 August 2024).

[77] James Thuo Gathii and Ntina Tzouvala, 'Racial Capitalism and International Economic Law: Introduction' (2022) 25:2 *Journal of International Economic Law* 199.

[78] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22.

[79] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, Award (24 July 2008), para 392.

[80] See, for example, UN Special Rapporteur on the Right to Development, Surya Deva, *Role of Business in Realizing the Right to Development*, UN Doc A/78/160 (12 July 2023).

[81] *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/2, Procedural Orders No. 5 and 6 (21 July 2016).

[82] UNDRIP, note 8, articles 19, 23 and 32.

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> project, which involves a corporation arriving from a faraway place to pursue an investment in the lands of indigenous and tribal peoples.[83]

Different visions of territory, the environment and development were also at stake in the *Eco Oro v Colombia* dispute, where the arbitral tribunal rejected an *amicus curiae* application submitted by five civil society organisations, including a grassroots advocacy group.[84] In the underlying investment process, the company highlighted the economic benefits of the proposed gold mine and the national mining agency supported the project as part of strategies to promote national development. On the other hand, activists advocated for environmental protection and the right to water, while some artisanal miners expressed concern about the squeeze a large-scale project could impose on their activities.[85]

This brief review of a few illustrative examples highlights how investment disputes are often grounded in contestation not only over the distribution of material costs and benefits, but also over competing visions of development: from development-as-growth models that legitimise resource extraction to development visions that emphasise the close connection between nature, culture and way of life. The contestation over these broad notions is reflected in more specific claims that question, for example, the extent to which a given investment responds to local development priorities; the weight of historical injustices in shaping development trajectories; the place of small- and large-scale producers in the mining or agriculture sectors; the role of States and markets in the provision of public services instrumental to realising human rights; and the interplay of economic and environmental considerations.

IV. The Investment and Development Nexus: Codified Assumptions in IIL and BHR

Recognising that contestation over development is a recurring feature of large-scale investments highlights questions about which notions of development, and which underlying values and assumptions, are codified into the rules of international law that govern foreign investment and the settlement of investment disputes. This section explores these issues, focusing on investment treaties and ISDS, but also touching on the rules applicable to relations between business, human rights and the environment, which beyond their direct application can also have reverberations for the interpretation of investment rules.[86] The main argument is that IIL is primarily premised on advancing development-as-growth, complemented by elements of sustainable development thinking. This emphasis can structurally marginalise worldviews that align with other notions of development, including rights and freedom.

[83] *Bear Creek Mining Corporation v Republic of Peru*, note 81, Partial Dissenting Opinion of Professor Philippe Sands, 4.

[84] *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No. ARB/16/41.

[85] On these aspects of the case, see Cotula and Perrone, note 67.

[86] See, for example, Surya Deva, 'International Investment Agreements and Human Rights: Assessing the Role of the UN's Business and Human Rights Regulatory Initiatives' in Chaisse et al (eds.), note 24; Alessandra Arcuri and Federica Violi, 'Public Interest and International Investment Law: A Critical Perspective on Three Mainstream Narratives' in Chaisse et al (eds.), note 24; Nicolas Bueno, Anil Yilmaz Vastardis and Isidore Ngueuleu Djeuga, 'Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses' (2023) 24:2 *Journal of World Investment and Trade* 179; Stephanie Triefus, 'The UNGPs and ISDS: Should Businesses Assess the Human Rights Impacts of Investor–State Arbitration?' (2023) 8:3 *Business and Human Rights Journal* 329.

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A. Investment treaties as a catalyst for development: A challenged assumption

Most investment treaties do not elaborate on the notion of development or on the relation between investment and development. They do not explicitly condition their legal protections on investment providing a positive contribution to the host country's development. However, the investment treaty regime is founded on notions of development. The expectation that the treaties would promote foreign investment and that foreign investment would promote development is considered a key reason why many governments, particularly in low- and middle-income countries, signed the treaties.[87] Further, the idea that promoting investment to those countries necessitated international arrangements aimed at protecting foreign investment hinged on perceptions that domestic legal systems were not sufficiently developed to provide adequate reassurance for businesses.

