At the Crossroads of International Human Rights Law and International Investment Law

- Reflection on the Right to Development in the Exercise of Expropriation -

The thesis submitted by

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DECLARATION

By submitting this dissertation, I declare that the entirety of the work contained therein is my own, original work, that has not been submitted for any degree or examination in any institution or published in any journal, textbook or media.

Signed

Young Jae KIM

DEDICATION

This thesis is dedicated to the glory of God who knows me better than I know myself and loves me better than I love myself.

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ABSTRACT

Given the current legitimacy crisis of international law, particularly the international law of investment owing to fragmentation and the negative impact of unfettered economic development on the environment and human rights, competing claims between North and South, sovereign states and multinational corporations, and sovereign states and their nationals over development and its benefits must be effectively and legitimately reconciled before any strategy to promote development can be implemented. In this respect, the human right to sustainable development, which this thesis introduced, provides a framework in which the potential competing claims of economic value and human rights value can be reconciled.

This thesis considers the interplay of international development law, international human rights law and international investment law, by reference to the evolution of a right to sustainable development. In particular, it focuses on how the international investment law regime has evolved to incorporate human rights and sustainable development, by examining expropriation as a case study.

The thesis traces the concept of development as it underlines international development law, and shows how it has moved from 'orthodox economic development' to 'modern human development' by means of the evolution of the human right to sustainable development. It proceeds to contemplate the content of this human right to sustainable development, with a view to demonstrating its relevance to international investment law. Thereafter, it shows how international investment law has evolved over time, from being narrowly focused on upholding foreign investors' interests and rights, to taking into account international human rights and the human right to sustainable development. As a concrete example of this shift in international investment law, the thesis then conducts a case study of expropriation, which illustrates the increased interaction between the three clusters of international law. In particular, the protection of foreign investors' rights and host states' rights to regulate foreign investment for the purpose of ensuring international human rights and sustainable development are explored through leading cases in international investment tribunals.

In conclusion, it is argued that the legitimacy of the international investment law regime can

be enhanced through continuing efforts of the international community to harmonise the three clusters of international law within the human right to sustainable development.

ACRONYMS

AAAA	Addis Ababa Action Agenda
ACHPR	African Charter on Human and Peoples’ Rights
ACP-EC	African, Caribbean and Pacific Partnership Agreement with the European Community
ADB	African Development Bank
ANC	African National Congress
AU	African Union
BIT	Bilateral Investment Treaty
CDHR	Centre for Development & Human Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CERDS	Charter of Economic Right and Duties of States
CESCR	Committee on Economic, Social and Cultural Rights
CHR	Commission on Human Rights
CSR	Corporate Social Responsibility
CRC	Convention on the Rights of the Child
EAC	East African Community
EC	European Community
ECA	Environmental Conservation Act
ECOSOC	Economic Social and Cultural Council
ECOWAS	Economic Community of West Africa
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EDF	European Development Fund
EEC	European Economic Community
EPA	Economic Partnership Agreement
EU	European Union
FAO	Food and Agriculture Organisation
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade

GNP	Gross National Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ICSD	International Centre for Sustainable Development
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
IMF	International Monetary Fund
MDG	Millennium Development Goal
MOU	Memorandum of Understanding
NAM	Non-Aligned Movement
NEPAD	New Partnership for Africa's Development
NIEO	New International Economic Order
NAFTA	North American Free Trade Agreement
ODA	Official Development Assistance
OECD	Organisation for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
RTD	Right to Development
SADC	Southern African Development Community
TEU	Treaty on the European Union
UN	United Nations
UNCITRAL	UN Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNDRTD	UN Declaration on the Right to Development
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WHO	World Health Organisation

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CHAPTER 1 INTRODUCTION: BEYOND FRAGMENTATION OF INTERNATIONAL LAW

1.1 Introduction

As law finds its cause of existence in explaining and regulating reality, contemporary international law has been required to create a growing number of new sub-fields of international legal studies to address evolving international relations.[1] International law itself has expanded and extended its coverage to embrace new areas of progressive legal developments.[2] Novel sub-branches of operational international law include 'international human rights law, international humanitarian law, international environmental law, international investment law and international development law.'[3] Among these, three clusters of contemporary international law, namely international development law, international human rights law and international investment law, stand out.

International development law, originally aimed at vitiating discrepancies in economic development between developed and developing states and regulating national economic development,[4] has broadened its coverage ranging from sustainable, social and cultural development to the right to development as a human right. Likewise, international human rights law has paid more attention to economic and social rights in addition to political ones and has focused on the collective nature of international human rights as well as their individual nature by stressing the importance of the human rights of vulnerable or marginalised groups. More importantly, international investment law is often required to meet the Sustainable Development Goals (SDGs) and thereby to realise the right to development beyond its traditional role of protecting foreign investors' rights. Whereas protection of foreign investors' rights is crucial to achieve the SDGs, this needs to be balanced against the need for states to respect, protect and fulfil a broad range of international human rights.

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[1] Sompong Sucharitkul 'International Development Law and Public International Law' (2010) in Munir Maniruzzaman, Aaron Schwabach & Arthur John Cockfield et al *International Sustainable Development Volume I* 101-11 at 102.
[2] Ibid.
[3] Ibid.
[4] Ibid at 109.

While international development law, international human rights law and international investment law are often posited as being in tension, their relationship at their intersections is significantly under-explored. In a fractured world of international law, this is perhaps understandable. In general, the separate subject-matters of international law, such as human rights, environmental protection, trade, development assistance, investment and others are often described as originally disconnected from one another, while the whole of international law is understood to consist of a collection of fragmentary components.[5] The nature of fragmentation, nationally or internationally, reflects the paradox of globalisation: while having contributed to increasing uniformisation of human life around the world, globalisation has also led to the emergence of specialised, unique and relatively stand-alone regimes to regulate action of their members.[6]

In particular, as far as international investment law is concerned, international lawyers in this area would prefer such a fractured system of international law. Under this system, a lopsided purpose of international investment law, namely focusing on full protection of investors, to the exclusion of competing concerns, can easily be fulfilled. In contrast, when it comes to protecting the rights of negatively affected individuals or groups in exchange for protection of the investor, the traditional separation of international investment law and international human rights law is far from perfect and falls short of legitimacy. Investors are strongly inclined to pursue compensation under international investment law, while individuals or groups negatively affected in this process are likely to resort to protective tools under international human rights, not under international investment law. The protection afforded to affected local marginalised people has so far been inferior to the protection granted to foreign investors,[7] since tribunals in international investment disputes often argue that they are not in a position to deal with international human rights issues in a fractured international law system.

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[5] Philippe Sands 'Treaty, Custom and the Cross-fertilization of International Law' (1998) 1 (1) *Yale Human Rights and Development Journal* 85-106 at 88.

[6] Martti Koskenniemi 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) at 11, available at *legal.un.org › ilc › documentation › english › a_cn4_l682,* accessed on 3 July 2020.

[7] Lorenzo Cotula 'Law at two speeds: legal framework regulation foreign investment in the global South' (2012) 73 *Columbia FDI Perspective* at 1.

A fractured world of international law notwithstanding, there has recently been an increase in the areas of intersection between separate sub-fields of international law, leading researchers to examine ways in which clusters of international law can be balanced or integrated. Above all, the emergence and evolution of the notion of sustainable development is key to paving the way for creating harmonised international law. While itself originating within a particular fragment of international law and addressed only by specific institutions, it is increasingly recognised that the overarching concept of sustainable development can lessen the extent of fragmentation in international law.[8]

1.2 Background to the Study

The rapidly changing international environment has posed fundamental questions on whether international law is a suitable vehicle to explain realties or whether international law provides the best narrative to safeguard values underpinning the international community. The theoretical necessity of examining the interconnections of the three clusters in international law has arisen in order to explain practical phenomena in international relations. In particular, four recent international political, economic and social phenomena have moved the intersections between international development law, international human rights law and international investment law to centre stage.

First, development necessitates investment. Many developing states face the challenge of lack of financial resources in pursuing 'overriding priorities to eliminate poverty and eradicate inequality.'[9] Eliminating poverty and eradicating inequality, particularly in developing states requires a substantial amount of money for the purposes of boosting economic development, enhancing basic education, universal health and social security, alongside satisfying basic needs such as adequate access to food, affordable housing and efficient energy.[10] As such,

[8] CISDL Concept Paper 'What is Sustainable Development Law?' (2005) at 4, available at *https://cisdl.org/public/docs/What%20is%20Sustainable%20Development.pdf*, accessed on 17 February 2020.
[9] South Africa's Intended Nationally Determined Contribution (INDC), available at *https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/South%20Africa%20First/South%20Africa.pdf*, accessed on 21 February 2020.
[10] Ibid.

international investment is often required to catalyse sufficient financial resources, which can meet the SDGs and thereby realise the right to development. For instance, in order to implement South Africa's National Development Plan 2030 (NDP 2030), the South African government should attract tremendous foreign investment.[11] The question is how international law can explain the relations between foreign direct investment (FDI) and the NDP for sustainable development.

Secondly, it seems obvious that achieving the SDGs and combating climate change or adapting to a carbon-free world economy are very closely linked. In particular, both of these goals require a considerable amount of private investment, including from foreign investors.[12] The two issues of sustainable development and climate change have been discussed in separate fora, but they are closely interconnected. In this regard, several questions need to be asked: Are there any legal conflicts in the process of achieving the SDGs and complying with the Paris Agreement against climate change while ensuring more foreign investors? If so, how can international law solve the problem? In particular, one can examine the fact that whereas protection of a foreign investor's rights is crucial to achieve the SDGs, this needs to be balanced against the need for states to respect, protect and fulfil a broad range of international human rights.

Thirdly, in order to achieve NDP targets (which requires more energy) and to cope with climate change (which requires less energy or more efficient energy) simultaneously, individual states and the international community must pay more attention to the energy sector than to other sectors, where both developing states and developed states[13] should face real challenges.

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[11] It is estimated that since 2008, FDI in South Africa has dropped from 24 per cent of GDP to 19 per cent and President Cyril Ramaphosa of South Africa has a plan to push up FDI to account for 30 per cent of GDP in line with the NDP 2030. See Susan Menon 'President targets $100bn in foreign injection' *Business Day* 17 April 2018.

[12] UNFCCC Executive Secretary Patricia Espinosa stressed that the sustainable development and climate change agendas are inherently linked, in her opening speech of the President of the General Assembly High-Level Event Climate Change and the Sustainable Development Agenda in New York on 23 March, available at *http://newsroom.unfccc.int/unfccc-newsroom/climate-and-development-agendas-are-inherently-linked,* accessed on 21 April 2019.

[13] In the case of developed states, one can see a good example of what is presumed to be the conflict of environmentally friendly energy policy and foreign investors' rights in nuclear power plant construction in Germany. Following the 2011 nuclear accident in Fukushima, Japan, the German government decided to shut

Energy poses a fundamental dilemma for sustainable development in that it is essential for achieving the NDP goals, yet fossil fuel based energy systems are associated with environmental pollution, especially in relation to climate change.[14] For instance, South Africa considers both stable energy supply for economic development needs and climate change imperatives for sustainable development commitment under the Paris Agreement on Climate Change.[15] In the course of fulfilling both these objectives, the South African government will be faced with a dilemma.[16] In reality, the South African government has recently notified the Saudi Arabian energy company, ACWA, contracted to build the 306-megawatt Khanyisa coal power plant in Mpumalanga Province, that its authorisation for the project has expired, possibly because climate activists have criticised the use of coal as a means of generating power owing

down eight older reactors out of the 17 nuclear power units immediately and speed up efforts to phase out nuclear energy generation completely for transition to a low-carbon, nuclear-free economy. The decision is called the Energiewende (literally meaning energy turnaround), aiming to reduce the emissions of greenhouse gases, to make Germany more independent of oil and gas imports in the long term and to enable the gradual phasing out of nuclear energy until 2022. See 'Germany to compensate utilities for nuclear phaseout losses' *World Nuclear News* 24 May 2018. The Energiewende would be justified in terms of fighting climate change, reducing energy imports, stimulating technology innovation and the green economy, reducing and eliminating the risks of nuclear power disasters. However, in response to the radical change of energy policy of the German government, a Swedish energy group called Vattenfall reclaimed losses resulting from 'the Energiewende' on the base of protection against expropriation without compensation. In 2016 the Federal Constitutional Court of Germany found that the 2011 decision to close all nuclear power plants by 2022 violated some property rights of existing investors, enabling the possibility of compensation for the utilities affected. See 'Germany to compensate utilities for nuclear phaseout losses' *World Nuclear News* 24 May 2018.

[14] J Gururaja 'Energy for sustainable development: Review of national and international energy policies' (2003) 27 *Natural Resources Forum* 53–67.

[15] South Africa, the world's 14th largest emitter of greenhouse gases, principally because of heavy dependency on coal, can pursue contracts with a consortium of foreign investors to build more fossil fuel energy plants to achieve one of the goals of the NDP in the energy sector. At the same time, South Africa should consider her commitments to the international community. South Africa's Nationally Determined Contribution under the Paris Agreement on Climate Change highlights the government's challenges to prioritise poverty reduction and inequality concerns, as per the NDP 2030, while meeting climate change needs by a number of measures to promote the deployment of renewable energy such as the future energy mix designed to replace an inefficient fleet of ageing coal-fired power plants with clean and highly efficient technology, a Renewable Energy Independent Power Producer Procurement Programme, the decarbonisation of the electricity sector and plans to deploy carbon capture and storage for coal-to-liquid processes. See South Africa's INDC op cit note 9.

[16] One can presume the following scenario. The South African government may grant a foreign company the concession to build coal power plants to achieve her NDP and the foreign investor would invest a considerable amount of capital in this project. However, after considering her climate change commitments or criticism of environmentalists, the South African government might suspend all plans to construct coal power plants and phase out existing fossil fuel energy for the purpose of shifting its energy policy from a fossil-fuel based one to a renewable energy based one, claiming that it should comply with the Paris Agreement.

to its volume of greenhouse gas emissions.[17] This example in the energy sector, which is pivotal to development, illustrates that investment, climate change and development are closely linked. Some experts convincingly argued that the application of renewable energy has a direct positive impact on achieving the SDGs.[18] In this context, how can international law explain the conflicts between the rights of foreign investors, the public interest and the obligations of each state?

Fourthly, the claim of sustainable development and human rights can be abused by developers. For instance, the Brazilian government announced its aspiration of economic development in the Amazon by arguing that this development project is aimed at 'improving the human rights or the right to development' of its 30 million inhabitants, including its indigenous peoples. Following harsh criticism of the development plan, it was recently reported that the Brazilian government will create an Amazon council to protect and ensure the sustainable development of the Amazon.[19] The case of the controversial development plans of the Amazon indicates that the three clusters of international law should be taken into account together and in a balanced way, particularly in relation to competing human rights among rights holders who are entitled to enjoy the right to development.

1.3 Aims and Scope of the Thesis

This thesis aims to explore the evolution of the concept of development and the associated emergence of the notion of the human right to sustainable development, which has contributed to harmonising the three sub-fields of international law.

Traditionally, development was understood to be only economic development. However, recent studies on development have focused on human development within a holistic concept of development,[20] which led international law scholars to pay more attention to 'various elements'

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[17] Ishioma Emi 'Why South Africa withdrew coal power plant license from Saudi's ACWA' *Ventures Africa* 20 February 2020.

[18] Ruojue Lin & Jingzheng Ren 'Renewable Energy and Sustainable Development' (2020) 6(1) *Journal of Renewable Energy and Sustainable Energy* 3-7.

[19] 'Brazil to create Amazon Council to protect and develop forest' *Aljazeera* 22 Jan 2020.

[20] Maria Green & Susan Randolph 'Bringing theory into practice: operational criteria for assessing

of the concept of sustainable development and the element of 'right' of the concept of the right to development.[21] Accordingly, sustainable development, having multi-faced dimensions and limitless character,[22] has globally 'pervaded the environmental, social, political, economic, and cultural discourses of development,' in both the public and private sectors.[23] 'Sustainable development has also widely penetrated the legal domain' and 'become an unavoidable paradigm' in international development law and international human rights law.[24] In this respect, this thesis suggests using the human right to sustainable development to underline the characteristic of the inter-connectiveness of sustainable development and the right to development in the context of both international development law and international human rights law.[25]

Given the evolution of the concept of development, urgent challenges to international governance include understanding the interaction between the different branches and norms of international development law, international human rights and international investment law, and, within an understanding of this interplay, to provide a theoretical account for solving conflict between, or balancing, trade and non-trade rules, or economic and non-economic objectives. The move to reconcile development and non-economic ends is noticeable in the field of investment, which has evolved in a variety of forms, such as international legal instruments, international guidelines and the norm hierarchy. To be more specific, most currently concluded international instruments have demonstrated that international investment

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implementation of the international right to development' (2010) at 8, available at *https://www2.ohchr.org/english/issues/development/right/docs/a-hrc-15-wg-2-tf-crp-5_en.pdf*, accessed on 3 July 2020.

21 See *the 1987 Brundtland Report.* After the 1983 World Commission on Environment and Development (WCED), chaired by Gro Harlem Brundtland, a 1987 report named ' Report of the World Commission on Environment and Development: Our Common Future was published. In this thesis, this report is called 'the 1987 Brundtland Report'. Also see Alan Boyle & David Freestone *International Law and Sustainable Development* (1999) 16-17.

22 M Fitzmaurice 'the Principle of Sustainable Development in International Development Law' (2010) at 2, available at *https://www.eolss.net/Sample-Chapters/C13/E6-67-03-02 pdf*, accessed on 2 February 2020.

23 See Virginie Barral 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23(2) *EJIL* 377-400 at 377.

24 Ibid.

25 For the purpose of convenience, the term sustainable development is used in some parts of this thesis, while the term the right to development is used in other parts. However, overall, this thesis is to be examined based on the integrated concept of the human right to sustainable development.

and the right to development or sustainable development are mutually supportive. Creating a sustainable-development-friendly international investment regime is therefore a top priority of policy-makers around the globe.[26] Moreover, a plethora of international investment guidelines has required individual states and the international community to link sustainable development and international investment agreements, which led an increasing number of international investment agreements to encompass provisions relating to sustainable development. Furthermore, it is argued that potential conflicts between investment policies and human rights obligations could be avoided or solved if international human rights norms would always trump international investment rules.[27]

So far there have been many studies that analyse international development law, international human rights law (including the right to development) and international investment law (including the rights of foreign investors pertaining to expropriation). However, an overwhelming majority of these studies have analysed these areas separately. Thus, in a fragmented international legal regime, it is argued that international legal obligations to protect foreign investment can potentially prevent states, mainly host states, from complying with their obligations under international human rights law.[28] There have nevertheless not been any meaningful attempts to investigate the interaction of these legal regimes with the goal of harmonising them. As will be shown in the following chapters, the endeavour to reconcile international human rights law and international investment law has been found in international investment tribunals. This might be attributable to the lack of enforcement mechanism similar to that in the international investment dispute settlement regime in other international law regimes.