As already noted, these assumptions are reflected in the preamble of numerous bilateral treaties on the protection of foreign investment, starting with the first BIT, which was concluded in 1959 between the Federal Republic of Germany and Pakistan. While formulations vary, many preambular clauses explicitly affirm, or at least imply a 'theory of change' that causally links legal protection, investment flows and economic development. In the Mozambique-Netherlands BIT of 2001, for example, the parties recognise 'that agreement upon the treatment to be accorded to such investment will stimulate the flow of private capital and the economic development of the Contracting Parties'.[88] Similar assumptions are embedded in multilateral instruments related to dispute settlement. The preamble of the International Convention on the Settlement of Investment Disputes refers to 'the need for international cooperation for economic development, and the role of private international investment therein'.[89] The hosting of ICSID at the World Bank and the negotiation of the Convention upon the initiative and with the facilitation of the World Bank further cemented this connection between investment promotion and economic development.[90]

In these approaches, the investment-development nexus is contextual rather than operational: it inhabits underlying assumptions and policy rationales but is largely absent from the actual legal rules. Evolutions in the arbitral jurisprudence have outlined a more operational role for the link to development, though ultimately with limited lasting effects. Article 25 of the ICSID Convention links the jurisdiction of arbitral tribunals to legal disputes that arise 'directly out of an investment', though the Convention does not offer a definition of investment. Building on this provision and the preamble of the ICSID Convention, some arbitral tribunals have specifically discussed the relationship between investment and development, in the context of their decisions on jurisdiction. In the oft-cited case *Salini v Morocco*, the arbitral tribunal linked the notion of investment to key characteristics,

[87] Ole Kristian Fauchald, 'International Investment Law in Support of the Right to Development?' (2021) 34 *Leiden Journal of International Law* 181.

[88] Agreement between the Government of the Republic of Mozambique and the Government of the Kingdom of the Netherlands Concerning the Encouragement and the Reciprocal Protection of Investments (18 December 2001) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2055/download (accessed 29 August 2024), 3rd preambular paragraph.

[89] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), available at https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf (accessed 29 August 2024), 1st preambular paragraph.

[90] On the intersections between investment law and development aid instruments, see Milena Mottola, 'Development Aid Institutions in International Investment Law: towards a Holistic Approach to Development Financing Flows' (2024) 25 *Journal of World Investment & Trade* 19.

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namely contributions, a certain duration, an element of risk and—significantly, for this discussion—a 'contribution to the economic development of the host State'.[91]

Versions of the *Salini* test have been widely used by ICSID tribunals,[92] and some of the key characteristics have found their way in treaty definitions of investment.[93] However, arbitral tribunals have taken different approaches as to the specific features of investment. The development contribution has formed the object of particularly intense controversy in the arbitral cases and has not been included in treaty clauses on the definition of investment. Ultimately, arbitral tribunals have tended to abandon this criterion.[94] They have also often treated the characteristics as *indicative* of the presence of an investment, rather than jurisdictional criteria to be met one by one—in line with developments in treaty drafting as well.[95] The fading of the development contribution requirement means that the relation between investment treaties and economic development remains largely implicit—grounded in the historical circumstances that led to the negotiation of the treaties, rather than in explicit legal requirements in either treaty clauses or arbitral jurisprudence.

The link between investment and development is more expressly reflected in the outcome of the talks conducted at the World Trade Organization (WTO) on a proposed plurilateral agreement on 'investment facilitation for development'.[96] But while 'development' features explicitly in the title, in the preamble[97] and the objectives clause of this proposed agreement,[98] the substantive provisions do not elaborate on the link between investment facilitation on the one hand and development on the other. For example, the provisions do not condition investment facilitation measures on the investment's demonstrable contribution to economic development.[99]

In practice, empirical evidence questions these implicit and explicit assumptions about causal connections between investment treaties, foreign investment and economic

[91] *Salini Costruttori S.p.A. and Italstrade S.p.A v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001), https://www.italaw.com/sites/default/files/case-documents/ita0738.pdf (accessed 29 August 2024) para 52. See Jean Ho, 'The Meaning of "Investment" in ICSID Arbitrations' (2010) 26:4 *International Arbitration* 633; Markus Petsche, 'The Application of the Salini Test Beyond Article 25 of the ICSID Convention: Analysis of Recent Trends in Treaty and Arbitral Practice' (2023) 24 *Journal of World Investment & Trade* 879.

[92] Nitish Monebhurrun, 'The (Mis)use of Development in International Investment Law: Understanding the Jurist's Limits to Work with Development Issues' (2017) 10:2 *Law and Development Review* 451.

[93] See, e.g., Canada-EU Comprehensive Economic and Trade Agreement (CETA) (30 October 2016), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/ceta-chapter-chapter_en (accessed 29 August 2024) art 8.1 (defining investment as 'every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk').

[94] See, for example, *Mr Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010), https://www.italaw.com/sites/default/files/case-documents/ita0314.pdf (accessed 29 August 2024) para 111; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinatioanl State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1098.pdf (accessed 29 August 2024) para 220.

[95] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf (accessed 29 August 2024) paras 314–318; CETA, note 93. For a fuller discussion of the *Salini* jurisprudence, see Monebhurrun, note 92.

[96] World Trade Organization, Investment Facilitation for Development Agreement, INF/IFD/RD/136 (6 July 2023), https://www.bilaterals.org/IMG/pdf/wto-investment-facilitation.pdf (accessed 29 August 2024).

[97] Ibid, 1st and 2nd preambular paragraphs.

[98] Ibid, art 1.

[99] For a discussion of this point, see Martin Dietrich Brauch, 'Can Existing International Agreements on "Investment Facilitation" Advance Sustainable Development, Climate Action, and Human Rights?', *Columbia Centre for Sustainable Investment* (30 November 2023), https://ccsi.columbia.edu/news/investment-facilitation-wto-sustainable-development-climate-energy-transition (accessed 29 August 2024).

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development. Significant methodological challenges affect research on these issues and the findings are often mixed. For example, evidence on whether investment protection treaties promote foreign investment is inconclusive, with a major review finding that 'for many claims about the positive or negative impact of [investment treaties], little robust evidence has been generated to date'.[100]

Complexities also affect the relationship between foreign investment and economic development. Evidence shows that, by contributing capital, know-how and market links, foreign investment can promote economic growth, generate foreign exchange earnings and public revenues, develop infrastructure and create employment in countries with limited alternative options for development. However, foreign investment may also fail to create enough positive linkages with the local economy, for instance in the form of employment and opportunities for local businesses, and it may crowd out or out-compete local producers.[101] While empirical studies on the relationship between foreign investment and development have often focused on economic aspects, considering the fuller spectrum of issues further problematises that relationship, particularly as regards large-scale projects. For example, foreign investment projects can bring cleaner technologies but also degrade the environment. They can create employment but also destroy established livelihoods and ways of life. Greater wealth can expand choice and well-being, but certain types of large-scale investments have also been associated with compressions of rights and freedoms and repression of environmental and human rights defenders.[102]

B. The notion of development in investment law

The approaches arbitral tribunals have taken when discussing development have formed the object of critique based on the often brief and superficial engagement with the complex notions at play, and ultimately on the challenges jurists face when grappling with social, economic, ecological and political questions of development.[103] Beyond the brevity of arbitral engagements with notions of development, it is clear that IIL reflects specific assumptions about what development is and how it happens.