To examine the missing link between international development law, international human

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[26] James X Zhan 'Taking Stock of International Investment Agreement Reform' (2016) *Introductory Remarks UNCTAD's Expert Meeting on Taking Stock of IIA Reform* at 2.

[27] Markus Krajewski 'Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights' (2017) at 13, available at *https://www.cidse.org/2017/03/03/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies/*, accessed on 12 February 2020.

[28] Nicolas Klein 'Human Rights and International Investment Law: Investment Protection as Human Right?' (2012) 4 (1) *Göttingen Journal of International Law* 199-215 at 200.

rights law, and international investment law, a case study on expropriation is very useful. When one thinks of unlawful interference with the interests or rights of a foreign investor, it is natural to think first of expropriation.[29] While international investment law has traditionally focused on protecting and compensating foreign investors in instances of expropriation, modern international law (including theory, jurisprudence of international tribunals and international instruments on international human rights and the right to development) hints at instances where expropriation can be justified. Individual states may exercise their own sovereign rights to expropriate foreign assets in the name of sustainable development, or for the purpose of enhancing international human rights law. Furthermore, sovereign states are obliged to respect foreign assets in the context of international investment law. Accordingly, the issue of expropriation presents a useful case study of the intersection of the three clusters of international law and the intricacies of attempting to reconcile their competing demands.

For several decades, it was clearly demonstrated in the process of expropriation that international investment law, international development law and international human rights law evolved in relative independence as specialised fields of international law.[30] Such relative independence explains why the interactions between the three fields remained restrained; conflicts were less likely to occur because the international investment regime was in favour of protecting the interests or rights of foreign investors. In the context of expropriation, a host state's powers to expropriate have generally not been contested or explored, but the focus has been on the question of compensation in the exercise of the right to expropriation. From its inception, the international investment law regime has allowed host states and foreign investors to play on unlevelled grounds in an asymmetrical and unbalanced way, namely offering lop-sided legally substantive protection for foreign investors and denying legally equivalent procedural protection to host states or their marginalised people.[31]

However, with the increasing reach and sophistication of international investment law,

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[29] Vaughan Lowe 'Changing Dimensions of International Investment Law' (2007) *University of Oxford Faculty of Law Legal Studies Research Paper Series* 4 at 53.

[30] Viñuales J E 'Foreign investment and the environment in international law: The current state of play' (2016) *C-EENRG Working Papers* 2016-1 1-42 at 4.

[31] William Burke-White 'Inter-Relationships between the Investment Law and Other International Legal Regimes' (2015) *E15 Task Force on Investment Policy* at 1.

international development law and international human rights law, the possibility that foreign investment protection could intrude on sustainable development and the right to development in the process of expropriation and *vice versa* has received more attention from the international law community.[32] On the one hand, a number of scholars have pointed out the need to reconcile competing rights, such as the rights of foreign investors and the right of sovereign states to regulate investments in the process of expropriation. On the other hand, very few scholars have paid attention to the need for balancing the rights of foreign investors and the rights of vulnerable individuals or groups negatively affected by investment.

Thus, this thesis will explore how the possibility of conflicts between the three clusters of international law, notably in the process of expropriation, can be lessened. Specifically, the focus is on the apparent solution offered by the evolving notion of sustainable development which, as will be shown, is capable of effecting a balance between the protection of foreign investors' rights, on the one hand, and the promotion of the right to sustainable development of host states and their vulnerable and marginalised residents, on the other.

1.4 Methodology

The study involves entirely desk-based work, which entails a study of the relevant literature in the various fields. This thesis is based on a review of academic articles, relevant international documents (including UN documents), relevant international agreements (including international investment agreements (IIAs) or bilateral investment treaties (BITs)), applicable jurisprudence from relevant domestic, regional and multilateral bodies or tribunals and international policy statements. Some reliance was placed on print and electronic media reports.[33]

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[32] See Viñuales op cit note 30.

[33] A study of literature will be focused on international development law, international human rights law and international investment law as well as general international law, which lays a foundation for theoretical analysis of the three clusters in international law, in particular by providing *erga omnes*, the third-generation human rights, solidarity, diplomatic protection, international responsibility, the legal personality of MNCs etc., which will be elaborated on in each relevant section. Literature surveyed in the field of international development law will include literature reconciling the concept of 'development' with 'sustainable development' in the context of international development law and human rights law; literature on the nature of the right to development and its relationship to human rights; literature on the content and implication of the right to development; and literature

1.5 Structure of the Thesis

It is intended that this thesis will examine first the evolution of the notion of development and its inherent relationship with international development law and international human rights law in general. Thereafter it will identify in some detail the contents, application areas and subjects of the right to development under international human rights law, before turning to the character of international investment law and its relations with international human rights.

Chapter 2 traces the concept of development as it underlines international development law and shows how it has moved from 'orthodox economic development' to 'modern human development' by means of the right to development. While the right to development evolved in international human rights law, it also infiltrated and indeed came to dominate international development law. In now being understood as a right to sustainable and inclusive development, it has drawn international human rights and international development law together. The SDGs are the vivid and salient illustration of the end result of this shift. They are at the heart of international development law, but are closely infused with human rights principles and are a manifestation of the right to development.[34]

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on the human rights obligations of non-state actors. On international investment law, literature surveyed includes literature on international investment agreements including BITs and bilateral or regional trade or economic agreements e.g. free trade agreements; literature on the rights of foreign investors; and literature on tensions between the rights of foreign investors and human rights. There will also be extensive engagement with literature on expropriation as a case study. I will also cover all the relevant international documents including the declarations and decisions of the UN General Assembly, UN Security Council, UN Human Rights Committee and all the relevant important international conferences such as the Declaration on the Right to Development, the 1992 Rio Declaration on Environment and Development, the 2030 Agenda for Sustainable Development, the Paris Agreement on climate change, the OECD Guidelines for Multinational Enterprises etc. An analysis of international agreements entails wide coverage, ranging from multilateral and regional agreements such as NAFTA, TPP to BITs including significant model BITs. Finally, leading cases brought before the ICJ, WTO and decisions of quasi-judicial international bodies such as the UN Human Rights Committee, the African Commission on Human and Peoples' Rights (ACHPR), and the Inter-American Commission on Human Rights (IACHR) etc. will be researched.

[34] This thesis will thus suggest using the human right to sustainable development considering the evolution of the concept of development in international law.

Chapter 3 is then focused on the content of this human right to sustainable development, with a view to demonstrating its relevance to international investment law. It clarifies the central characteristics of the right and describes the main right-holders, with the emphasis on marginalised and vulnerable groups (the subjects of the human right to sustainable development) and the constituent and closely interdependent human rights (the areas of application of the human right to sustainable development).

Chapter 4 then shows how international investment law has evolved over time, from being narrowly focused on upholding foreign investors' interests and rights, to taking into account international human rights and the human right to sustainable development.

Chapter 5 provides a concrete example of this shift in international investment law in action by examining expropriation as a case study, which explicitly demonstrates the relationship of the three clusters of international law. In particular, the protection of foreign investors' rights and host states' rights to regulate foreign investment for the purpose of ensuring international human rights and sustainable development are explored through leading cases in international investment tribunals.

Chapter 6 steps back and reflects on the shifts traced throughout the thesis. It considers the implications of the overall shift towards harmonisation of the three clusters of international law, and suggests possible future developments and areas for further research that flow from this shift.

CHAPTER 2 INTERNATIONAL DEVELOPMENT LAW AND THE RIGHT TO DEVELOPMENT

Previously the concept of development referred to droit du developpement understood from the perspective of economic prosperity and it has been progressively linked to human rights by the shift to from droit du developpement to droit au developpement.[1]

2.1 Introduction: The Concept of Development

As will be shown in the following subsections, historically, in the 1940s and 1950s the notion of development was understood to be related to purely economic growth. Later, in the 1970s, this understanding was broadened to encompass environmental concerns as well, as reflected by the notion of sustainable development. In the late 1970s, a broader human rights-based understanding of development emerged through the notion of the 'right' to development. Against this backdrop, this chapter tracks the evolution of the notion of development under international law. First, the traditional way of understanding development within a solely economic paradigm will be examined. Second, it will be explored how the notion of development has been expanded over time, to encompass also environmental, social and cultural rights.

Generally speaking, international development law is understood to refer to the law regulating the relations among sovereign but economically unequal states,[2] or to be a branch of international law that aims at narrowing the gap in development between developed and developing states, or at achieving the economic independence of developing states.[3] Traditionally, international development law is the international law of the modern era of the development of mankind and refers to a body of principles and rules formed within the international legal system with the aim of promoting development.[4] Recalling the trend of

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[1] Yannick Radi, 'International investment law and development: A history of two concepts' in Stephan W Schill(eds) *International Investment Law and Development* (2015) at 69.

[2] Edward Kwakwa 'Emerging International Development Law and Traditional International Law-Congruence or Cleavage?' (1987) *GA J INT'L & Comp L* 431-455 at 432.

[3] Maki Nishiumi 'Development and Democracy from a Viewpoint of International Law' (2005) in Y Matsuura (eds) *the Role of Law in Development Past, Present and Future* 81-86 at 81.

[4] Kwakwa op cit note 2 at 431.

dealing with development in international politics, international law and international business alike, many studies have attempted to explain the relations of development with the international reality taking place in various areas. In essence, in its inception, the right to development was regarded as an economic right for developing countries, and the material aspect of the right received excessive emphasis.[5] However, such a traditional perspective of understanding development within the framework of economic prosperity and considering development as being inconsistent with international human rights has been replaced by a new perspective intended to be of relevance in explaining the evolving notion of development. Over time it has become obvious that human rights cannot be fully realised in the absence of development while development policy cannot be effectively carried out without regard to human rights.[6]

In this respect, one can refer to an approach that categorised development in two sub-concepts from a theoretical perspective. Maria Green and Susan Randolph summarised the theoretical approaches[7] to development in 'orthodox development theory' premised on neoclassical economics, on the one hand, and 'human development theory or the capabilities approach', focused more directly on human well-being, on the other**.** **'**Orthodox development theory is focuses on building the productive capacity of national economies so as to enhance material well-being, measured as increasing per capita gross domestic product (GDP).'[8] Thus, orthodox development theory is understood to be 'production-centred, rather than people-centred.'[9]

Based on orthodox development theory, there are two approaches to international development law. Some regard international development law as a branch of international economic law (a

[5] Satvinder Juss *International Migration and Global Justice* (2006) 278.
[6] Ibid.
[7] Amartya Sen notes that there are two distinct visions of the development process: one that requires sacrifices, by privileging economic growth to the detriment of peoples' rights; and the other a 'friendly' development defined as a 'process that expands real freedoms that people enjoy.' See Sen Amartya *Development as Freedom* (1999) 36.
[8] Maria Green & Susan Randolph 'Bringing theory into practice: operational criteria for assessing implementation of the international right to development' (2010) at 6, available at *https://www2.ohchr.org/english/issues/development/right/docs/a-hrc-15-wg-2-tf-crp-5_en.pdf*, accessed on 3 July 2020.
[9] Ibid.

sub-field of international law),[10] while others regard international development law as an immediate branch of international law dealing with the rights and responsibilities of states and other actors in the development process.[11] The former is more focused on the economic dimensions of international development law under the umbrella of international economic law while the latter is more focused on the rights and responsibilities regarding international development law. Some differences notwithstanding, the two approaches (which will respectively be referred to here as 'the solely economic approach' and 'the economic and rights-based approach' to the concept of development and the function of development law) have it in common that they understand development from a vantage point of economic growth.

Proponents of the economic and rights-based approach to international development law such as Daniel D Bradlow, regard international development law as the constituent branch of international law that involves the rights and responsibilities of all participants (including states and non-state actors) in the course of development. According to Bradlow, international development law 'emerged as a distinct and independent body of international law after World War II, inspired by Latin American dependency theorists and by the experience of the newly independent countries of Africa and Asia.'[12] Despite being politically independent, these countries were still in 'unequal and unfavourable economic relations with their former colonial' countries, which hindered them from developing.[13] This economic and rights-based approach to understanding development is useful in the sense that it was one of preciously few efforts to define international development law to recognise it as a branch of international law, taking cognisance of rights and responsibilities of states in the development process and stressing the importance of the role of non-state actors in the process of development. In particular, the definition in this analysis can assist in laying a foundation for research on the character of the right to development, which includes the establishment of legal relationships, new actors of international law and the importance of participation and the process in development.

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[10] Guiguo Wang 'International Development Law in the Globalized World' (2006*)* 10 *JCULawRw* 187-232 at 187.

[11] Daniel D Bradlow 'Development Decision-Making and the Content of International Development Law' (2004) 27 B C *Int'l & Comp L Rev* 195-217 at 195.

[12] Ibid at 196.

[13] Ibid.

The limitation of this analysis results from its focus on economic factors of development, which underemphasises various human rights factors in the process of development. The shortcomings of the traditional approach are found, *inter alia*, in its failure to adequately address environmental and social issues in relation to development. Conceptually, development has been used to refer to several factors: economic growth or development, changes in the economic structure of production, spatial distribution of populations (increasing urbanisation), improvement in social indicators of education and health, etc. In essence, from the traditional perspective, the right to development is referred to as being neither consistent with, nor mutually supportive of, environmental or social justice. In this respect, both the solely economic approach and the economic and rights-based approach seemingly remain rooted in the traditional approach.

Human development theory, can be regarded as a good attempt to replace the traditional approach inspired by orthodox development theory, which became increasingly irrelevant owing to its failure to explain the many interlocking dimensions of the modern world accurately. The principal idea of human development, that improving the lives and well-being of individuals and people is fundamental, has much in common with the human rights approach.[14] Human development theory is people-centred. Beyond considering a quantitative amount of production and per capita income growth as index of assessing development, human development theory evaluates economic conditions according to the extent to which they promote human well-being, taking development into consideration in a comprehensive and holistic concept.[15] According to this approach, all aspects of the components of sustainable development, such as economic, social, and cultural aspects, are viewed from the vantage point of enabling all people, especially the most vulnerable or the marginalised.[16]

In this context, the following section will examine the relationship of the human rights

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[14] Human rights and human development are accordingly sufficiently interwoven in their sense of dealing with a problem and approaches to solve the problem to be compatible and in harmony. See Office of UN High Commissioner for Human Rights 'Migration and Development: a Human Rights- Approach at 4.
[15] Ibid at 8.
[16] Green & Randolph op cit note 8 at 8.

approach to development with the notion of sustainable development, alongside the evolution of understanding of the concept of development to incorporate modern notions of sustainable development and inclusive development.

2.2 Evolution of the Concept of Development: Sustainable Development and Inclusive Development

The concept of development in the area of international law has evolved in two ways, the emergence of the notion of sustainable development and the rediscovery of the human rights factor in development. Much of this section will focus on the first, while the second will be addressed in the following section.

2.2.1 Birth of the Concept of Sustainable Development and its Evolution

The concept of sustainable development emerged as one of the efforts to integrate the environment and development, which can be traced back to the 1960s when *Silent Spring,* an environmental science book, was published by Rachel Carson and to the 1970s when the United Nations Environment Programme was established. However, the concept was first officially articulated in the 1980s. Sustainable development was proposed by the 1987 Brundtland Report[17] as development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs.'[18]

It is noteworthy that the 1987 Brundtland Report already distinguished development from economic growth[19] and recognised multifaceted dimensions of development. To be more specific, the 1987 Brundtland Report states:

> 'Sustainable development clearly requires economic growth in places where such needs are not being met. Elsewhere, it can be consistent with economic growth, provided the content of growth reflects the broad principles of sustainability and non-exploitation of others. But growth by itself is not enough. High levels of productivity activity and widespread poverty

[17] See note 21 in chapter 1 for the background of accepting the report.
[18] *The 1987 Brundtland Report* para 27.
[19] Darrel Möllendorf 'A Right to Sustainable Development' (2011) 94(3) *The Monist* 433-452 at 434.

can coexist, and can endanger the environment.'[20]

The 1992 Rio Declaration on Environment and Development defined sustainable development as follows:

> 'Principle 3: The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.
> Principle 4: In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.'

At the rudimentary stage, the notion of sustainable development emerged in connection with concerns about the environment and some have since maintained the position of understanding sustainable development in light of only protection of the environment. This rudimentary position is in line with the above-mentioned traditional approach to development, which fails to address a diversity of dimensions of development and the intrinsic human rights factors that the concept of development encompasses. Such shortcomings of the traditional approach can be illustrated in several international instruments and practices. In particular, the term 'development' has been used in conflicting contexts, in relation to the environment. For instance, when the above-mentioned 1992 Rio Declaration states that 'the right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generations,' the term development is understood to refer to only economic growth and therefore to be opposed to protection of the environment. Thus, the Rio Declaration puts special emphasis on consideration of the environment. This perspective is also shown in Judge Trindade's opinion that sustainable development came to be perceived as a link between the right to a healthy environment and the right to development. Although Judge Trindade's emphasis on the importance of the environment and sustainable development would be highly regarded, he still held the traditional view, understanding development in the context of 'economic development.' This view was demonstrated and reaffirmed in the final decision of a famous international tribunal. When the Permanent Court of Arbitration (PCA), in its decision on the *Iron Rhine* case, recognised the duty of a host state to ensure that development does not

[20] *The 1987 Brundtland Report* para 6.

significantly harm the environment as a principle of general international law, the term development still referred to only economic development,[21] although the case made progress in recognising the environment itself as a separate principle. Thus, an author commenting on it conceived of sustainable development as a new type of economic development, albeit radical and opposite to the conventional type of economic development, limited to the use of natural resources.[22]

In 1977 a historic milestone was reached, in the form of the recognition of the right to development by the UN Commission on Human Rights, in a resolution that explicitly incorporated 'the Right to Development as a human right.'[23] Such a move to regard development as a human right has broadened the concept of sustainable development, which was understood only in the context of environmental protection, to be conceived of in the context of human rights. Eventually, the sustainable development approach indeed came to be based on the human development theory, which was noticeable in the early 1990s with the publication of the UN Development Programme's Human Development Reports. However, its appearance dates back to at least before 1986, and it was widely recognised by member states when the UN Declaration on the Right to Development (UNDRTD) was drafted and adopted in 1986.[24] Thus, some authors use the term 'broad-based sustainable development' to replace the traditional, growth-focused notion of development and to instead highlight equitable, participatory, and environmentally sustainable development.[25]

Among the efforts to offer a clear definition or statement on sustainable development in the context of broader human rights, the 2002 Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific [26]

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[21] *Iron Rhine Arbitration (Belgium v Netherlands*) PCA No 2003-2 Award of 24 May 2005.