The emphasis is typically on *economic* development and development-as-growth, as reflected in the explicit wording of the preambular clauses of numerous investment treaties and of the ICSID Convention as well as in the formulation of the *Salini* test. At least implicitly, there is also an emphasis on macro level aspects, reflecting concern about *national* development ('the economic development of the host State' in the *Salini* formulation) more than local development visions or interests. In the arbitral jurisprudence that originated from the *Salini* test, foreign investment is seen as an important source of the capital, technology and know-how that are considered necessary for national economic transformation, with the complexities of social, environmental and economic considerations largely remaining in the background.

Indeed, as Nitish Monebhurrun noted in a more comprehensive review of the relevant jurisprudence, arbitral tribunals have tended to take the development contribution of

[100] Joachim Pohl, *Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence* (Paris: OECD, 2018), https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en (accessed 20 August 2024) 1.

[101] For a fuller discussion of the relationship between investment treaties, foreign investment and development, see Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford: Oxford University Press, 2017) 155–180.

[102] Special Rapporteur on the Situation of Human Rights Defenders, Mary Lawlor, *Final Warning: Death Threats and Killings of Human rights Defenders*, A/HRC/46/35 (24 December 2020).

[103] Monebhurrun, note 92.

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investments as relatively self-evident, for example, based on the significance of a general sector to the national economy (such as tourism in Egypt in the case *Helnan v Egypt*[104]), without elaborating further on criteria or methods and without any detailed assessment of the specific investment at stake.[105] Some arbitral decisions do provide additional elements of analysis, including nods to the interests of local communities. In the contract-based ICSID arbitration *Elsamex v Honduras*, a dispute related to a road rehabilitation project partly supported through development aid, the arbitral tribunal found the economic development contribution requirement to have been met by specifically referring to the reconstruction needs of communities affected by Hurricane Mitch, as well as to the 'reactivation' of national development.[106] While in this case community and national interests were seen as coextensive, questions remain about how local development visions would be considered, as part of a discussion on development contribution, in situations presenting clearer trade-offs between local and national interests.

The Stated aim of investment treaties—to promote cross-border investment flows—also reflects assumptions about *how* development-as-growth happens: through business activities that promote economic integration, via the influx of foreign capital and possibly also via the export of the products resulting from the investments. In this way, investment treaties codify an economic policy approach that identifies businesses as key actors of development. The institutional location of investor-State dispute settlement at the World Bank—the leading multilateral development finance institution—reinforces this vision about the role of business in development, with international capital flows seen as complementary to the World Bank's development aid.

The preambles of many recent investment treaties frame development issues more broadly, for example reaffirming the parties' commitment to promote *sustainable* development in its economic, social and environmental dimensions, while also reiterating assumptions about investment protection as a basis for stimulating mutually beneficial business activities.[107] In addition, a growing minority of investment treaties contain increasingly extensive provisions that set out investor responsibilities, including in social and environmental matters.[108] These recalibrated approaches to treaty drafting offer greater space for considering a fuller range of issues cutting across economic and non-economic spheres. However, the concrete effects of this shift towards the sustainable development paradigm have so far been limited.

Data highlight that these 'new-generation' investment treaties only cover a small share of foreign direct investment in developing countries.[109] The data also show that 'old-generation' treaties 'have served as the basis for almost all ISDS cases to date'.[110] This also means that the

[104] *Helnan International Hotels A/S v The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction (17 October 2006), https://www.italaw.com/sites/default/files/case-documents/ita0398_0.pdf (accessed 29 August 2024) para 77.

[105] Monebhurrun, note 92, 460–464.

[106] *Elsamex S.A. v República de Honduras*, ICSID Case No. ARB/09/4, Laudo (12 November 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1291.pdf (accessed 29 August 2024) paras 7–9, 13–15 and 268-269 (original in Spanish). For further commentary on this decision, see Mottola, note 90, 36–37.