[22] Mihaela Elvira Gherasim 'The Fundamentals of Sustainable Development' (2012) 4(1) *Contemporary Readings in Law and Social Justice* 446-456 at 448.

[23] Karin Arts & Atabongawung Tamo 'The Right to Development in International Law: New Momentum Thirty Years Down the Line?' (2016) 63 *Neth Int Law Rev* 221-249 at 226.

[24] Green & Randolph op cit note 8 at 7.

[25] James H Weaver, Michael T Rock & Kenneth Kusterer *Achieving Broad-Based Sustainable Development: Governance, Environment, and Growth with Equity* (1997) 1.

[26] This definition is assessed to provide an agreed-upon definition of sustainable development, placing its emphasis on certain aspects (human-centred, and focused on the need to reconcile environmental protection and

provides a useful definition of sustainable development, as follows:

> 'Sustainable development means the process of progressive change in the quality of life of human beings, which places it as the centre and primordial subject of development, by means of economic growth with social equity and the transformation of methods of production and consumption patterns, and which is sustained in the ecological balance and vital support of the region. This process implies respect for regional, national and local ethnic and cultural diversity, and the full participation of people in peaceful coexistence and in harmony with nature, without prejudice to and ensuring the quality of life of future generations.'[27]

As a matter of fact, in the absence of sophisticated efforts, the conceptual categorisation above would lead the international community to deal with the areas of economic, social and environmental development in a fragmented and isolated way and to overlook that these three dimensions can promote each other and achieve sustainable development goals.[28] Conversely, an integrated and holistic approach to socio-economically responsible and environmentally-friendly development, as a multifaceted and dynamic process, would contribute to achieving sustainable development goals.[29] As the UN Secretary General stressed in a recent report, 'the goal of sustainable development is convergence among the three components of economic growth, social development and environmental protection.'[30]

2.2.2 Recent Emergence of the Notion of Inclusive Development

In recent years, not only sustainable development but also inclusive development has caught

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social development with economic development) of the concept of sustainable development that have been recognised by states. See Marie-Clarie Cordonier Segger 'International Law, Criminal Justice, and Sustainable Development' (2013) in Jodoin S & Cordonier Segger M (eds) *Sustainable Development, International Criminal Justice, and Treaty Implementation (Treaty Implementation for Sustainable Development)* at 25.

[27] Article 3(1)(a) of Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coasted Environment of the Northeast Pacific (2002).

[28] See Lisa Warth & Malinka Koparanova 'Empowering Women for Sustainable Development' (2012) 2012(1) UNECE Discussion Paper Series at 6, available at *https://sustainabledevelopment.un.org/content/documents/549ece4.pdf*, accessed on 19 January 2020.

[29] Ibid.

[30] The *Report of the UN Secretary-General on Progress to date and remaining gaps in the implementation of the outcomes of the major summits in the area of sustainable development, as well as an analysis of the themes of the Conference* (A/CONF 216/PC/2 of 1 April 2010) para 22.

the eye of both international economists and international law experts. As the UNDRTD stipulated in its article 1, 'all people are entitled to participate in economic, social, cultural and political development, the participation of all people is critical in terms of development.' The UNDRTD is thus understood to concentrate on the importance of inclusiveness as a concept of participation in a development process as a means as well as a goal, which is in line with the SDGs.[31]

Although the UNDRTD mentions the importance of participation in development, it does not use the term 'inclusive development' and only demonstrates the nature of inclusive development, being 'participation.' Some scholars have tried to clarify inclusive development from the perspective of results that the policy of inclusive development will achieve, rather than from the perspective of participation of all potential beneficiaries, being one of the human rights implicated in the process of development. For instance, according to Cook and Lee, 'inclusiveness does not imply simply targeted interventions; inclusion requires that policies ensure universal access to essential services, non-discrimination as well as consideration of the solidarity and social cohesion effects of universal and appropriate redistributive policies.'[32] Others understand inclusive development as part of human rights. For instance, according to Jacqueline Wood, 'inclusiveness is understood as one of democratic and human rights principles and is an end itself as well as a means to promote participation, to boost innovation and opportunity, and to share the benefits of development.'[33]

There seem to be similarities between the notion of 'inclusive development' and that of 'inclusive growth' as used by the United Nations Development Programme (UNDP) and the Organisation for Economic Cooperation and Development (OECD). First, the UNDP, a leading global body in the area of international development cooperation, explicitly uses the concept of inclusive growth, referring to equity with growth or to broadly shared prosperity resulting

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[31] Arts & Tamo op cit note 23 at 222.
[32] Coo S & Lee D 'E-discussion summary: Sustainable development gains through inclusive development' (2014), available at *https://one.unteamwork.org*, accessed on 19 January 2020.
[33] Jacqueline Wood 'Progress Since Busan on Inclusive Development' (2014) *Discussion Paper for Session 1 of the GPEDC* at 1, available at *https://taskteamcso.files.wordpress.com › 2014/03 › inclusive-development*, accessed on 19 January 2020.

from economic growth[34] by stressing integrated planning for inclusive and sustainable growth.[35] Likewise, the OECD employs a notion of inclusive growth rather than inclusive development on the understanding that inclusive growth is part of economic growth. According to the OECD, 'Inclusive Growth is economic growth that creates opportunity for all segments of the population and distributes the dividends of increased prosperity, both in monetary and non-monetary terms, fairly across society.'[36] This approach is in line with that of the African Development Bank (AfDB). The AfDB mostly 'refers to inclusive growth as economic growth that results in a wider access to sustainable socio-economic opportunities for a broader number of people, regions or countries, while protecting the vulnerable, all being done in an environment of fairness, equal justice and political plurality.'[37]

There is indeed a conceptual difference between the notions of inclusive development and inclusive growth. However, both inclusive development and inclusive growth have common ground, since both focus on participation to solve inequality and achieve poverty eradication. In other words, the core of inclusive development is rooted in the merit of including all stakeholders 'in the development process as planners, implementers and beneficiaries, through a whole-of-society approach.'[38] Likewise, in the case of inclusive growth, the concern with the process of growth is based on the understanding that in addition to sharing the benefits of growth, people must actively participate in the growth process and accordingly, inclusive growth can be conceived of 'as entailing the expansion of opportunities for participation, which can include both engagement in productive economic activities and having a say in the orientation of the growth process.'[39] Thus, the concept of inclusive development is often used interchangeably with related concepts such as inclusive growth.[40] For instance, the European

[34] The *UNDP's Strategy for Inclusive and Sustainable Growth* (2017) 4, available at *www.undp.org › content › dam › undp › library › UN...*, accessed on 3 July 2020.
[35] Ibid 3.
[36] The *OECD Policy Brief on Opportunities for all: OECD Framework for Policy Action on Inclusive Growth* (May 2018) 2.
[37] Benedict S Kanu, Adeleke Oluwole Salami & Kazuhiro Numasawa *Inclusive Growth An imperative for African Agriculture (*2014) 4.
[38] Ibid.
[39] Rafael Ranieri & Raquel Almeida Ramos 'After All, What is Inclusive Growth?' (2013) 188 *International Policy Centre for Inclusive Growth One Paper*.
[40] Shanina van Gent 'Beyond buzzwords: What is Inclusive Development?' (2017*) INCLUDE Synthesis report* at 2, available at *includeplatform.net › uploads › 2017/09 › Beyond-buzzwords*, accessed on 21 March 2020.

Union (EU) has several policy frameworks in which inclusive growth and inclusive development are used interchangeably.[41]

In a nutshell, overall adoption of inclusive development in the international debate on development is becoming a key focus of alternative approaches to development that include the voices of the vulnerable or marginalised.[42] Inclusive development has gained widespread currency as a recent dimension of development[43] and has been understood to refer to including all stakeholders in particular, those who are excluded from policy-making in the process of development and benefit-sharing of the outcomes of development. In other words, inclusive development places special emphasis on the vulnerable or marginalised by taking into account economic, social and environmental dimensions and structural factors that hinder the vulnerable or marginalised from participating in the development process.[44]

2.2.3 Relationship between Sustainable Development and Inclusive Development

In a strict sense, the concept of sustainable development is more strongly related to the areas of application of the right to development such as environment, health, education, water and labour, as well as more strongly focused on future generations in the course of development. On the other hand, the concept of inclusive development is rather centred on people, especially the specific group of people in the present generation, as subjects of the right to development, as well as on the process through which the right to development is realised.

Marginalised or vulnerable groups are easily excluded from the process of development and have little chance of enjoying the right to development. The 1996 Santa Cruz Summit on Sustainable Development and the subsequent Inter-American Council for Development in 2000 clarified the importance of participation for the right to development by giving the following useful definition of participation:

> 'A process by which the government and civil society open dialogue, establish partnerships,

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[41] Ibid at 16.
[42] Ibid at 17.
[43] Ibid at 8.
[44] Ibid.

share information and otherwise interact to design, implement and evaluate development policies, project and programs … that requires the involvement and commitment of all interested parties, including, among others, the poor and traditionally marginalised groups, especially racial and ethnic minorities.'

Notwithstanding such a fine distinction between sustainable development and inclusive development, the concept of sustainable development has in recent years been extended to entail the core components of inclusive development. The notions of sustainable development and inclusive development have been converging into a *de facto* single notion. Thus, this conceptualisation is reflected in the report of the Human Rights Council, which states that social sustainability touches on issues of social equity and acceptance and that a participatory process will greatly contribute to sustainability.[45] Another illustration is the Cariforum-EU Economic Partnership Agreement (Cariforum-EU EPA). Article 3 of the Cariforum-EU EPA states, under the title of sustainable development, that 'the application of this Agreement shall fully take into account the human, cultural, economic, social, health and environmental best interests of their population and of future generation.' The wording 'their population' in this provision can be understood to refer to inclusive development, while 'future generation' refers to sustainable development. Further, Jacqueline Wood's contribution to the conceptualisation of inclusive development is to interconnect the concept of inclusive development to human rights. It can be argued that a human rights-based approach to development regards the realisation of human rights as both a goal of and a means to inclusive development, which contributes to dealing with the underlying causes of poverty and marginalisation.[46] This 'human rights-based approach' 'identifies rights holders and their entitlements and corresponding duty-bearers and their obligations and works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations.'[47]

This approach can serve the purpose of this thesis to explain the necessity to establish legal

[45] Catarina de Albuquerque 'Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation' (2009) para 68, available at *https://digitallibrary.un.org/record/662236?ln=en*, accessed on 3 July 2020.
[46] Wood op cit note 33 at 4.
[47] Ibid.

right-obligation relations, to recognise the rights of marginalised people in the process of development and to underline the obligations of duty-bearers, including multinational companies, in addressing the intersections between the three clusters of international law.

2.2.4 Status of Sustainable Development under International Development Law

When it comes to the relations between the notion of sustainable development and the afore-mentioned human development theory in the context of international development law, the human development theory can be construed as a 'sustainable development-based approach' to the notion of development. The sustainable development-based approach to development has the same characteristics as the human development theory.

Given that the sustainable development-based approach refers to an emerging corpus of international legal norms and instruments that involve the intersections between international economic, environmental and social law and their interplay with international human rights law, for the development of the present and future generations,[48] the term 'international development law' may often be replaced by the term 'sustainable development law'.

Moreover, this approach entails all members of society including the vulnerable or marginalised.[49] It stresses that people are not only the beneficiaries of development; they can play a crucial role as prime drivers in the process of development.[50] Enhancing people's capabilities is both the end goal of development and the means of empowering people to participate effectively in directing every facet of the development project.[51]

This approach also focuses on claims and thus obligations and mechanisms that can promote respect for rights and adjudicate their violation.[52] A sustainable human rights focus means that one views those who are entitled to enjoy rights as rights holders, not simply beneficiaries of

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48 CISDL Concept Paper 'What is Sustainable Development Law?' (2005), available at *https://cisdl.org/public/docs/What%20is%20Sustainable%20Development.pdf*, accessed on 17 February 2020.
49 Ibid.
50 Ibid.
51 Ibid.
52 Ibid.

or participants in development.[53] Serving as a conceptual bridge to connect the right to social and economic development and the need to protect the environment,[54] the notion of sustainable development accompanies both rights and responsibilities and, most importantly, indicates that future generations have rights too.[55]

First and foremost, according to this approach, the boundaries between development, human rights and sustainability disappear and all of them become conceptually and operationally inseparable parts of the same processes of achieving sustainable development.[56] Consequently, the sustainable development-based approach to development can be translated into 'the human right to sustainable development' in more sophisticated terms, taking into consideration the various aspects of human rights, as will be examined in detail in sections 2.4 and 2.5.

In essence, one should recognise that, regardless of the different terms used to incorporate the notion of development into international law, international development law lies at the heart of the interests of the entire international law community and is necessitated by the growing interdependence of states in international relations.[57] On the other hand, one cannot deny that sustainable development, inclusive development and the right to development can and should be explored in a single or interchangeable concept to avoid any confusion arising from the usage of different terms. Thus, this thesis suggests that the concept of development is extended to incorporate sustainable development and inclusive development as part of international development law in order to avoid any confusion that development can refer to only economic growth or be understood in the context of the right to property. The concepts of sustainable development and inclusive development are mutually complementary, as key parts of the right to development under international development law.

2.3 Acceptance of the Right to Development under International Human Rights Law

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[53] Peter Uvin *Human Rights and Development* (2004) 129.
[54] Marie-Claire Cordonier Segger & C G Weeramantry 'Introduction to Sustainable Justice: Implementing International Sustainable Development' (2005) in Marie-Claire Cordonier Segger & C G Weeramantry(eds) *Sustainable Justice: Reconciling Economic, Social and Environmental Law* at 3.
[55] Edith Brown Weiss 'In Fairness to Future Generations' (1989) 8(1) *American University International Law Review* 19-26 at 20.
[56] Uvin op cit note 53 122.
[57] Kwakwa op cit note 2 at 432.

Historically, development and human rights have been understood to exist in parallel.[58] Only with the promulgation of the Universal Declaration of Human Rights of 1948 and the recent reconstruction of human rights, has development entered a new phase of the human rights approach.[59] Thus, one cannot deny that there are crucial relationships between development and human rights.[60] Consequently, the proper attempt of the international community to link development and human rights clearly lies at the centre of the appeal of the notion of the right to development.[61]

As a matter of conception, as the discussion of the right to development is quite closely related to that of human rights, some authors use the term 'human right to development'.[62] Accordingly, it is not surprising that the UN has dealt with the right to development within the structure of human rights. As is well known, in Article 1 of the UNDRTD, the right to development and the human right to development are used interchangeably. Furthermore, combined with an increased awareness of sustainable development in the international development law regime, as shown in the previous section, the reconsideration of the right to development attracted attention, in particular, when the UN Human Rights Council decided to appoint a Special Rapporteur on the Right to Development in 2016 in order to promote, protect and fulfil the right to development in the context of the coherent and integrated implementation of the 2030 Agenda for Sustainable Development.[63] The Special Rapporteur is supposed to 'submit proposals aimed at strengthening the revitalized partnership for sustainable development from the perspective of the right to development.'[64]

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58 Uvin op cit note 53 47.

59 Flavia Piovesan & Melina Girardi Fachin 'Gender Equality, the Right to Development, and the 2030 Agenda for Sustainable Development' (2018) *E-Learning Module on Operationalizing the Right to Development in Implementing the Sustainable Development Goals* provided by OHCHR, UPEACE & UNU-IIGH, available at *https://www.ohchr.org/Documents/Issues/Development/SR/AddisAbaba/Rtd_GenderEquality_2030Agenda.pdf*, accessed on 21 March 2020.

60 Jack Donnelly 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1985) 15 *California Western Int'l Law Journal* 473-509 at 477.

61 Ibid.

62 Ibid.

63 UN Human Rights Council *Resolution on the Right to Development* (2016) *UN Doc A/HRC/33/L 29* para 14.

64 Ibid para 14(c).

In essence, sustainable development was mostly discussed in the area of environment and the right to development in the area of development, but they have been closely reconciled and have gradually been addressed together.[65]

2.3.1 Scholarly Elaboration on the Right to Development

Most Western scholars[66] were reluctant to acknowledge the right to development as a real right, internationally or domestically. Rather, they tended to stick to a pure economic orthodox understanding of development as being separate from and irrelevant to human rights. It has been observed that Western countries challenge the very existence of the right to development based on reasons such as its relation to the controversial economic social and cultural rights, its conceptual confusion and the conflict of jurisdiction it may bring about with trade, investment, human rights and other international law issues.[67] On the extreme side of the debate on the right to development, one criticism against the right to development is based on its non-justiciable nature.[68] For instance, Jack Donnelly criticises the existence of the right to development *per se*:

> 'The Right to Development is not merely a delusion of well-meaning optimists, but a dangerous delusion that feeds off of, distorts and is likely to detract from the urgent need to bring together the struggle for human rights and development.'[69]

Some milder critics of the right to development dismiss its legality because it is allegedly a 'right to everything,' the 'sum of all human rights' or an amalgamation of all the existing

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[65] Thus, even though the term the right to development is used as title in this section, this thesis will examine the way in which the international community accepts the right to development or sustainable development under international human rights law.

[66] Rosalyn Higgins said that 'the real difference is that in large part the State's duties in respect of civil and political rights are covered in terms of abstention from prohibited conduct, whereas the provisions of economic and social rights usually require specific action by the state and formidable problems remain about classifying it (the Right to Development) as a human right.' See Rosalyn Higgins *Problems and Process* (1994) 103. Malcolm N Shaw also concluded that 'while the general issue of development is clearly on the international agenda in the context of economic issues and broad human rights concerns it is premature to talk in terms of a legal right in international law of groups or peoples or states to development.' See Malcolm N Shaw *International Law* (2008) 302.

[67] Stephen Marks 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 *Harvard Human Rights Journal* 137-168 at 143.

[68] Donnelly op cit note 60 at 478.

[69] Ibid at 479.

individual human rights. They argue that the right does not add anything new and substantial to human rights law because all it does is to combine existing individual human rights.[70] More concretely, according to this view, if there is a right to development, it adds nothing to the collection of civil and political ('first generation') rights and the economic, social, and cultural ('second generation') rights that are enshrined, respectively, in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[71]

However, since Keba M'Baye first introduced the right to development,[72] most scholars in favour of recognising the right to development have agreed that, after the Vienna Conference on Human Rights of 1993 and several other international conferences and summits, the right to development has acquired the international status of a human right. Arjun K Sengupta is one of the leading scholars in line with this position; he argues that the right to development is now recognised as a human right like other internationally accepted human rights.[73] He has indicated that the debates in relation to whether the right to development is recognised as a human right have already been resolved and the focus has shifted to how to implement the right to development and to set up mechanisms to realise it in the context of international human rights. Mohammed Bedjaoui, a former judge of the International Court of Justice (ICJ), claims that the right to development is 'the alpha and omega of human rights, the first and last human right, the beginning and the end, the means and the goal of human rights.'[74]

Extreme proponents of the right to development argue that 'separate legal norms which are already in existence in international law actually coalesce and reinforce one another to form a super-norm which is the Right to Development.'[75] To them, the right to development is 'so

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[70] Noel G Villaroman 'The Right to Development: Exploring the Legal Basis of a Supernorm' (2010) *22 Fla J Int'l L 299* at 302.
[71] Nico Schrijver 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status (Volume 329)' (2007) *Collected Courses of the Hague Academy of International Law* at 289.
[72] Jaakko Kuosmanen 'Eyes on the Unicorn: On the Nature of the Human Right to Development' (2013) *JWI Working Paper* No 2013/05 at 3.
[73] Arjun K Sengupta 'Preface' (2008) in Marks Stephen P (eds) *Implementing the Right to Development The Role of International Law* at 8.
[74] Juss op cit note 5 281.
[75] Villaroman op cit note 70 at 304.

fundamental, so inviolable, and so broadly accepted, it may even be properly considered a *jus cogens* norm.'[76]

A significant number of scholars currently recognise the right to development as a human right. Even some international trade experts, who are mostly inclined to support protection of foreign investor's rights, have admitted the significance of the right to development, given that the Doha Development Agenda in the World Trade Organisation (WTO) has started taking into consideration the importance of development in the context of trade. According to them, 'the UN has proclaimed the existence of a human right to development and this right refers not only to economic growth but also to human welfare, including health, education, employment, social security, and a wide range of other human needs.'[77] Leading groups of international law experts also recognise the right to development. For instance, the 1986 International Law Association Seoul Declaration confirmed the existence of the human right to development together with corresponding duties and responsibilities. The Seoul Declaration and subsequent declarations by the international law expert community repeatedly recognised the right to development. A leading example is the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development which noted that 'sustainable development is now widely accepted as a global objective and that the concept has been amply recognised in various international and national legal instruments, including treaty law and jurisprudence at international and national levels.'[78]

The unavoidable conclusion from the debate among international lawyers is that 'there is a profound interconnection between development and human rights in the context of international development law and international human rights law alike.'[79]

2.3.2 International Instruments

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[76] Benjamin Manchak 'Comprehensive Economic Sanctions, the Right to Development, and Constitutionally Impermissible Violations of International Law' (2010) *30 B C Third World L J* 417-51 at 428.
[77] Mitsuno Matsushita, Thomas J Schoenbaum & Petros C Mavroidis *The World Trade Organisation* (2003) 389.
[78] The Preamble of the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development (2002).
[79] Isabella D Bunn 'The Right to Development: Implications for International Economic Law' (2000) 15(6) *American University International Law Review* 1425-67 at 1444.

In this section two important types of international instruments will be examined. One is international agreements, traditionally well-recognised sources of international law (hard law), while the other, which is gaining more ground in modern international law as a new source of international law (soft law),[80] is declarations or resolutions in major international conferences or bodies.

(a) Treaties or international agreements

Even if the main argument of opponents of the right to development is that there are few global pacts to deal with this right to development, one can recognise the right to development from certain examples of global and bilateral agreements below, and more importantly, through interpretation of treaties. It is argued that sustainable development has, in various forms, been enshrined as an explicit objective in many binding international agreements or treaties.[81] Likewise, it has been argued that a number of international agreements already contain explicit or implicit references to the key dimensions of the right to development.[82] As a principal source of international obligation between the contracting parties, treaties and international agreements, bilateral or multilateral, regard sustainable development as constituting an important element of international treaty law.[83]

At the global level, while there are few international agreements explicitly mentioning the right

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[80] Even though it is argued that any effort to find the 'source' from which the right to development emanates must be consistent with Article 38(1) of the Statute, it is controversial whether the enumeration of sources of international law in Article 38 was exhaustive and the term 'soft law', referring to certain norms whose underlying basis lies outside the category of 'sources' of international law as stipulated in the ICJ Statute, can be used to strengthen the existence of sources of the Statute. Also, it is obviously inappropriate to maintain rigid categorisation of the sources of international law. See Villaroman op cit note 70 at 19.

[81] See Markus Gehring & Andrew Newcombe 'An Introduction to Sustainable Development in World Investment Law' in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe (eds) *Sustainable Development in World Investment Law* (2011) 3-12 at 5.

[82] See Nico Schrijver 'Many roads lead to Rome. How to arrive at a legally binding instrument on the right to development?' (2008) in Stephen P Marks(eds) *Implementing the Right to Development* 128.

[83] See Christina Voigt *Sustainable Development as a Principle of International Law* (2009) 146. In the same vein, a CISDL Concept Paper with a variety survey of studies concluded that 'in international treaty law, sustainable development is an agreed objective of many international trade treaties, both at the global and regional levels. As such, sustainable development can be considered part of the 'object and purpose' of a growing number of treaties, and therefore directly relevant in the interpretation of their provisions.' See CISDL Concept op cit note 48.

to development, the notion ‘sustainable development’ can be found in more than 100 multilateral international agreements, 30 of which involve universal participation.[84] At the regional level, the right to development *per se* has gained legal ground in some regional and inter-regional international instruments. The African region clearly recognises the right to development as a legal right, playing an important role in establishing justifiability of the right to development. The African Charter on Human and Peoples' Rights mentions the right to development[85] and obliges states to ensure the exercise of the right to development.[86] The Arab Charter also recognised the right to development as a legal right in a clear way by stating ‘the right to development is a fundamental human right.’[87] The right to development is also recognised under its own separate title in the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration.[88]

At the bilateral level, there are numerous examples of BITs that have provisions related to sustainable development, even though it is still controversial whether those provisions can be interpreted to recognise the right to development. Since this topic will be covered in more detail in chapter 3, only some examples will be provided here. The International Institute for Sustainable Development (IISD) Model BIT demonstrates such an effort by including ‘Investment for Sustainable Development’ in its title. Article 1 of the IISD Model BIT states that the objective is to be the promotion of foreign investment that supports sustainable development.[89] At the inter-regional level, the importance of sustainable development is found

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84 See Virginie Barral ‘Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm’ (2012) 23(2) *EJIL* 377-400 at 384. An example of global multilateral international agreements which deal with the interplay between investment and sustainable development is the Energy Charter Treaty (ECT). The ECT is understood to be based on complementarities and mutual benefits, as well as on the principles of sustainable development and sovereignty over energy resources. See Gazzini Tarcisio *Interpretation of International Investment Treaties* (2016) 29.

85 Article 22.1. ‘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. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.’

86 Article 22.2: ‘States shall have the duty, individually or collectively, to ensure the exercise the right to development.’

87 Article 37.

88 Article 35, whereby ‘the right to development is an inalienable human right by virtue of which every human person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development.’

89 The most noticeable agreement is the EU-Canada CETA. This agreement stressed the importance of sustainable development in relation to international trade by stating that ‘the Parties reaffirm their commitment to promote sustainable development and the development of international trade in such a way as to contribute to

in international agreements such as the Lomé Convention and the Cotonou Partnership Agreement that have laid the foundation for development cooperation relations between the ACP Group, consisting of 79 states in Africa, the Caribbean and the Pacific and the EU.[90] More interestingly, in May 2020 the EU made a very progressive proposal for the modernisation of the Energy Charter Treaty, in which the EU articulates the importance of sustainable development as objective, the basic concept of sustainable development[91] and states' right to determine their sustainable development policy and regulate the level of domestic environmental protection in the context of sustainable development.[92]

From the foregoing, it is clear that great importance is attached to sustainable development as reflected in divergent research into treaties and international agreements. Today, the notion of the right to development and its components, or the notion of sustainable development, is found

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sustainable development in its economic, social and environmental dimensions for the welfare of present and future generations.' This agreement makes it clear that trade should promote sustainable development. See Article 22.3.1.

[90] Arts & Tamo op cit note 23 at 227. While the Lomé Convention and Cotonou Partnership Agreement did not directly mention the right to development, their approach, contents and basic general principles certainly came a long way in operationalising the right to development in a comprehensive manner by understanding 'development' as an objective and process to be pursued, with economic, social, cultural, political and possibly other relevant dimension.

[91] EU text proposal for the modernisation of the Energy Charter Treat
'[New article/placement to be decided] Sustainable development - Context and objectives
(1) The Contracting Parties recall the Rio Declaration and Agenda 21 on Environment and Development of 1992, the ILO Declaration on Fundamental Principles and Rights at Work of 1998, the Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work of 2006, the ILO Declaration on Social Justice for a Fair Globalisation of 2008, the UN 2030 Agenda for Sustainable Development of 2015 with its Sustainable Development Goals.
(2) The Contracting Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development. The Contracting Parties affirm their commitment to promote the development of international trade and investment in energy-related sectors in such a way as to contribute to the objective of sustainable development.'

[92] EU text proposal for the modernisation of the Energy Charter Treat
'[New article/placement to be decided] Sustainable development - Right to regulate and levels of protection
(1) The Contracting Parties recognise the right of each Contracting Party to determine its sustainable development policies and priorities, to establish the levels of domestic environmental and labour protection it deems appropriate, and to adopt or modify its relevant laws and policies. Such levels, laws and policies shall be consistent with each Contracting Party's commitment to the internationally recognised agreements and standards referred to in Article X.3.
(2) Each Contracting Party shall strive to ensure that its relevant laws and policies provide for and encourage high levels of environmental and labour protection, and shall strive to improve such levels, laws and policies.
(3) The Contracting Parties shall not encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law and standards as well as in their labour law and standards.
(4) A Contracting Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental or labour law or, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental and labour laws in order to encourage trade or investment.'

in international instruments entailing a variety of issue-areas and is firmly embedded in treaty practice.[93]

(b) Declarations and resolutions adopted by the international community

It marks significant progress toward to the evolution of the concept of development that the UNDRTD acknowledges that '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.'[94] Judge Weeramantry, in his separate opinion in *the Gabčikovo-Nagymaros Project* case[95] of the ICJ, highlighted that the UNDRTD had the overwhelming support of the international community. It has been gathering strength since then. The UNDRTD has five prominent characteristics in terms of definition, purpose, obligations on states and scope. First, since development in the Declaration is defined in comprehensive and participatory terms, one can include factors of sustainability and inclusiveness in the concept of development. Second, in terms of the objective of the right to development the Declaration makes it clear that its ultimate purpose is to alleviate poverty. Thirdly, more important in this analysis, the Declaration imposes both internal and external obligations on states. Fourthly, the Declaration incorporates various aspects of both international human rights and international development theory and practice ranging from the national to the international dimension.[96] Fifthly, since its inception, the right to development has been more clearly articulated by the individual and specific international human rights instruments that recognise it. For instance, the right to development explicitly constitutes part of indigenous peoples' human rights.[97] In a nutshell, the UNDRTD, as 'the first international instrument to express the individual as well as collective right to development at a global level,' 'provides one of the few structured approaches to addressing development issues in a rights-based manner.'[98] As a result of this, the evolution of the right to development in human rights

[93] Schrijver op cit note 71 at 289.
[94] Article 1 of the Declaration on the Right to Development.
[95] *The Gabčikovo-Nagymaros Project (Hungary v Slovakia)* Judgment of 25 September 1997, Separate Opinion of Vice-president Weeramantry at 92.
[96] Green & Randolph op cit note 8 at 4.
[97] According to Article 23 of UN Declaration on the Rights of Indigenous Peoples, 'Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development.'
[98] Arts & Tamo op cit note 23 at 222.

law has been mirrored by positing its growing centrality in international development law.

It is interesting that many scholars did not pay attention to the fact that the international community already recognised some key factors comprising the right to development before the UNDRTD in 1986. However, the UN Charter of Economic Rights and Duties of States adopted by the UN General Assembly in 1974[99] stressed the importance of participation of people in the process of development as follows:

> 'To this end, each State has the right and the responsibility to choose its means and goals of development, fully to mobilize and use its resources, to implement progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development.'[100]

It is noticeable that the 1992 Rio Declaration unanimously accepted the right to development. It understood the right to development to be closely related to environmental needs of present and future generations, and stressed that environmental protection should be considered in an integrated rather than an isolated way since it 'shall constitute an integral part of the development process.'[101] Since the 1992 Rio Declaration, there has been significant progress with articulating the components of sustainable development. The Programme for the Further Implementation of Agenda 21 adopted in the UN General Assembly in 1997 affirmed the third component of sustainable development, that is, social development, and such rebalancing of the notion was generalised at the Johannesburg Summit for Sustainable Development in 2002.[102]

Most importantly, international support for the right to development is evident in the enunciation of the 2000 Millennium Declaration and the recent 2030 Agenda for Sustainable Development. In particular, the 2000 Millennium Development Goals (MDGs) adopted by the UN General Assembly is understood to have pledged the realisation of the right to development

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99 The General Assembly adopted resolution 3281 (XXIX) containing the Charter of Economic Rights and Duties of States on 12 December 1974, by 115 votes to 6, with 10 abstentions.
100 Article 7 of the UN Charter of Economic Rights and Duties of States.
101 Principle 4 of the Rio Declaration.
102 Barral op cit note 84 at 379.

by explicitly mentioning it.[103] In paragraph 11 of the MDGs, the international community expressed its commitment 'to making the Right to Development a reality for everyone and to freeing the entire human race from want.' Also, the recently adopted 2030 Agenda for Sustainable Development underlines essential elements of the right to development.[104] The 2030 Agenda is understood to 'point to development that is sustainable, equitable for all, environmentally sound, and grounded in human rights.'[105] It is thus convincingly argued that the right to development runs as a clear normative thread across the entire framework of the 2030 Agenda.[106] A large body of scholarly review has recently been devoted to ensuring that development goals, such as the MDGs and the SDGs, are effectively implemented and legitimately achieved with full respect to human rights, and to 'using human rights obligations and techniques as concrete legal tools by which to advance the achievement of the goals.'[107]

It is obvious that over time the right to development has become firmly embedded in international human rights law through several resolutions and declarations, especially since its unanimous inclusion in the Rio Declaration of 1992, as well as in the 1993 Vienna Declaration and Programme of Action,[108] the 2001 Durban Declaration and Programme of

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[103] Arts & Tamo op cit note 23 at 228.

[104] Ibid.

[105] Zeid Ra'ad Al Hussein (United Nations High Commissioner for Human Rights) 'Opening Statement' (2015) available at *https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16414*, accessed on 3 July 2020.

[106] There are two more important international instruments. First, the 1993 Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights with representatives of 171 states present contained more than ten references to the right to development and/or the UNDRTD. For instance, the Vienna Declaration 'reaffirms the right to development, as established in the UNDRTD, as a universal and inalienable right and an integral part of fundamental human rights,' and underlines the interconnection of the right to development with sustainable devolvement by stating that 'the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.' Secondly, the 2001 Durban Declaration and Programme of Action reaffirmed the right to development as a universal and inalienable human right. The Durban Declaration stresses the importance 'to make the right to development a reality for everyone' and affirms 'the solemn commitment of all states to promote universal respect for, and observance and protection of, all human rights, economic, social, cultural, civil and political, including the right to development, as a fundamental factor in the prevention and elimination of racism, racial discrimination, xenophobia and related intolerance.'

[107] Christophe Golay, Irene Biglino & Ivona Truscan 'the Contribution of the UN Special Procedures to the Human Rights and Development Dialogue' (2012) 9 (17) *SUR - International Journal On Human Rights* at 18.

[108] Mihir Kanade 'The Right to Development and the 2030 Agenda for Sustainable Development' (2018) *E-Learning Module on Operationalizing the Right to Development in Implementing the Sustainable Development Goals* available at *https://www.ohchr.org/EN/Issues/Development/SRDevelopment/Pages/RegionalConsultationBangkok.aspx*, accessed on 18 March 2020.

Action and the recent 2030 Agenda. Emerging from such declarations, the consolidated status of the right to development in international law will help to resolve conflicts brought before international tribunals and support the balanced incorporation of law and policies at the intersection of international development law, international human rights law and international investment law.

2.3.3 Individual States' Practice and Expressed Positions and their Domestic Laws

From a comparative perspective, individual states' practice and their domestic laws would be useful as a supplementary source in understanding the legal basis of the concept of the right to development. In spite of limited sources to look into individual states' practice and domestic law, it is found that many states, irrespective of whether they are developed or developing, recognise the right to development through their constitutions or decisions of their domestic courts or their official remarks in various international meetings. This finding can also play an auxiliary role in reviewing the status of the right to development, which can be understood to be *opinio juris* comprising customary international law.

According to a study by Dinah Shelton, 'more than 100 constitutions throughout the world guarantee the right to a clean and healthy environment, impose a duty on the state to prevent environmental harm, or mention the protection of the environment or natural resources.'[109] 'Over half of these constitutions explicitly recognise the right to a clean and healthy environment, including nearly all constitutions adopted since 1992.'[110] In terms of the official

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[109] Dinah Shelton 'Human Rights, Health & Environmental Protection: Linkages in Law & Practice' (2002) *WHO Health and Human Rights Working Paper Series No 1* available at *https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf*, accessed on 22 August 2020.