[107] See, e.g., Canada-EU Comprehensive Economic and Trade Agreement, note 93, 8th and 9th preambular paragraphs.

[108] See, e.g., Priscila Pereira De Andrade and Nitish Monebhurrun, 'Mapping Investors' Environmental Commitments and Obligations' in Jean Ho and Mavluda Sattorova (eds), *Investors' International Law* (Oxford: Hart, 2021) 263.

[109] The 'new-generation' investment treaties only cover 2% of foreign direct investment stocks in Least Developed Countries and 8% of stocks in other developing countries, against 18% of stocks in Developed Countries. United Nations Conference on Trade and Development, *World Investment Report 2024: Investment Facilitation and Digital Government* (UNCTAD, 2024) 26, Figure II.21.

[110] Ibid, 25.

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recalibrated clauses are yet to generate a sizeable arbitral jurisprudence that can shed light on whether and how their application might change the understandings of development in IIL. In addition, investor responsibility clauses are typically formulated in non-mandatory terms. Evolutions towards mandatory approaches, though not absent, are limited, fragmented and yet to deliver significant binding instruments, with provisions included in treaty templates,[111] or in bilateral investment agreements that are yet to come into force.[112]

Relative to the legal and institutional architecture established to mobilise businesses for (economic, sustainable) development objectives, arrangements aimed at ensuring that businesses do deliver on those objectives, and that their activities respond to, or are at least aligned with, the development priorities and strategies of those most directly impacted, are therefore embryonic. International human rights law does set important parameters in these regards. As already noted, for example, the UNDRIP provides that indigenous peoples 'have the right to determine and develop priorities and strategies for exercising their right to development'.[113] However, the application of these provisions in an IIL context has been limited and has generated conflicting approaches in the arbitral jurisprudence.[114] In these respects, the 'sustainable development turn' in IIL seems superficial as of now, confined to hortatory clauses, within legal instruments otherwise characterised by binding rules and relatively effective dispute settlement and enforcement mechanisms oriented towards the protection of foreign investment.

The extensive, mandatory provisions included in the African Continental Free Trade Area (AfCFTA) Protocol on Investment are an exception, illustrating one approach for deeper engagement with a wider range of sustainable development issues in an investment treaty context. The Protocol—not yet in force—contains detailed clauses on compliance with national and international law; business ethics, human rights and labour standards; environmental protection; indigenous peoples and local communities; socio-political obligations; anti-corruption; corporate social responsibility; corporate governance; and taxation and transfer pricing.[115]

In addition to their binding nature (upon entry into force), the provisions of the AfCFTA Investment Protocol depart from established practices on investor responsibilities clauses in that they cut across social, environmental and economic issues and include notions of rights and sustainability. They also go beyond basic 'do no harm' to cover positive contributions, for example as regards taxation. Further, they require active engagement with indigenous peoples and local communities, based on free, prior and informed consent as applicable, and on local participation in the benefits generated by the investment.[116] Besides (and possibly even more than) channelling material economic benefits to affected groups, such participation rights and rules on free, prior and informed consent are designed to align investment activities with the development vision advanced by those groups. In

[111] Agreement on Reciprocal Promotion and Protection of Investments between ____ and the Kingdom of the Netherlands (Netherlands Model Investment Agreement (22 March 2019), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download (accessed 29 August 2024) arts 7 and 23.

[112] For example, Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (Morocco-Nigeria BIT, 3 December 2016, not in force), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/otheriia/3711/morocco—nigeria-bit-2016- (accessed 29 August 2024).

[113] UNDRIP, note 8, art 23.

[114] See, for example, *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/2, Award (30 November 2017) paras. 565–569, 662–669 and Partial Dissenting Opinion of Professor Philippe Sands, note 83.

[115] Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (19 February 2023) art 32-40.

[116] Ibid, art 35. See also article 2(b).

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effect, these aspects of the Protocol can resonate with notions of development-as-freedom, development-as-right and sustainable development.

A consequential caveat, however, is that, in defining the scope of application of the Protocol, Article 3(6) states: 'For greater certainty, and subject to the applicable international law, references to 'indigenous people', 'local communities' and 'underrepresented groups' in this Protocol do not apply on the territory of State Parties which do not recognise those groups under their domestic laws and regulations'.[117] In effect, the application of these important dimensions ultimately hinges on approaches determined by national law.

C. The investment-development nexus from a BHR perspective

Recentring the investment-development nexus around more plural notions of development, including those advanced by Indigenous Peoples and local communities, and around the extent to which investment responds to local development priorities and strategies, highlights the relevance of rules and standards related to BHR. As noted above, certain notions of development (development-as-freedom, development-as-right, and, to some extent, sustainable development) connect closely to rights framings. Further, centring the development priorities and strategies of indigenous peoples and local communities highlights issues related to these groups' human rights in the face of business activities.

However, established framings in the field of BHR present limitations as well as opportunities. According to the UN Guiding Principles on Business and Human Rights (UNGPs), for example, while States have a duty to protect human rights in the context of business activities, businesses only have a responsibility to *respect* human rights—meaning that they 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.[118] The UNGPs make it clear that this corporate responsibility to respect applies to the spectrum of human rights recognised in the 'International Bill of Rights', which includes not only the ICCPR but also the ICESCR.[119]

While covering social and economic rights as well as civil and political ones, this corporate responsibility is primarily framed in terms of 'do no harm' ('respect'), rather than positive development contribution. In practice, the boundaries between the two dimensions can be porous: effective safeguards, such as free, prior, and informed consent and the protections applicable to land, water, and territorial rights, can provide the foundations for mutually agreed development contributions, and they can promote alignment between investment activities and locally formulated development priorities and strategies.

In his 2023 report to the General Assembly, the UN Special Rapporteur on the Right to Development, Surya Deva, articulated the case for normatively codifying a more positive contribution from business to realising the right to development.[120] The report called for reimagining the role of business in society,[121] so they can more directly contribute to realising all four facets of the right to development (economic, social, cultural and political development).[122] The report noted that 'several components of the right to development—such as improvement of human well-being, self-determination, non-discrimination, participation and international cooperation—are already part of the International Bill of

[117] See also the second paragraph of article 35(1).

[118] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011) principles 1 and 11.

[119] Ibid, principle 12 and related commentary.

[120] Special Rapporteur on the right to development, note 80.

[121] Ibid, para 3.

[122] Ibid, paras 12, 44–46.

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Rights',[123] which as noted above frames the scope of the corporate responsibility to respect under the UNGPs. The report explicitly called on businesses to go beyond 'do no harm' and to fundamentally interrogate their business models to contribute to the realisation of the right to development.[124]

While the specific contours of this hoped-for evolution are yet to be precisely defined, the approach appears to echo some of the thinking and practices that have emerged around concepts such as 'inclusive business'—the notion whereby firms should rethink the way they make money to both improve financial returns and benefit low-income groups.[125] This concept has proved influential, for example as regards business initiatives to 'include' small-scale farmers in corporate-led agri-food supply chains—but it has also been subjected to critique: the approach tends to take the viewpoint of the individual business and downplay the structural factors that affect business conduct.[126] In emphasising the win-wins, it can also gloss over important tensions and trade-offs, with evidence pointing to disappointing or even negative results, for example as regards diverse agri-food sectors.[127]

While the BHR framing can inherently reinforce the central role of business in the development process, the right-to-development entry point can involve shifts from prevailing patterns. Businesses routinely argue that they provide positive contributions to development-as-growth, by investing capital, developing technological innovations, paying taxes and playing other catalytic roles in socio-economic change. For some firms, this logic extends to sustainable development dimensions, for example emphasising the role of business in advancing cleaner technologies and the energy transition. However, a development-as-right perspective can go significantly beyond these approaches, not only by outlining a more comprehensive process of social, economic, cultural and political transformation but also by codifying expectations of positive contribution as a matter of legal entitlement rather than just business goodwill.