[110] Ibid. For instance, Ethiopia included the right to development in its national constitution, which provides that the people of Ethiopian as a whole, and each nation, nationality and people in Ethiopia in particular have the right to improved living standards and to sustainable development; Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), Art 43. Like Ethiopia, other African states followed the trend of recognising the right to development as a constitutional right. S 30 of the Malawi Constitution 1994 provides: '(1) 1. All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right. (2) The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure. (3) The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities. (4) The State has a responsibility to respect the right to development and to justify its policies in accordance with this

positions that individual states take in international meetings, when the right to development was adopted in a 1986 General Assembly Declaration, 146 states were in favour, one state (the United States of America - USA)[111] was against and there were eight abstentions. In the case of Africa, it is obvious that the African Union (AU) fully recognises the right to development, given that the right to development was already proclaimed by the Organisation of African Unity (OAU, predecessor of the AU) and included in 1981 in the African Charter on Human and Peoples' Rights before the 1986 UNDRTD. In the case of Western states, mostly from Europe, it has been known that they are reluctant to recognise the Right to Development. However, the EU is understood to recognise the concept of the right to development in effect. According to the statement of the EU presidency before the UN General Assembly in 2005, the EU remains firmly committed to the realisation of the right to development.[112] Most significantly, the external agreements that the EU has recently concluded refer to human rights

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responsibility.' The Constitution of the Republic of Cameroon, 1996 Preamble provides: 'We, the people of Cameroon, Resolved to harness our natural resources in order to ensure the well-being of every citizen without discrimination, by raising living standards, proclaim our right to development as well as our determination to devote all our efforts to that end and declare our readiness to co-operate with all States desirous of participating in this national endeavour with due respect for our sovereignty and the independence of the Cameroonian State.' The Constitution of the Republic of Uganda 1995, Articles IX and X provide: 'IX. The Right to Development. In order to facilitate rapid and equitable development, the State shall encourage private initiative and self-reliance. X. Role of The People in Development The State shall take all necessary steps to involve the people in the formulation and implementation of development plans and programmes which affect them.'
In the case of Western states, sustainable development is enshrined in Switzerland's Federal Constitution, whereby Article 2 (Object) declares sustainable development to be a national objective and Article 73 (Sustainability) calls upon the Confederation and the cantons to strive for 'a balanced relationship between nature and its ability to renew itself, on the one hand, and the demands placed by the human race, on the other. See the Government of Switzerland, *Swiss Position on a Framework for Sustainable Development Post-2015* (2014) 7, available at *https://www.eda.admin.ch/agenda2030/en/home/documentation/post-2015-agenda.html*, accessed on 28 March 2020.

[111] Among those developed states that supported the Declaration were Australia, Canada, France, the Netherlands and New Zealand. The USA is of the view that development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. However, the USA, in its Explanation of Vote to the Right to Development Resolution in the UN Human Rights Council demonstrated its reserved position to recognise the legal character of the Right to Development by stressing that it is not appropriate for this resolution to suggest explicitly the possibility that any criteria related to the Right to Development would evolve into a basis for consideration of an international legal document of a binding nature. The USA representative also remarked that the USA was not prepared to join consensus on the possibility of negotiating a binding international agreement on the Right to Development, calling a vote on the resolution instead of reaching consensus and abstained, EOV by the United States of America Right to Development Resolution UN Human Rights Council – 15th Session Geneva of 1 October 2010 available at *https://www.state.gov/documents/organisation/179240 pdf*, accessed on 20 January 2020.

[112] Jean-Marc Hoscheit 'Statement on behalf of the EU' at the informal thematic consultations of the General Assembly of the UN (2005) para 49, available at *eu2005.lu/en/actualities/discours/2005/04/27uncluster1/index.html*, accessed on 7 April 2020.

as essential elements. According to EU documents, 'since 1995 the EU has implemented a policy of systematically inserting an essential elements clause into all political agreements such as association agreements, partnership agreements and cooperation agreements with third countries.'[113] The essential elements clause is understood to constitute the basis of those agreements and to be an attempt to reconcile political purposes such as respect for human rights and democratic principles with economic purposes.

More interestingly, domestic courts of some states in the third world have clearly recognised the right to development. For instance, the South African Constitutional Court stressed the importance of sustainable development and the inexorable linkage between the environment and development in its recent decision in the *Fuel Retailers* case.[114] The Constitutional Court decided that 'the decision of the environmental authorities is flawed and falls to be set aside as they misconstrued the obligations imposed on them' and 'in all the circumstances, the decision by the environmental authorities to grant authorisation for the construction of the filling station cannot stand and falls to be reviewed.'[115] This case is significant in that 'the Court thoroughly interrogated the concept's history and status of Sustainable Development in international law and concluded that it is now an established concept in international law,'[116] at the global level, beyond simply referring to the provision of sustainable development in the national constitution.

2.3.4 Jurisprudence of Judicial and Quasi-judicial International Bodies

There is an emerging tendency to invoke the right to development or sustainable development

[113] The essential elements clause 'exists in agreements with over 130 countries.' See EU 'Non paper Using EU Trade Policy to promote fundamental human rights Current policies and practices' (2012) at 3, available at *http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149064.pdf*, accessed on 9 April 2016.

[114] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC) para 57. 'As in international law, the concept of sustainable development has a significant role to play in the resolution of environmentally related disputes in our law. It offers an important principle for the resolution of tensions between the need to protect the environment on the one hand, and the need for socio-economic development on the other hand. In this sense, the concept of sustainable development provides a framework for reconciling socio-economic development and environmental protection.'

[115] Ibid para 105.

[116] Loretta Feris 'Sustainable development in practice: Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province' (2008) 1(1) *Constitutional Court Review* 235 – 253 at 244.

considerations in international disputes before international and regional bodies.[117]

(a) International bodies

This section will examine leading cases before two international courts or tribunals, namely the ICJ and the WTO. Both institutions are very significant for the purpose of this study to show how the concept of sustainable development, which developed in international human rights, has been relevant in a general international law court, the ICJ, and in an extremely isolated international trade tribunal such as the WTO. One leading case before an arbitral court will also been explored.

The *Gabčikovo-Nagymaros Project* case[118] before the ICJ is well known to be a landmark case in relation to sustainable development.[119] This case is very important in terms of sustainable development. First, sustainable development received its first attention in the ICJ. Secondly, the ICJ acknowledged sustainable development as a concept that needs to be considered relevant as a newly developed norm of environmental law for the implementation of the Treaty. Thus, the ICJ regarded 'sustainable development as part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.'[120] Thirdly, in his separate opinion, Vice-president Judge Weeramantry recognised the existence of the right to health, the right to life and the protection of the environment as 'a vital part of contemporary human rights,' all of which are regarded as ingredients of the right to development.[121] Finally, Judge Weeramantry also stated that

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117 Emilie Folkesson studied how international human rights courts interpret sustainable development and reiterated the argument of Lowe that 'judges can hence operationalise sustainable development even if there is no unanimity among states on the exact meaning or legal status of the concept.' See Emilie Folkesson 'Human Rights Courts Interpreting Sustainable Development: Balancing Individual Rights and the Collective Interest' (2013) 2 *Erasmus Law Review* at 144.

118 *The Gabčikovo-Nagymaros Project (Hungary v Slovakia)* Judgment of 25 September 1997.

119 This case 'arose out of the signature, on 16 September 1977, by Hungary and Czechoslovakia, of a treaty "concerning the construction and operation of the Gabčikovo-Nagymaros System of Locks" (the 1977 Treaty). It provides for the construction and operation of a system of locks by the parties as a joint investment.' The problem was caused by the decision of the Hungarian government to suspend the construction works at Nagymaros on May 1989 and finally to abandon the works on October 1989 owing to environmental and ecological concerns. Ibid paras 15 and 33.

120 *Gabčikovo-Nagymaros* supra note 118 para 95.

121 *Gabčikovo-Nagymaros* supra note 95 at 91.

‘sustainable development was a legal principle which had an *erga omnes* character.’[122]

Another well-known ICJ decision is the *Pulp Mill on the River Uruguay* case,[123] where the Court underlined that the case highlighted the importance of ensuring environmental protection of shared natural resources while allowing for sustainable economic development.[124] The Court also decided that a balance had to be struck between the rights and needs of each party state to ‘use the river for economic and commercial’ purposes and their ‘obligation to protect it from any damage to the environment.’[125] Notably, Judge Trindade, in his separate opinion, argued that ‘the ICJ should have taken note of, and endorsed, sustainable development *as such*, contributing to the progressive development of International Environmental Law.’[126] This case is understood to present the complexity of sustainable development, directly reconciling environmental protection and human health promotion with economic development.[127]

As one of the leading cases before the WTO in relation to sustainable development, the *Shrimp/Turtle* case[128] is significant for the reasons stated below. This case is understood to be

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[122] Ibid at 92.

[123] *Pulp Mill on the River Uruguay (Argentina v Uruguay)* Judgement (2010) ICJ Reports 2010 14-107. This case concerns the dispute that Argentina brought in 2006 in connection with the planned construction authorised by Uruguay of one pulp mill and the construction and commissioning of another, also authorised by Uruguay, on the River Uruguay (para 25) in accordance with the Statute of the River Uruguay, a treaty signed by Argentina and Uruguay in 1975. Argentina claimed that the authorisation by the government of Uruguay for the project works was given without due consideration of the environmental impact of the construction of such plants, and in support of this claim referred to specific deficiencies in the environmental assessment carried out for each project (para 7) In 2010 the Court ruled that Uruguay was obligated by the treaty to notify and consult with Argentina before authorising the pulp mill and allowing construction to start and that Uruguay had breached its procedural obligation (para 282). The Court found that its declaration of Uruguay’s breach was *per se* an appropriate satisfaction as a remedy for Argentina’s claim.

[124] Ibid para 80.

[125] Ibid para 175.

[126] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgement of 20 April 2010, Separate opinion of Judge Cançado Trindade ICJ Reports 2010 135-205 at 190.

[127] Cymie R Payne ‘Pulp Mills on the River Uruguay: The International Court of Justice Recognizes Environmental Impact Assessment as a Duty under International Law’ (2010) 14 (9) *ASIL Insight* at 6.

[128] Report of the Appellate Body WTO ‘United States-Import Prohibition of Certain Shrimp and Shrimp Products’ (1998) *WT/DS58/AB/R*. The *Shrimp/Turtle* case was brought to the WTO panel and the appellate body initiated by Malaysia and Thailand, and afterwards joined by Pakistan and India to annul the ban that the US required all US shrimp trawl vessels to use approved special devices in specified areas where there was a significant mortality of sea turtles in shrimp harvesting (para 2) and imposed upon importation of certain shrimp and shrimp products on the ground of a significant mortality of sea turtles in shrimp trawl. In the Panel Report, the Panel reached the conclusions that the import ban on shrimp and shrimp products by the US was not consistent with relevant articles of GATT 1994, and could not be justified under GATT 1994 (para 7). In 1998 the US was not satisfied with certain legal issues covered in the Panel Report and certain legal interpretations

most relevant to the discussion on sustainable development.[129] The Appellate Body took into account that sustainable development had generally been accepted as integrating economic and social development and environmental protection.[130] The most important point that the Appellate Body made in this case was to characterise sustainable development as a concept having practical legal consequences by stating that 'the preamble attached to the WTO Agreement shows that the signatories to that Agreement were fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy and the WTO Agreement explicitly acknowledges the objective of sustainable development.'[131] Finally, in the *Guinea-Guinea Bissau Maritime Delimitation* case, the Tribunal referred to the legitimate claims of the parties as developing states and, more importantly, recognised 'the right of peoples involved to a level of economic and social development.'[132]

From the foregoing it can be assessed that the ICJ and the WTO, two leading universal international tribunals took the following significant positions: First, the cases demonstrate that it is not impossible to devise some balancing tools in contemporary international law that can appropriately and legitimately accommodate on a case-by-case basis as well as on a general basis both the right to development and the interest of environmental protection, with a view to achieving the overarching objective of sustainable development in practice and in theory.[133] Secondly, they are fully aware of the importance and necessity of specialised regimes under international law, as well as trying to reconcile different regimes in a single international law. Thirdly, even though achieving harmonisation of international law regimes is highly valued, their positions support the traditional view on sustainable development, namely understanding sustainable development in a limited environmental concept. Last, more interestingly, in

developed by the Panel and filed a notice of appeal with the Appellate Body (para 8). In response to the US appeal, the Appellate Body concluded that the US measure failed to meet the requirements of the chapeau of Article XX, and, therefore, was not justified under Article XX of the GATT 1994 (para 187).

[129] Schrijver op cit note 71 at 320.

[130] *United States-Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R of 6 November 1998 para129.

[131] Ibid.

[132] Laure-Hélène Piron 'Annexes, The Right to Development A Review of the Current State of the Debate' (2002) *Report for the UK Department for International Development* at 11.

[133] Massimiliano Montini 'The Interplay between the Right to Development and the Protection of the Environment: Patterns and Instruments to Achieve Sustainable Development in Practice' (2004) 10 (1) *African Yearbook of International Law Online* 181-223 at 223.

comparison to the cases before the ICJ and the WTO that are mostly related to sustainable development, the *Guinea-Guinea Bissau Maritime Delimitation* case is dealt with in the context of the right to economic and social development.

(b) Regional bodies

It is noteworthy to review the cases before the African Commission on Human and Peoples' Rights (ACHPR) and the Inter-American Commission on Human Rights (the Commission)/Inter-American Court of Human Rights (IACtHR) given that the issue in relation to sustainable development has mostly been raised in developing states on the African and Latin American continents.

The first case is the *SERAC* or *Ogoni* case[134] before the ACHPR. In this case,[135] the ACHPR suggested that the right to development was violated by emphasising the violation of several substantive rights belonging to the right to development, such as the right to health and the right to the environment. However, the judgment has been criticised for the Commission's failure to make an express pronouncement on the articulated right to development in Article 22 of the Charter.[136] This presented a significant missed opportunity to pronounce on the right to development and the ways in which it could be operationalised.[137]

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134 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, ACHPR Communication No 155/96 Decision of 27 May 2002.

135 The case involves the claim that 'the military government of Nigeria has been directly involved in oil production through the state-owned Nigerian National Petroleum Company, the majority shareholder in a consortium with Shell Petroleum Development Corporation.' (para 1). In 1996, the complaint was lodged by two NGOs, the Social and Economic Rights Action Center and the Center for Economic (SERAC) based in Nigeria and the Centre for Economic and Social Rights (CESR) based in New York and their communication was submitted to the ACHPR. The communication alleged human rights violations towards the indigenous peoples, the Ogoni people, among others, concerted violation of a wide range of rights (para 43) enshrined in relevant provisions of the African Charter on Human and Peoples' Rights (the African Charter), such as provisions in relation to the right to health, the right to dispose of wealth and natural resources, the right to a clean environment and family rights. In 2001, the ACHPR found Nigeria in violation of almost all relevant provisions of the Charter that the communication claimed and particularly appealed to Nigeria to ensure protection of the environment and the health of the people of Ogoniland (*The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights Comm No 155/96 (2001) at 14).

136 Olajumoke O Oduwole 'International Law and the Right to Development: a Pragmatic Approach for Africa' (2014) Inaugural Lecture to the Prince Claus Chair in Development and Equity 2013/2015 the International Institute of Social Studies.

137 Justice C Nwobike 'Peoples' Rights and the Demystification of Second and Third Generation Rights under

The ACHPR's *Endrois*[138] decision, which followed two years after *SERAC*, is significant in the following respects: First, as Human Rights Watch[139] observes, the SERAC decision was the first time that any international tribunal had found a violation of the right to development.[140] The ACHPR established a precedent for the justifiability of the right to development by ruling that the respondent state (Kenya) was in violation of six articles of the African Charter on Human and Peoples' Rights, including article 22 on the right to development.[141] Secondly, this case is a historic one in terms of clearly providing the contents comprising the right to development. According to the decision of the ACHPR, 'the right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end.'[142] Thus, 'a violation of either the procedure or substantive element constitute a violation of the right to development'[143] and 'fulfilling only one of the two prongs will not satisfy the right to development.'[144] Also, the ACHPR notes that 'recognising the Right to Development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent.'[145] Furthermore, the ACHPR is, in its *Congo v Burundi, Rwanda and Uganda* decision,**[146]** understood to reconfirm the existence of the right to development, the interplay between the right to development and natural resources, and the multi-faceted

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the African Charter: Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria' (2005) *1 Afr J Legal Stud* 2 129-146 at 142.

[138] *The Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* ACHPR Communication 276/2003 Decision of 4 February 2010. This case is related to the allegations of the complainants on behalf of the Endorois community that the government of Kenya in violation of relevant provisions of the African Charter on Human and Peoples' Rights (the African Charter), the Constitution of Kenya and international law, forcibly removed the indigenous people, the Endorois community, from their ancestral lands. In particular, the complainants claimed the violation of article 22 on the right to development enshrined in the African Charter. The Commission found Kenya to be in breach of relevant provisions of the Charter including article 22.

[139] Human Rights Watch 'Kenya: Landmark Ruling on Indigenous Land Rights African Human Rights Commission Condemns Expulsion of Endorois People for Tourism Development' available at *https://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights*, accessed on 14 March 2017.

[140] Arne Vandenbogaerde 'The Right to Development in International Human Rights Law: A Call for its Dissolution'(2013) 31 (2) *New Journal of European Criminal Law* 187-208 at 199.

[141] Ibrahim Salama 'the Right to Development: renewal and potential' (2008) in Stephen P Marks(eds) *Implementing the Right to Development The Role of International Law* at 490.

[142] *Endorois* supra note 130 para 277.

[143] Ibid.

[144] Ibid.

[145] Ibid.

[146] *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, ACHPR Communication 227/99 Decision of 29 May 2003.

dimensions of the right to development when mention is made of violation of the right to their economic, social and cultural development guaranteed under article 22 of the African Charter.

Under the inter-American system, the *Sumo* case[147] is a landmark in that the IACtHR, in the first legally binding decision in the context of an international investment tribunal, upholds the collective land and resource rights of indigenous peoples when a state fails to do so. 'Through an evolutionary interpretation of international instruments for the protection of human rights,'[148] the Court broadened the scope of the subject who enjoys the right to property to include 'the rights of members' of specific groups,[149] which can be understood to be a collective right comprising the right to development.

Finally, the *IACtHR' Advisory Opinion in relation to the environment and human rights* case[150] is also significant, in that the Court underlined the intrinsic relationship of the right to development with human rights by stating 'the interdependence and indivisibility between human rights, the environment and sustainable development, since the full enjoyment of all human rights depends on a favourable environment.'[151]

From the foregoing, two significant issues arise. First, in the case of Africa, the Commission's positions towards the right to development have made a great contribution to the international community's recognition of its concept and legal nature. Above all, the Commission clearly uses the term 'the right to development' in its various decisions. Further, it considers whether the right to development is violated or not, which means that the right to development is recognised as a 'human right', which should not be violated. More importantly, the Tribunal presents concrete and individual rights comprising the right to development, such as the right to health and the right to natural resources. Secondly, although American states do not explicitly mention the right to development in inter-American legal instruments, regional tribunals have

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147 *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Judgment (Merits, Reparations and Costs) of 31 August 2001.
148 Ibid para 148.
149 Ibid.
150 Inter-American Court of Human Rights 'Environment and Human Rights' (2017) Advisory Opinion OC-23/17.
151 Ibid at 2.

on occasion held, by means of interpreting the existing legal instruments in an evolutionary way, that development projects may violate, as part of the right to development, the collective human rights of people, in particular indigenous people given that the right to development constitutes a human right by nature.

(c) Other quasi-judicial international bodies[152]

There are many quasi-judicial international institutions within the ambit of each international human rights regime. References to constituent human rights of the right to development in each human rights regime will be examined in the following chapter. Among these in its various resolutions and decisions, it is significant that the UN Human Rights Committee (UNHRC)[153] reaffirms that the right to development could be placed before other human rights. For instance, the UNHRC, in resolution 33/14 in 2016, encouraged all relevant international organisations, including the UN itself and the WTO, as well as relevant stakeholders, to give due consideration to the right to development in the implementation of the 2030 Agenda, on the premise that the right to development is key to the SDGs as a human right. In terms of the UNHRC's decisions on certain cases, which have come before it for adjudication, the case of *Aprirana Mahuika v New Zealand*[154] is noteworthy. In this case, the Committee confirmed that it is understandable for a state to desire more development and economic activities of corporations, but the relevance of these will be assessed by referring to the obligation in article 27 of the ICCPR.[155]

[152] Apart from international agreements examined above or other manifestations of state practice as custom, and the decision of international tribunals, opinions and resolutions or interpretation of authoritative international bodies of international organisations in particular, including UN bodies, 'can be regarded as providing evidence of customary law in so far as they identify, specify, confirm or reformulate rules of customary law.' See Nico Schrijver *Sovereignty over natural resources: balancing rights and duties in an interdependent world* PhD Thesis, the University of Groningen (1995) 355, available at *http://www.rug.nl/research/portal/files/3265513/h11.pdf*, accessed on 18 February 2020.

[153] The Human Rights Committee considers communications made by individuals alleging violations of the rights set forth in the ICCPR by States parties to the First Optional Protocol to the International Covenant on Civil and Political Rights.

[154] See *Apirana Mahuika et al v New Zealand*, Communication No 547/1993 Adoption of 27 October 2000 para 6.1. The authors claim that the relevant domestic law of New Zealand confiscates their natural resources and 'interferes with their right to freely pursue their economic, social and cultural development,' particularly by arguing that the right to self-determination is only effective when people have access to and control over their resources.

[155] *Jouni E Länsman et al v Finland,* Communication No 1023/2001 Adoption of 17 March 2005 para 9.4. Article 27 states that 'In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy

While the cases before the UNHRC did not explicitly on their own establish the right to development, they helped crystallise the rights of indigenous peoples within the right to development. These cases are understood to have established the need to recognise the group rights of indigenous peoples in the quest to realise the right to development.[156]

2.4 Reflections on Sustainable Development and the Right to Development in the Context of the 2030 Agenda

As elaborated above, the right to development and sustainable development are now recognised as the foundation for establishing the international development law regime. Combined with this, the above-mentioned evolution of the concept of development results in an international development law regime that has remarkable features in terms of the status and the relationship of sustainable development and the right to development in the 2030 Agenda (SDGs).

It can be convincingly argued that there are inseparable interconnections between the 2030 Agenda and the right to development, the notion of sustainable development and inclusive development, respectively and collectively. In the case of the right to development, 'the interconnections between the SDGs and the Right to Development are evident,'[157] and 'there is a close connection between the Right to Development and the SDGs.'[158] This view is consolidated by reviewing various remarks and analysis[159] of international lawyers and experts. Thus, it is convincingly argued that the 2030 Agenda emphasises core elements of the right to development, in particular SDG16 and SDG 17.[160]

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their own culture, to profess and practise their own religion, or to use their own language.'

[156] See Nwobike op cit note 137.

[157] Arts & Tamo op cit note 23 at 229.

[158] Martin Khor 'the statement in the panel at the Human Rights Council commemorating the 30th anniversary of the Right to Development' (2016) available at *https://www.sharing.org/information-centre/articles/right-development-30-looking-back-ad-forwards-0*, accessed on 26 February 2020.

[159] Zeid Ra'ad Al Hussein United Nations High Commissioner for Human Rights expressed that the 2030 Agenda is a child of the Right to Development. See Zeid Ra'ad Al Hussein (United Nations High Commissioner for Human Rights) 'Opening Statement' (2016) available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20163&LangID=E, accessed on 3 July 2020. Also, Justice Weeramantry stressed that the Right to Development as thus refined is clearly part of modern international law and it is compendiously referred to as sustainable development. See *Gabčikovo-Nagymaros* supra note 91 at 92.

[160] Arts & Tamo op cit note 23 at 228.

Another illustration of interconnection is found in the relations between the notion of sustainable development and that of inclusive development. In the case of the relation of sustainable development to the 2030 Agenda, although the notion of sustainable development has conceptually originated in the structure of international environmental law, in the present world represented by globalisation and the SDGs, it would be an over-simplification to restrict the scope covered by sustainable development to only the field of environmental protection and development,[161] given that the 2030 agenda articulates, in its preamble, the three dimensions of sustainable development, namely economic, social and environmental development. In this respect, one author goes on to highlight the multi-faceted dimensions of sustainable development by his criticism that 'to confine the Right to Development to the very useful but succinct definition of the Brundtland Report would not reflect fully its versatile and almost limitless character.'[162] Thus, the conceptualisation of sustainable development in such narrow terms is no longer conceived of as a sufficient tool to resolve possible conflicts between various values in international law.[163] In the case of inclusive development, above all, it can be convincingly argued that sustainable development is aimed at protecting environmental, economic and social rights or interests, as well as considering the rights or interests of future generations (inter-generational equity) and of vulnerable groups in society (intra-generational equity).[164] Inter-generational equity is understood to have been deeply rooted in international law[165] and to be already part of the fabric of international law. In comparison, unlike inter-generational equity, intra-generational equity addresses inequity within the existing system,[166] which is reflected in the notion of inclusive development. The 2030 Agenda calls for formal and substantive equality of opportunities and outcomes for people who are vulnerable and must be empowered. This includes all children, women, persons with disabilities, indigenous peoples, refugees and internally displaced persons and migrants. In this respect, inclusive development

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[161] M Fitzmaurice 'the Principle of Sustainable Development in International Development Law' (2010) at 2, available at *https://www.eolss.net/Sample-Chapters/C13/E6-67-03-02.pdf*, accessed on 2 February 2020.
[162] Ibid.
[163] Viñuales J E 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship' (2010) 02 *CIES Research Paper* at 4.
[164] Alan Boyle & David Freestone 'Introduction' (1999) in Alan Boyle & David Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* at 17.
[165] Weiss op cit note 55 at 20.
[166] Ibid at 15.

is well reflected in the flagship expression contained in the 2030 Agenda, 'no one left behind,' which implies the necessity of special attention for the right of vulnerable and marginalised people in the course of pursuing the SDGs.[167]

It is noticeable that the emergence of the human rights factor in international development law has significantly contributed to creating the right to development as a human right and linking human rights to sustainable development in the international development law regime. Without even characterising poverty as a human rights abuse in itself, it is at least obvious that the link between the elimination of poverty (ultimate objective of the SDGs) and the promotion of human rights is inter-related.[168] Reconsideration of human rights in international development law has also led to changing the way that individuals, including the vulnerable and marginalised, perceive themselves vis-à-vis governments and other actors.[169] Thus, this approach draws the attention from economic growth towards individual claims conferring rights and duties.[170] Given that there has been such a subtle yet noticeable shift in international development law, from the theoretical perspective to the conceptualisation of development, sustainable development may be better used to refer to the concept at the heart of the human right to sustainable development, instead of simply being understood as a constituent part of the right to development. To highlight the human rights factor of sustainable development, the term 'right to sustainable development' was also coined. A good example supporting this assessment is found in the UN Framework Convention on Climate Change, which states that 'the Parties have a right to, and should, promote sustainable development.'[171]

Most importantly, sustainable development has obtained the solid status of the most 'significant and influential legal and policy-making principle in all areas of activity, in particular as an essential tool' in understanding, managing, and addressing international development law and international human rights law.[172] Likewise, the right to development can play a crucial role

[167] Arts & Tamo op cit note 23 at 238.
[168] Sarah Joseph *Blame it on the WTO?: A Human Rights Critique* (Oxford, Oxford University; 2011) 143.
[169] Uvin op cit note 53 130.
[170] Ibid.
[171] Article 3 paragraph 4 of the UN Framework Convention on Climate Change.
[172] See Ipshita Chaturvedi 'Sustainable Consumption: Scope and Applicability of Principles of International Law' (2018) 2 *Chinese Journal of Environmental Law* 5-27.

as the missing link between international investment law, international development law and international human rights law.[173] As a result of this, today, the notion of the human right to sustainable development is central to the mandate of the international community, including states, international organisations and private actors such as non-governmental organisations (NGOs) and multinational corporations (MNCs). It 'guides domestic and international law in many areas of economic, social and environmental policy, particularly where these fields intersect.'[174]

When it comes to application of sustainable development and the right to development in international tribunals, sustainable development has been recognised as a principle of international law from various sources of international law, which leads and forces states to comply with their international obligations pertaining to sustainable development within the structure of the right to development. More importantly, it is convincingly argued that the recognition of the right to development is accepted as *opinio juris* of states,[175] given that the clear proclamations of the right to development in various international instruments reflect the participating states' understanding of the current international law.[176]

2.5 The Integrated Concept of Development: The Human Right to Sustainable Development

For the purpose of this thesis, it is very useful to confirm that the human right to sustainable development gains legal recognition as a general principle of law in international law in articulating and solving international law-related issues.[177] This thesis is of the view that more international tribunals will be willing to consider sustainable development and the right to development, eventually the human right to sustainable development as a general principle of law in resolving international disputes,[178] as relevant international law in the course of treaty

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173 Ibrahim Salama stated that 'for some, the Right to Development is the missing link between trade, development and human rights.' See Salama op cit note 140 at 117.
174 See Gehring & Newcombe op cit note 81 at 5-6.
175 Beate Rudolf 'The Relation of the Right to Development to Existing Substantive Treaty Regimes' (2008) in Stephen P Marks(ed) *Implementing the Right to Development The Role of International Law* 105-116 at 105.
176 Ibid.
177 Voigt op cit note 83 145.
178 For instance, as general principles of law have been developed through soft law instruments on the

interpretation in the case of the absence of explicit mention of such a notion in that treaty.[179]

In essence, by taking the approach of the human right to sustainable development, this thesis seeks to improve the understanding and application of the notion of sustainable development in the field of international development law and, in addition, to define sustainable development as a human rights issue under international human rights law. More importantly, this approach may make further contributions to understanding the concept of development for the purposes of this thesis, in various ways.

Above all, the new notion of the human right to sustainable development can play out as part of the essential paradigm in international development law and international human rights law, and can pervade the environmental, social, political, and cultural discourses of development, from the local to the global level and involving both the public and private sectors. In particular, given that the scholarly discussion on and individual states' practice of the human right to 'sustainable development is premised on the indispensability and interconnection of the environmental, economic, social and political dimensions in the process of seeking better conditions for people to live, these multiple dimensions cannot be seen in isolation' in the context of contemporary protection of human rights.[180]

Moreover, the notion of the human right to sustainable development is understood to go beyond environmental issues and encompass much broader economic, social, and legal dimensions; it has widely penetrated the international legal domain.[181] Thus, it can serve as a unifying notion of sub-branches of international law, such as international human rights, international development law and international investment law, by forging a clear link between development and human rights.

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international level such as the Rio Declaration, and subsequently applied in international disputes beyond the provisions of the applicable international agreements. See Michelle Biddulph & Dwight Newman 'A Contextualized Account of General Principles of International Law' (2014) *26 Pace Int'l L Rev* 286-344 at 314.

[179] In the advisory opinion on *Reservations to the Genocide Convention,* the ICJ observed that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.' *Reservations to the Convention on Genocide Advisory Opinion*: ICJ Reports 1951 15-58 at 23.

[180] Piovesan & Fachin op cit note 59.

[181] Barral op cit note 84 at 384.

CHAPTER 3 ANALYSIS OF THE HUMAN RIGHT TO SUSTAINABLE DEVELOPMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW

As demonstrated in the previous chapter, the right to development has evolved by engaging with sustainable development and human rights, which led to the evolution of a human right to sustainable development. However, few studies have been conducted on the content and constituent elements of this right. This chapter explores three elements that are significant in explaining the content of the human right to sustainable development and its relationship with international investment law, despite there being no consensus on the exact contours of the human right to sustainable development as an institutionalised norm in the international human rights system. At the outset, a number of basic components of the human right to sustainable development are expounded. Thereafter, the focus is on various subjects that enjoy special protection under the right, before an overview is given of some of the right's primary areas of application

3.1 Basic Components of the Human Right to Sustainable Development

Based on Article 1 of the UNDRTD and related scholarly analysis,[1] the following five basic elements are deemed to constitute the human right to sustainable development:[2] inalienability as human right, participation, equity, collectiveness, and sustainability.

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[1] Boyle and Freestone stated that 'the evolving elements of the concept of sustainable development include the integration of environmental protection and economic development (the principle of integration); sustainable utilisation of natural resources (the principle of sustainable use and exploitation of natural resources); the right to development; the pursuit of equity in the use and allocation of natural resources (the principle of intra-generational equity); the need to preserve natural resources for the benefit of present and future generations (the principle of inter-generational and intra-generational equity); and the need to interpret and apply rules of international law in an integrated systematic manner.' See Alan Boyle & David Freestone 'Introduction' (1999) in Alan Boyle & David Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* at 8-16.

[2] Margot Salomon finds that 'the most vital component of the right to development is that it is preoccupied 'not with a State's duties to its own nationals, but with its duties to people in far off places.' See Salomon M E 'Legal Cosmopolitanism and the Normative Contribution of the Right to Development' (2008) 2008 (16) *LSE Law, Society, and Economy Working Papers* 1–14 at 11.

3.1.1 Inalienability

The UNDRTD places integrated human rights at the centre of development. The development process must respect all human rights and contribute to the realisation of rights for all. The human right to sustainable development may not be realised as a process of development unless the intrinsic relationship between the various human rights is fully considered in an integrated way.[3] Thus, the realisation of the right to property in the process of development may not justify violations of other human rights, such as the right to the environment. The inseparability of the right to development has been confirmed in many international documents. In particular, the right to development was affirmed as an inalienable human right in the Vienna Declaration and Programme of Action.[4]

The principle of inalienability is crucial for purposes of this thesis. In many cases before international investment tribunals, human rights other than the right of investors have been ignored. Yet, from the perspective of recognising the inalienability of the right to development, all human rights alike have to be considered in the process of achieving the purpose of investments. As will be examined in chapter 4, the inalienability of the right to development has increasingly been reflected in proceedings before international investment tribunals, whereby the tribunals ask a host state to fulfil all its obligations to protect its citizens' rights (e.g. the right to water, the right to health) while simultaneously protecting foreign investors' rights.

3.1.2 Participation

Participation is a key element of the UNDRTD. Under the Declaration, the human person is the active participant in the right to development, while 'States should encourage popular participation in all spheres as an important factor in development and in the full realisation of

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[3] Arjun K Sengupta 'Conceptualising the right to development for the twenty-first century' in UN *Realizing the Right to Development* (2013) at 78.

[4] Vienna Declaration and Programme of Action para 72.

all human rights.'[5] The factor of participation is related to a process of development.[6] Manouchehr Ganji, the Special Rapporteur of the Commission on Human Rights, articulated that the basic principle of human rights in relation to development should be the participation of the people in decision-making pertaining to development programmes.[7] Arjun Sengupta also stressed that the right to development refers to a rights-based process of development 'as a participatory, non-discriminatory, accountable and transparent process with equity in decision-making and sharing of the fruits of the process.'[8]

The importance of participation in realising the right to development has been reflected in the decisions or awards of international organisations and international tribunals. For instance, in the *Lansman* case of 1995,[9] the UN Human Rights Committee recalled the terms of paragraph 7 of its General Comment on Article 27, 'in which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or reindeer husbandry', and affirmed that all measures must be taken to 'ensure the effective participation of members of minority communities in decisions which affect them.'[10]

Another example is found in the *Endorois* case. In this case, the ACHPR found that the lack of meaningful participation by indigenous people was a violation of the right to development.[11] In particular, this case is significant in that the ACHPR elaborated on detailed standards of effective or meaningful participation. These are, first, that community representatives should be in an equal bargaining position in the process of deciding on development projects. Secondly, indigenous people should be given an opportunity to design the policies and to play roles in the

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5 Article 8 of the Declaration.
6 The UN Charter of Economic Rights and Duties of States in 1974 stressed the importance of participation of people in the process of development as follows: 'To this end, each State has the right and the responsibility to choose its means and goals of development, fully to mobilize and use its resources, to implement progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development.'
7 Report of the UN Secretary-General 'The emergence of the right to development' in UN *Realizing the Right to Development* (2013) at 14
8 Arjun Sengupta 'Implementing the Right to Development' (2004) in Nico Schrijver & Friedl Weiss (eds) *International Law and Sustainable Development: Principles and Practice* at 344.
9 *Jouni E Länsman et al v Finland,* Communication No 1023/2001 Adoption of 17 March 2005.
10 Ibid para 10.4.
11 *The Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* ACHPR Communication 276/2003 Decision of 4 February 2010 para 281.

process of development. The ACHPR felt that the project in question fell short in this regard because 'community members were informed of the impending project as a fait accompli, and not given an opportunity to shape the policies or their role in the Game Reserve.'[12] Thirdly, the ACHPR mentioned that the result of development should be the empowerment of the Endorois community. It was not sufficient for the Kenyan authorities merely to give food aid to the Endorois. The capabilities and choices of the Endorois had to be improved in order for the right to development to be realised. In other words, the right to development was violated as a result of encroachments upon Endorois peoples' choices and capabilities.[13]

Participation plays two important roles in the analysis of the right to development. First, the concept of inclusiveness can be inferred from the factor of participation. Thus, as I mentioned in chapter 2, inclusive development is not a separate or independent concept from the right to development, but an integral part of the right to development. Secondly, participation can make it clear that all relevant shareholders' interests have to be considered and respected in the process of development.[14]

Participation is understood to be one of the key human rights principles, as well as an elementary condition of democracies, allowing individuals to be involved as key players in their own development, and in the development of their communities.[15] In particular, the active and informed participation of vulnerable or marginalised groups such as women, children, migrants, indigenous peoples and persons with disabilities, 'is not only consistent with but is also a requisite of a human rights-based approach.'[16]

3.1.3 Equity

[12] Ibid.
[13] Ibid para.283.
[14] Nicolas Perrone criticised the international investment law regime for contributing to unfair result without considering participation by arguing 'local populations have limited or no participation in foreign investment decision that that affect their rights and values.' See Nicolas Perrone 'The international investment regime and local populations: are the weakest voices unheard?' (2016) 7 *Transnational Legal Theory* 383 at 6,
[15] The Special Rapporteur on the rights of persons with disabilities 'Report of the Special Rapporteur on the rights of persons with disabilities' (2016) *A/HRC/31/62* para 13.
[16] Ibid para 13.