That said, fundamental questions remain as to whose development priorities should inform these positive development contributions. Even 'inclusive' business models whereby a firm integrates low-income groups in its supply chains may reflect top-down approaches that do not necessarily respond to local development priorities.[128] In addition, the emphasis on the proactive social responsibility of business denotes an ambitious policy project—whereby firms would take over public interest roles, including certain responsibilities traditionally associated with States—that contrasts with the current advancement of the normative agenda on BHR. More than 13 years after the adoption of the UNGPs and with the proposed binding treaty process seemingly at a standstill,[129] corporations are more powerful than ever, and States are often unable or unwilling to address power imbalances

[123] Ibid, para 30 (footnotes omitted).

[124] Ibid, paras 68, 77.

[125] World Business Council for Sustainable Development and Netherlands Development Organization, *Inclusive Business: Profitable Business for Successful Development* (World Business Council for Sustainable Development, 2008), http://wbcsdservers.org/wbcsdpublications/cd_files/datas/business-solutions/social-impact/pdf/InclusiveBusiness-ProfitableBusinessForSuccessfulDevelopment.pdf (accessed 29 August 2024).

[126] Lorenzo Cotula, 'Social and Environmental Issues in Foreign Direct Investment: A Legal and Policy Perspective' in J Anthony VanDuzer and Patrick Leblond (eds), *Promoting and Managing International Investment: Towards an Integrated Policy Approach* (Abingdon: Routledge 2020) 247.

[127] Laura A German et al, '"Inclusive Business" in Agriculture: Evidence from the Evolution of Agricultural Value Chains' (2020) 134 *World Development* 1.

[128] Ibid.

[129] Draft Legally Binding Instrument (Clean Version) to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf (accessed 29 August 2024).

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and rising inequalities through the policy instruments at their disposal, such as taxation of corporate profits.[130]

Jurisdictions such as France, Germany, Switzerland, The Netherlands and the European Union have adopted legislation that requires some form of human rights due diligence and includes, to varying extents, civil liability provisions.[131] However, most States worldwide have yet to adopt legislation mandating and operationalising effective due diligence and corporate accountability obligations. Even access to redress for victims of corporate abuse remains highly constrained in many contexts, owing not just to practical barriers but also to legal constructs that shelter businesses from accountability; the 'corporate veil' as an instrumental separateness of legal entities and bodies of norms continues to prevent justice in many contexts. In these circumstances, while BHR initiatives provide framings that centre human rights in the context of investment processes and have gained momentum in some jurisdictions, they are yet to fundamentally address the questions about development models raised in the context of IIL.

V. Conclusion

International investment law partly draws its legitimacy from specific notions of development. The discussions surrounding investment and development often focus on macro level aspects, including questions about whether investment treaties promote foreign investment flows and whether these flows promote economic development. In the arbitral decisions that have considered this issue, the contribution of foreign investment to the host country's development is largely taken as a given. Yet, large-scale investment projects often expose and foster deep contestation over the very notion of development in ways that resonate with the conceptual evolutions that have variously connected ideas of development to economic growth, freedom, human rights and ecological considerations, or that have fundamentally critiqued the very relevance of development constructs. These ideas connect to several norms of international law, from human rights and self-determination to environmental rules, which support diverse notions of development. Such complexities become more apparent if we consider not just the investor-State relationship but the fuller range of actors involved in, or affected by, investment projects. In such multi-actor settings, investment disputes can manifest themselves as conflicts over inadequate consultation, environmental harm or land dispossession. However, they often are, at the root, disputes over notions of development and the deeper values these notions epitomise.