When economic growth is pursued at the expense of equity, it dooms large numbers of people, from both present and future generations, to disaster.[17] As numerous international instruments and declarations, including the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, pointed out, the principle of equity (understood as both inter-generational and intra-generational equity) is central to the attainment of sustainable development.

Inter-generational equity is more strongly focused on future generations and environmental concerns, while intra-generational equity focuses on the sharing of wealth within the contemporary generation. To be more specific, on the one hand, inter-generational equity is each generation's responsibility to leave an inheritance of wealth no less than what they themselves have inherited.[18] This concept of equity is also explicitly referred to in various international instruments, which provide for the right to development to be achieved so as to meet the developmental and environmental needs of the present and future generations equitably.[19] On the other hand, intra-generational equity relates to the argument that the benefit of economic growth should be equitably shared and that vulnerable groups such as women, refugees, and the handicapped should get a fair deal in economic development.[20]

The right to development requires equity and justice to be essentially considered and to play a key role in determining the whole structure of the development process, since eradicating poverty and eliminating inequality require the structure of production to be equitably adjusted through development policy. Accordingly, most members of vulnerable and marginalised populations, who are currently poor and deprived or left behind, should have their living standards raised, leading to increased well-being of the entire population. Thus, the UNDRTD obliges states to 'ensure equality of opportunity for all in their access to education, health services, food, housing, employment and the fair distribution of income.'[21] Moreover, with

[17] James H Weaver, Michael T Rock & Kenneth Kusterer *Achieving Broad-Based Sustainable Development: Governance, Environment, and Growth with Equity* (1997) 2.
[18] Max Valverde Soto 'General Principles of International Environmental Law' (1996) *ILSA Journal of Int'l & Comparative Law* 194-209 at 206.
[19] Boyle & Freestone op cit note 1 at 13.
[20] Ibid.
[21] Article 8 of the Declaration on the Right to Development.

respect to gender equality, the UNDRTD specifically requires states 'to ensure that women have an active participatory role in the development process.'[22]

3.1.4 Collectiveness

The right to development was arguably initially conceived primarily as a collective peoples' right. This was unconventional, given the classical individualistic paradigm of human rights. However, the right to development soon became acknowledged as an individual human right as well. Accordingly, by positioning 'every human person' as well as 'all peoples' as holders of the right to development, the UNDRTD presents this right as having both collective and individual dimensions. The general term collectiveness is rather abstract. However, it plays an important and concrete part in international law. In particular, in terms of the right to development, one can infer three important elements from collectiveness.

Collectiveness is understood to refer to the notion of a collective right in the context of the right to development. The Inter-American Commission on Human Rights (IACHR) reiterated that indigenous peoples' right to property is a collective right, whose bearer is the corresponding people.[23] In *Mary and Carrie Dann v United States*,[24] the IACHR stressed the collective nature of indigenous rights in the sense of rights that are realised in part or in whole through their guarantee to groups or organisations of people.[25]

Moreover, collectiveness is related to the notion of solidarity, which is closely related to third-generation human rights[26] and inclusiveness.[27] It is argued that 'the true foundation of the

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[22] Ibid.
[23] Indigenous and Tribal Peoples' Rights over their ancestral lands and natural resources, Inter-America Commission on Human Rights, OEA/Ser L/V/II Doc 56/09(2009) at 24.
[24] *Dann v United States* Case 11 140 Inter-Am CHR Report No 99/99 of 27 September 1999.
[25] Ibid para 128.
[26] 'The third generation consisted of solidarity rights belonging to peoples and covering global concerns like development, environment, humanitarian assistance, peace, communication, and common heritage.' See Marks SP 'The Human Right to Development: Between Rhetoric and Reality' (2004) *17 Harvard Human Rights Journal* 137-168 at 138.
[27] To Cook and Lee, 'an inclusive approach does not imply simply targeted interventions; inclusion requires that policies ensure universal access to essential services, non-discrimination as well as consideration of the solidarity and social cohesion effects of universal and appropriate redistributive policies.' See Coo S & Lee D (2014) E-discussion summary: Sustainable development gains through inclusive development available at

Right to Development is the obligation of solidarity' imposed on individual states, which means that, as a third generation right, the right to development requires both national and international co-operation to achieve its implementation based on solidarity.[28] Solidarity is characteristic of collective responsibilities for the international community to progressively realise the second-generation human rights (composed of a variety of social and economic rights), most of which are key targets of the SDGs. In this respect, the international community has a duty to realise the right to development collectively, in a spirit of solidarity.[29] Collectiveness in the context of solidarity is more significant as global interdependence deepens, in particular in the area of health. For instance, failure by one state to contain infectious diseases such as COVID-19, which is testing the limit of individual states' ability to ensure the right to the health,[30] can threaten the right to health of people in other states. To overcome such a global crisis, more international cooperation and collective responsibilities are required.[31]

Most importantly, collectiveness involves group rights, which require the international law community to consider inter-generational rights and intra-generational rights in the context of intra-/inter-generational equity. The group may refer to future generations and contemporary generations. In terms of future generations, as the UN Secretary-General's report on intergenerational solidarity[32] noted, 'in the context of sustainable development, intergenerational solidarity goes beyond the relations among currently living representatives of different generations and embraces future generations, who do not yet exist.'[33] On the other hand, intra-generational rights are more directly related to intra-generational solidarity,

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https://one.unteamwork.org, accessed on 31 March 2019.

28 Hope Lewis 'Women (Under)Development: The Relevance of The Right to Development to Poor Women of Colour in the United States' (1996) 18 (3&4) *Law & Policy* 281-313 at 286.

29 The UNDRTD breaks with the traditional assumptions of international human rights law, which is rooted in the protection of individuals against abuse by their own state. See Margot E Salomon *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford, Oxford University Press; 2007)

30 UN 'Covid-19 and Human Rights: we are all in this together' (2020).

31 Sakiko Fukuda-Parr 'The Right to Development: Refraining a New Discourse for the Twenty-First Century' (2012) 79(4) *Social Research* 839-864.

32 Report of the UN Secretary-General 'Intergenerational solidarity and the needs of future generations' (2013) *A/68/x*, available at *https://sustainabledevelopment.un.org/content/documents/2006future.pdf*, accessed on 18 February 2020.

33 Ibid para 8.

requiring more attention to be paid to vulnerable or marginalised groups.

3.1.5 Sustainability

Given that the very 'term sustainability had not been used when international law took its first step to integrate environment and development'[34] in the 1972 Stockholm Declaration, the concept of sustainability *per se* is related to the environment and ecological context – 'the notion that human society and economy are intimately connected to the natural environment.'[35] Furthermore, it is well known that 'there is no development without sustainability or sustainability without development.'[36] Accordingly, although the UNDRTD itself does not explicitly mention sustainability, it is undeniably key to modern development. Over time the focus of sustainability pertaining to development has shifted from its initial preoccupation with environmental protection to an integrated concept inclusive of an environmental as well as a social and developmental component, which led to the evolution of the concept of 'Sustainable Development which has generated overlapping definitions of economic, environmental, and social sustainability.'[37]

3.2 Subjects who Enjoy the Right to Development

3.2.1 Introduction

Sovereign states are still the primary subjects of international law. Likewise, even though the UNDRTD does not explicitly mention states as rights holders, it affirms that states have the right to formulate appropriate national development policies[38] and accordingly it is argued that the beneficiaries of the right to development are indeed both states and individuals.[39] Today,

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[34] Klaus Bosselmann *The Principle of Sustainability: Transforming law and governance* 2ed (2016) 25.
[35] Jeremy L Caradonna *Sustainability: A History* (2014) 8.
[36] Wolfgang Sachs 'Environment' in Wolfgang Sachs (eds) *the Development Dictionary: A guide to knowledge as power* 2ed (London & New York, Zed Books; 2020) 24-37.
[37] Caradonna op cit note 35 13.
[38] Marcos Orellana 'Climate Change and the Right to Development: International Cooperation, Financial Arrangements, and the Clean Development Mechanism' *A/HRC/15/WG 2/TF/CRP 3/Rev1* para 22.
[39] Massimiliano Montini 'The Interplay between the Right to Development and the Protection of the Environment: Patterns and Instruments to Achieve Sustainable Development in Practice' (2004) 10 (1) *African*

states are no longer the only subjects of international law; the concept has expanded owing to 'legal developments pertaining to the principle of self-determination of peoples and to human rights, which have endowed peoples and individuals with rights and obligations under international law.'[40] In the context of the right to development, the principle of self-determination has been interpreted to refer not only to its traditional meaning (a reaffirmation of the independence or sovereignty of states from colonialism), but also to the improvement of the right of persons belonging to vulnerable or marginalised groups to determine for themselves the content, processes and forms of development.[41] Furthermore, MNCs 'have obtained a limited, functional international personality, as evidenced by the procedures under the World Bank Convention on the International Settlement of Investment Disputes between States and Nationals of Other States and by provisions relating to international settlement of deep sea-bed mining disputes in the 1982 UN Convention on the Law of the Sea.'[42]

Some authors argue that the UNDRTD failed to specify the legal actors in whom the right to development is vested.[43] However, once one looks carefully into the provisions of international instruments and jurisprudence of international tribunals, one can identify individuals or some groups to be specified as subjects of the right to development. The topic of subjects of the right to development is more concerned with the intra-generational dimension of the right, which highlights the principle of equity between current populations.[44] It should also be noted that discussion on vulnerable or marginalised groups reflects two important characteristics of the right to development: collectiveness and inclusiveness. As indicated in chapter 2, the notion of inclusive development is closely connected to special groups' rights to development. Furthermore, since the UNDRTD states that the right to development is both an

Yearbook of International Law Online 181-223 at 183.

[40] Nico Schrijver *Sovereignty over natural resources: balancing rights and duties in an interdependent world* PhD Thesis, the University of Groningen (1995) 7, available at *http://www.rug.nl/research/portal/files/3265513/h11.pdf*, accessed on 18 February 2020.

[41] Laure-Hélène Piron 'The Right to Development A Review of the Current State of the Debate' (2002) *Report for the UK Department for International Development* at 11, available at *https://www.odi.org/publications/1562-right-development-review-current-state-debate*, accessed on 5 February 2020.

[42] Schrijver op cit note 40.

[43] Piron op cit note 41 at 12.

[44] The 1987 Brundtland Commission recognised the essential needs of the poor, to which overriding priority should be given, the right to development *per se* includes the justice of the intra-generation.

individual human right and a right of peoples,[45] the right to development shall be enjoyed by every human being, with special emphasis on its enjoyment by vulnerable or marginalised groups. Thus, the 2030 Agenda highlights the importance of vulnerable or marginalised groups in achieving the SDGs and state that those whose needs are reflected in the Agenda include all children, youth, persons with disabilities, people living with HIV/AIDS, older persons, indigenous people, refugees and internally displaced persons and migrants.[46] More significantly, the concept of a right is accompanied by a discussion on entitlement to the subject of that right as rights holder and on the entities upon whom the obligation to fulfil that right is bestowed. Thus, 'a human rights-based approach to development requires a clear identification of rights-holders and duty-bearers, and an assessment of whether the state parties or the other duty holders have fulfilled their obligations.'[47]

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3.2.2 Specific Groups of Subjects under the Right to Development[48]

The debate within contemporary development studies is increasingly focusing on the extent to which current international development cooperation modalities are really improving and contributing to the livelihoods and well-being of the most vulnerable or marginalised groups.[49] Vulnerable or marginalised groups can be referred to as those whose human rights are in danger of being ignored or violated by a state or private actors, mostly MNCs, because they fail to

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[45] Article 1 of the UNDRTD. In contrast, it is argued that the African Charter on Human and Peoples' Rights is interpreted to refer the right to development with reference to all peoples' right rather than individual human rights. According to Obiora Chinedu Okafor, 'Article 22 is crystal clear in its identification of peoples (as opposed to individuals) as the subjects/holders of the Right to Development that it guarantees.' See Obiora Chinedu Okafor 'Righting the Right to Development: A Socio-Legal Analysis of Article 22 of the African Charter on Human and Peoples' Rights' (2008) in Stephen P Marks(eds) *Implementing the Right to Development The Role of International Law* at 57.

[46] Declaration 23.

[47] Orellana op cit note 38 para 20.

[48] This section will briefly examine five selected groups that have often been mentioned in various international instruments. However, the list is not exhaustive. The purpose of this brief examination of the five groups is to see how the international community has dealt with specific groups through international documents, international decisions of international organisations or international tribunals and how one can apply this approach in practice, for instance, in cases under international investment law, to be covered in the next chapter

[49] Teresa Njoroge Mwendwa, Ambrose Murangira & Raymond Lang 'Mainstreaming the Rights of Persons with Disabilities in National Development Frameworks' (2010) In Deborah A Ziegler (eds) *Inclusion for All: The UN Convention on the Rights of Persons with Disabilities* 126-145 at 126.

carry out their duties to respect, protect and fulfil human rights.[50] It is argued that because searching for a legal definition of vulnerability or marginalisation in the area of international human rights has proven to be an unachievable task, the most common definition to be found is a catalogue of so-called vulnerable groups, that is to say, a list of groups that can be characterised as vulnerable.[51] For instance, some authors suggest women, children, the disabled, migrant workers, the unemployed and the poor.[52] For the purpose of this study, however, when it comes to the human right to sustainable development at the international level, it is necessary to consider five vulnerable or marginalised groups, namely indigenous people, women, children, the disabled and migrants given that these groups are closely interconnected in realising the SDGs and thus most frequently addressed in many international instruments and tribunals, in particular in international discussions on the areas of application of the right to development to be examined in the next sub-section.

(a) Indigenous people

There is no clear and comprehensive definition[53] of indigenous people, but the notion that UN Special Rapporteur Martinez Cobo offered has been regarded as the most authoritative.[54] According to him, indigenous people are characterised by two factors; first, having a historical continuity with pre-invasion and pre-colonial societies that developed in their territory; and secondly, considering themselves distinct from other sectors of the societies in which they live.

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50 Romina I Sijniensky 'From the Non-Discrimination Clause to the Concept of Vulnerability in International Human Rights Law' in Yves Haeck, Brianne McGonigle Leyh & Clara Burbano-Herrera et al (eds) *The Realisation of Human Rights: When Theory Meets Practice* (2013) 259-272 at 262.

51 Ibid.

52 Audrey Chapman & Benjamin Carbonetti 'Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights' (2011) 33 *Human Rights Quarterly* 682–732 at 724.

53 According to the Report of the UN Special Rapporteur on the rights of indigenous peoples, 'the concept of 'indigenous peoples' is not defined under international law. However, its generally accepted characteristics include: self-identification as an indigenous people; the existence of and desire to maintain a special relationship with ancestral territories; distinct social, economic or political systems from mainstream society, which may be reflected in language, culture, beliefs and customary law; and a historically non-dominant position within society.' See A/HRC/33/42 para 15, available *at https://undocs.org/A/HRC/33/42*, accessed on 3 July 2020.

54 Ilias Bantekas & Lutz Oette *International Human Rights, Law and Practice* 3ed (2015) 436.

There are approximately 370 million indigenous peoples worldwide, in over 90 countries. Although they make up 5 per cent of the global population, they account for about 15 per cent of the extremely poor.[55] Thus, the issue of indigenous people's human rights is closely related to the SDGs, international investment,[56] climate change[57] and implementing actions of the international community, as well as the participation of indigenous people in the process of development, namely inclusive development.[58] It is at the global and regional levels that the rights of indigenous people are recognised and reaffirmed in many international instruments.[59] In the case of the right to development of indigenous people, Article 23 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[60] explicitly recognises the right to development, the preamble[61] and Article 9[62] of the American Declaration on the Rights of

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[55] The World bank 'Indigenous Peoples' (2019), available at *https://www.worldbank.org/en/topic/indigenouspeoples*, accessed on 9 February 2020.

[56] Report of the Special Rapporteur on the rights of indigenous peoples - International investment agreements, including bilateral investment treaties and investment chapters of free trade agreements, A/HRC/33/42.

[57] Report of the Special Rapporteur on the rights of indigenous peoples - Impacts of climate change and climate finance on indigenous peoples' rights, A/HRC/36/46.

[58] Vice-President of the UN General Assembly, speaking at the opening of the United Nations Permanent Forum on Indigenous Issues on April 2017, underscored the importance of the 2030 Agenda, the Paris Agreement on climate change and the Addis Ababa and targeted strategies would ensure that indigenous peoples could fully participate in implementing those accords, available at *http://www.un.org/apps/news/story.asp?NewsID=56615#.WQAx7re1vtQ*, accessed on 30 March 2019.

[59] At the global level, besides general human rights instruments such as the 1948 Universal Declaration of Human Rights, the 1951 Convention on the Prevention and Punishment of the Crime of Genocide, the 1966 ICCPR AND ICESCR and the 1966 Convention on the Elimination of All Forms of Racial Discrimination, one can find the recognition of indigenous peoples' rights by the international community in two leading specialised international instruments, namely the 2007 UNDRIP and the 1989 ILO Indigenous and Tribal Peoples Convention (No. 169). At the regional level, there are also two specific instruments: the 2016 American Declaration on the Rights of Indigenous Peoples; and the 1998 EU Council Resolution on Indigenous Peoples within the Framework of the Development Cooperation of the Community and Members States.

[60] Article 23 states that 'Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development.'

[61] 'CONCERNED that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and the dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, *their right to development* in accordance with their own needs and interests.'

[62] 'Article 29: Right to development

1. Indigenous peoples have the right to maintain and determine their own priorities with respect to their political, economic, social, and cultural development in conformity with their own cosmovision. They also have the right to be guaranteed the enjoyment of their own means of subsistence and development, and to engage freely in all their economic activities.