These aspects are difficult to track by only reading official case documents, such as the decisions of arbitral tribunals established under investment treaties, or the submissions of the parties in the arbitration. This is because the binary structure of ISDS inherently marginalises the perspectives of other actors in the dispute. In addition, arbitral tribunals have tended to treat development issues succinctly in their decisions. For these reasons, socio-legal research can play a helpful role in shedding light on how notions of development are mobilised in investment processes and disputes.[132] The practice of *amicus curiae*

[130] According to Oxfam, 'The world's five richest men have more than doubled their fortunes from $405 billion (£321 billion) to $869 billion (£688 billion) since 2020, while the wealth of the poorest 60 per cent – almost five billion people – has fallen'. Oxfam, 'Wealth of Five Richest Men Doubles since 2020, as Wealth of Five Billion People Falls' (15 January 2024), https://www.oxfam.org.uk/media/press-releases/wealth-of-five-richest-men-doubles-since-2020-as-wealth-of-five-billion-people-falls/ (accessed 29 August 2024).

[131] See, for example, Rachel Chambers and Anil Yilmaz Vastardis, 'Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability' (2021) 21:2 *Chicago Journal of International Law* 323; Nicolas Bueno et al, 'The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise' (2024) *Business and Human Rights Journal*, doi:10.1017/bhj.2024.10 (accessed 29 August 2024).

[132] Cotula and Perrone, note 67, 22.

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submissions has also helped surface these dimensions. While the submissions were not necessarily cited or considered by the relevant arbitral tribunal, or even accepted in the first place, they have, cumulatively and over the years, formally documented the multi-actor dimensions of investment disputes and the ways in which, at a deeper level, visions of development were at play.

In the face of this complexity and contestation, IIL tends to frame development issues primarily in terms of economic growth. This emerges from the preambles of numerous investment treaties and arbitral decisions that assessed the investments' development contribution. More recent shifts in treaty drafting have integrated notions of sustainable development, potentially providing opportunities to consider a wider range of economic and non-economic aspects. However, these provisions only cover very small shares of investment stocks in developing countries. Further, they have not been accompanied by commensurate changes in operational treaty clauses to ensure that business activities do contribute to sustainable development and that they are aligned with the development priorities of those most directly impacted.

Overall, the IIL system flattens complex, multifaceted, contested and evolving notions of development, primarily prioritising a development-as-growth paradigm that can resonate with the commercial concerns of foreign investors and the modernising policies of many States, but not necessarily with the fuller range of concerns and aspirations advanced by indigenous peoples and local communities. In other words, the codification of a notion of development that centres economic growth entails a specific prioritisation of interests and worldviews in investment processes and disputes. Centring the development visions of indigenous peoples and local communities would resonate more directly with international legal instruments and constructs that affirm human rights and the close interdependence between people and nature. This presents interlinked procedural and substantive dimensions, with arrangements such as free, prior, and informed consent and participation rights intended to promote alignment between foreign investment and local development strategies.

Such a shift in perspective highlights the relevance of international rules on BHR to negotiating development visions in investment processes. It also highlights the complementarity of different areas of legal expertise—from human rights to investment law—and the need to explore mechanisms for more effectively coordinating the application of multiple rules of international law in order to inform a more plural notion of development. Exploring these aspects raises legal and practical questions that would require careful thinking through. For example: what legal arrangements can enable indigenous peoples and local communities to advance their own visions, or critiques, of development in the face of business activities? Are investment tribunals well-placed to arbitrate on competing notions of development? What mechanisms, if any, might enable or require these tribunals to refer issues to international human rights institutions, and under what circumstances? How might intra-community differences in understandings of development be accommodated in international dispute settlement fora?

By connecting human rights and development in immediate terms, ongoing discussions about the right to development can provide an important arena to clarify and effect these normative shifts. Advancing this agenda highlights questions about the rules, institutions and processes of international human rights law and the representation of indigenous peoples and local communities in the political structures of the host State. But it also requires ensuring that the wider frameworks of international economic law recognise and provide space for plural notions of development.

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