2. This right includes the development of policies, plans, programs, and strategies in the exercise of their right to development and to implement them in accordance with their political and social organisation, norms and procedures, own cosmovisions, and institutions.

Indigenous Peoples, while Article 7 of the ILO Indigenous and Tribal Peoples Convention[63] indirectly does so by stressing the importance of participation of indigenous people in the process of development.

There are many cases involving indigenous peoples' rights. One of the leading cases is the 2017 *Ogiek Case.*[64] This case involves the eviction notice of the Kenyan government, which requested the Ogiek community, an indigenous minority ethnic group in Kenya comprising about 20000 members,[65] well known as Africa's last remaining forest dwellers in Kenya's Mau Forest, to leave the forest within 30 days.[66] In response to this eviction notice, the Ogiek decided to bring a case against the Kenyan government before the ACHPR, with the assistance of some NGOs.[67] The Commission decided in favour of the Ogiek by issuing an order for provisional measures requesting the Kenyan government to suspend implementation of the eviction notice,[68] given the extensive implications for the political, social and economic survival of the Ogiek community and the potential irreparable harm to it as a result of the

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3. Indigenous peoples have the right to be actively involved in developing and determining development programs that affect them and, to the extent possible, to administer such programs through their own institutions.
4. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources.
5. Indigenous peoples have the right to effective measures to mitigate adverse ecological, economic, social, cultural, or spiritual impacts of the implementation of development projects that affect their rights. Indigenous peoples who have been deprived of their means of subsistence and development have the right to restitution and, where this is not possible, to fair and equitable compensation. This includes the right to compensation for any harm caused to them by the implementation of plans, programs, or projects of the State, international financial institutions, or private business.'

[63] 'The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.'

[64] *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogiek Case),* ACtHPR Application No 006/2012 Judgment of 26 May 2017.

[65] Ibid para 6.

[66] Ibid para 3.

[67] Ibid para 3.

[68] Ibid para 4.

implementation of the eviction notice.[69] However, the Kenyan government *de facto* rejected the decision by not responding to the order, which led the ACHPR to file an application to the ACtHPR against the Kenyan government in 2012.[70] The ACHPR alleged the violation of several rights and freedoms guaranteed under the Charter and other international human rights instruments such as the ICCPR and the ICESR.[71] To be more specific, the ACHPR alleged violation of the Ogiek's right to development in addition to its rights to property, natural resources, religion, culture, life, and freedom from discrimination and equality, in accordance with the African Charter, as a result of the treatment by the Kenyan government.[72] The ACtHPR declared that the Kenyan government had violated the Ogiek's rights, in particular the right to develop their property and natural resources under the ACHPR.[73]

Various aspects of this case are significant. First, it is the first in which the African Court ruled on an indigenous peoples' rights. It was originally lodged with the ACHPR, but was referred for the first time in history to the ACtHPR on the basis that it evidenced grave, mass human rights violations.[74] Secondly, the ACtHPR explicitly recognised indigenous peoples' subjectivity and their rights under international law,[75] while other cases[76] were mostly related to the property or land right of indigenous people in the process of development. Thirdly, the court explicitly based one of its reasonings on whether Kenya had violated human rights in the Charter on the Right to Development, meaning that it relied on an international instrument

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[69] Ibid para 4.
[70] Ibid para 5.
[71] Ibid para 52.
[72] Ibid para 101.
[73] Ibid para 227.
[74] ESCR-Net 'African Court delivered landmark judgment on Ogiek community land rights case' (2017) available at *https://www.escr-net.org/news/2017/african-court-delivered-landmark-judgment-ogiek-community-land-rights-case*, accessed on 9 February 2020.
[75] In the *Ogiek* case, the Court determined that 'that the Ogiek community could be recognized as an indigenous population that is part of the Kenyan people, with a particular status deserving of protection deriving from their vulnerability.'
[76] *Burlington Resources Inc v Republic of Ecuador* ICSID Case No ARB/08/5, *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador* UNCITRAL PCA Case No 2009-23, *Bernhard von Pezold and Others* v Republic of Zimbabwe ICSID Case No ARB/10/15, *South American Silver Limited v Bolivia*, UNCITRAL, PCA Case No 2013-15*, Glamis Gold Ltd v The United States of America* UNCITRAL, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Judgment (Merits, Reparations and Costs) of 31 August 2001.

directly involving the right to development. Fourthly, this case demonstrated that the rights belonging to the right to development are closely interconnected and that in specific cases a right can have a more immediate connection to another right. For instance, the right to food in this case had a more direct connection to the right to natural resources. In this respect, one scholar argued that the ACtHPR seemed to derive the right to food from the right to natural resources, which is a very interesting approach, as the right to food is mainly related to the right to life.[77] In my view, however, since both the right to food and the right to natural resources constitute the overarching right to development, the ACtHPR seems to have stressed the connectivity of the right to food and the right to natural resources under the right to development rather than underlining the right to food originating in the right to natural resources.

Based on the foregoing in-depth examination of the international instruments and the jurisprudence pertaining to the right to development of indigenous people, it is noteworthy to ponder on the four points discussed below.

It is participation that has been specially underscored in relation to the right to development of indigenous groups. The principle of participation obliges states to develop mechanisms through which indigenous peoples can freely participate as key players at the same level as the mainstream society in 'elective and administrative institutions as well as other bodies responsible for policies and programmes concerning them.'[78]

Collectiveness has also been outstandingly underlined.[79] The IACHR reiterated that indigenous peoples' right to property is a collective right, whose bearer is the corresponding

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[77] Ricarda Roesch 'The Ogiek Case of the African Court on Human and Peoples' Rights: Not So Much News After All?' (2017) *EJIL: Talk!*, available at *https://www.ejiltalk.org/the-ogiek-case-of-the-african-court-on-human-and-peoples-rights-not-so-much-news-after-all*, accessed on 9 February 2020.

[78] Article 6(1)(b) of the ILO Convention 169 states that 'establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.'

[79] According to Anaya, indigenous peoples themselves have been instrumental in moving international law towards a recognition of collective rights. See S J Anaya 'Indigenous Law and its Contribution to Global Pluralism' 6(1) *Indigenous Law Journal* 3-12.

people.[80] In particular, the main lesson from cases before international tribunals in relation to indigenous peoples' rights is that when a foreign investor attempts to develop land where indigenous peoples have resided, the foreign investor should take sustainability and inclusiveness into consideration. Sustainability concerns the illegality of any activity in relation to traditional lands of indigenous peoples in unsustainable exploitation of natural resources while inclusiveness is related to the illegality of any activity in the absence of prior consent from indigenous peoples.

More importantly, the reason that the protection of the rights of indigenous people attracts special attention is that one of the main legal issues in this area is the right to property of indigenous people. Since a BIT was initially established for the purpose of protecting the property right of investors, in the course of discussions of the rights of indigenous people, a situation arises in which the property right of investors and that of indigenous people conflict. In particular, land itself is of great significance to indigenous people. In the words of the IACHR for indigenous communities, 'relations to the land are not merely a matter of possession and production, but a material and spiritual element that they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.'[81] Furthermore, many cases concerning indigenous peoples have shown that international human rights occupy a superior position in international law. For instance, the IACHR decided in *Sawhoyamaxa* that 'the arguments put forth by the state to justify non-enforcement of the indigenous people's property rights did not suffice to release it from international responsibility.'[82]

Finally, in relation to other subjects covered in this thesis, the inter-connection of the indigenous peoples' rights and migrants' rights are, for instance, found in many international instruments and the international community's attention to that is demonstrated in several international meetings such as the 2018 meeting in commemoration of the International Day (9 August) of the World's Indigenous Peoples under the theme of 'Indigenous peoples'

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[80] Inter-American Commission on Human Rights 'Indigenous and Tribal Peoples' Rights over their ancestral lands and natural resources, Inter-America Commission on Human Rights' (2009) *OEA/Ser L/V/II Doc56/09* at 24.

[81] *Mayagna (Sumo) Awas Tingni Community v Nicaragua Judgment (Merits, Reparations and Costs)* of 31 August 2001 para 149.

[82] Ibid para 137.

migration and movement.'

(b) Women

As the now-famous saying goes, 'women's rights are human rights or human rights and international development law needs a view outside the cocoon of patriarchy.'[83] Yet almost everywhere around the world, women and girls are still denied human rights, often simply because of their gender.[84] While women's rights have been improved over the last two decades, women are still under-protected, in particular, in the areas of the right to development, such as education,[85] health[86] and the environment.[87] The inequality in those areas is likely to have a negative effect on development through a consequent lack of empowerment of women as economic and social actors.[88] Women's human rights in relation to the right to development are of significance in that women's right to development is closely related to the right to development of other subjects covered in this thesis, e.g. the right to development of migrants, and the right to development of children, mostly girls.

It is at the global and regional levels that the rights of women pertaining to the human right to sustainable development are recognised and reaffirmed in many international instruments.[89]

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[83] Marilyn Waring 'Gender and International Law: Women and the Right to Development' (1989) *AUYrBkIntLaw 8 (1988-1989) 12 Australian Year Book of International Law* 177-189 at 178.

[84] Globalfundforwomen Homepage 'Women's Human Rights' available at *https://www.globalfundforwomen.org/womens-human-rights/#.W12sf-QnY2w*, accessed on 13 April 2019.

[85] According to a study of Willemijn de Jong, 'whilst global enrolment of girls in primary and secondary schools is increasing, girls in 2002 still accounted for 60% of the 130 million children without primary education' and 'of the 880 million illiterate adults across the globe, two thirds are women.' See Willemijn de Jong 'The female face of sustainable development female' (2013) *Library Briefing* of *Library of the European Parliament* at 3.

[86] Ibid. 'Women's reproductive health has environmental implications as 2010 research has shown that providing the 200 million women across the world currently without contraception, with access to birth control, could slow population growth and as such reduce global carbon emissions by 8 to 15%.'

[87] Ibid. 'Women living in developing countries seem both more exposed to environmental challenges (the environment is the place where they live) and more vulnerable (they are less protected).'

[88] See de Jong op cit note 85 at 3.

[89] At the global level, one of the leading international arrangements pertaining to women's human rights is the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). At the regional level, there are general human rights instruments with women-related provisions, which include the 1981 African (Banjul) Charter on Human and Peoples' Rights, the Charter of the Organisation of American States that

When it comes to the right of women to development at the global level, the 1992 UN Conference on Environment and Development fully recognised women's contributions and their full participation in sustainable development. Principle 20 of the Rio Declaration stresses that women can play an essential role in the process of environmental management and development, and affirms that their full participation is key to achieving sustainable development. The Millennium Declaration underlines the importance of gender equality and empowerment of women to combat poverty, hunger, and diseases and to stimulate development that is truly sustainable.[90] Furthermore, the SDGs emphasise the importance of the role of women to achieve sustainable development. In particular, SDG 5 expresses the importance of achieving gender equality and empowering all women and girls by ending all forms of discrimination against all women and girls everywhere. At the regional level, the Maputo Protocol explicitly regards sustainable development as a right and imposes a duty on states to ensure women's right to sustainable development and women's participation in the process of development.[91]

Jurisprudence concerning women's human rights before international tribunals were mostly related to violence against women, and not directly to the right to development. For instance, although the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recognised women's rights as part of human rights, it focused on eliminating all forms of discrimination against women and did not consider the crucial role of women in

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includes a non-discrimination provision (article 3), and the American Convention on Human Rights (article 1). Moreover, there are several specialised regional instruments such as the 2003 Protocol to the ACHPR on the Right of Women in Africa (Maputo Protocol) and the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention).

[90] Para 20 of the Millennium Declaration.

[91] 'Article 19 Right to Sustainable Development Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to: a) introduce the gender perspective in the national development planning procedures; b) ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes; c) promote women's access to and control over productive resources such as land and guarantee their right to property; d) promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women; e) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.'

achieving sustainable development. However, as became evident in the previous section on the jurisprudence of international tribunals, there have been cases dealing with some rights comprising the right to development, mostly health-related ones.

(c) The disabled

The World Health Organisation (WHO) estimates that 'about 1 billion people worldwide live with disability or impairment, with a larger proportion living in low-and middle-income countries.'[92] Persons with disabilities 'remain among the most marginalised minority groups in most societies owing to a lack of disability-sensitive and responsive policy interventions, barriers such as stigma and discrimination as well as inaccessible physical and virtual environments, such as communication devices and transportation methods, and segregated educational institutions.'[93] It is widely accepted that inclusion constitutes fundamental human rights for the disabled.[94]

It is at the global and regional levels that the rights of the disabled are recognised and reaffirmed in many international instruments.[95] When it comes to the right to development of the disabled, the MDGs did not expressly deal with disability, but SDG Goal 2 implicitly included provisions pertaining to disability, which concern health and well-being for all and are also incorporated in other targets such as education (4.a), social, economic and political inclusion (10.2),

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[92] WHO 'Health in 2015 from MDGs to SDGs' (2015) at 31.
[93] United Nations 'Global Sustainable Development Report 2016' Department of Economic and Social Affairs at 68.
[94] Ibid.
[95] At the global level, the UN General Assembly adopted the Declaration on the Rights of Disabled Persons in 1975 and the Convention on the Rights of Persons with Disabilities (CRPD) was adopted on 13 December 2006 after eight sessions of an Ad Hoc Committee of the General Assembly from 2002 to 2006. The Convention provides in Article 4(e) that state parties have an obligation to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise. Also, the UDHR makes explicit reference to disabled persons, providing in Article 25 that everyone has the right to security in the event of disability. The other global convention is ILO 159 concerning Vocational Rehabilitation and Employment (Disabled Persons) (1983). At the regional level, one can also find many sources in relation to the right of the disabled, including the ACHPR, the European Social Charter, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (the Protocol of San Salvador), as well as the 1999 Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities.

sustainable cities (11.7), and equity monitoring (17.18). It is noteworthy that the special rapporteur on the rights of persons with disabilities, Catalina Devandas-Aguilarii stressed that 'the inclusion of persons with disabilities is not only a human rights issue, but also a crucial investment for development that States cannot afford to miss.'[96] The World Bank, as an international development institution mainly concentrated on economic growth, has also increased its focus on inclusive development in referring to guidance from internationally accepted frameworks including the Convention on the Rights of Persons with Disabilities (CRPD).[97]

Clearly, international instruments dealing with the rights of disabled persons, including the CRPD, have changed perceptions and conditions for persons with disabilities by accepting disability as a specific human rights issue in the context of development, requiring a new policy approach including development policy.[98] Moreover, international tribunals have mostly focused on the protection of disabled persons from the perspective of civil and political rights. A few cases have demonstrated the importance of social and economic rights; however, cases directly referring to the right to development have yet to be heard.

(d) Migrants[99]

According to the UN, the number of international migrants worldwide has continued to grow

[96] The UN Special Rapporteur on the rights of persons with disabilities 'Report of the Special Rapporteur on the rights of persons with disabilities in accordance with Human Rights Council resolution 26/20' (2015) available at *https://digitallibrary.un.org/record/801967?ln=en*, accessed on 3 July 2020.

[97] Iqbal Kaur 'Including Persons with Disabilities in Development: Opportunities and Accessibility' (2010) In Deborah A Ziegler (eds) *Inclusion for All: The UN Convention on the Rights of Persons with Disabilities* 119-125 at 119.

[98] See Mwendwa, Murangira & Lang op cit note 49 at 126-127.

[99] See the OHCHR Principles and Guidelines on the rights of migrants in vulnerable situations, GMG (2017) Principles and Guidelines, supported by practical guidance on the human rights protection of migrants in vulnerable situations (Draft, October 2017). There is no universal and legal definition of 'migrant' and the UNHCR consistently distinguishes between refugees and migrants, both to be clear about the causes and character of refugee movements and to keep in view the specific entitlements of refugees in international law. However, an international migrant (migrant) usually refers to 'any person who is outside a state of which they are a citizen or national, or, in the case of a stateless person, their state of birth or habitual residence' and this thesis will use this general definition.

rapidly in recent years, reaching up to 258 million in 2017, up from 220 million in 2010 and 173 million in 2000. The 2017 figure means that approximately 3 per cent of the world's population live outside their country of origin because of a variety of compulsions.[100]

It is at the global and regional levels that the rights of migrants are recognised and reaffirmed in many international instruments.[101] In relation to the right to development, international migration tended to be seen primarily in purely economic development terms, in the face of income and development gaps between developed states and developing states.[102] However, as migration emerges as a cross-national and cross-sectoral challenge to the international community, there is a risk that development policies may be conceived of as a means to deal with a fundamental reason for global migration, or that development assistance may be used to deter migration from developing states. Rather, it is important to consider how migration can facilitate sustainable development and improve opportunities for all. Over time, concern has been expressed that lack of respect for the human rights of migrants may result in lower development.[103] Likewise, given that poverty is a major motivation for migration, the right to development as a human right can make a contribution to remedying the factors causing poverty, such as poor education, an inadequate health system and water supply etc. causing migration, by guaranteeing migrants appropriate legitimate rights.[104] More importantly, the migrant issue is closely related to the protection of marginalised groups, in particular women, children and indigenous people. For instance, in the case of indigenous people, migration is often related to indigenous people's human rights. 'Some of the reasons for the migration of indigenous people'

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[100] UN Human Rights Office of the High Commissioner 'Migration and Human Rights' available at *https://www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx*, accessed on 9 February 2020.

[101] At the global level, the main instruments are the 1951 Convention relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air. These instruments, together with those on the rights of migrant workers adopted by the ILO, such as the ILO Convention No 97 concerning Migration for Employment (Revised 1949), and the ILO Migrant Workers Convention 1975 (Convention No 143) form the basis of the international normative and legal framework on international migration.

[102] The Office of UN High Commissioner for Human Rights 'Migration and Development: A Human Rights-Approach' at 3, available at *www.unhcr.org › en-ie,* accessed on 3 July 2020.

[103] Ibid at 4.

[104] Ibid.

involve 'development and loss of land' where indigenous people live.[105] Where their lands are taken over for business development, indigenous people may become migrants, which requires the right to development for migrants and indigenous peoples to be considered together.

Against this backdrop, the international community has demonstrated significant progress in addressing the challenge of the increase in international migrants through various international conferences. The first High-level Dialogue on International Migration and Development was held in 2006 and the second High-level Dialogue was convened in 2013, where a declaration was adopted stressing the crucial role of migration to realise the MDGs. It further recognised that migration can contribute to achieving sustainable development.[106] As a result of the 2013 High-level Dialogue, the member states unanimously adopted a Declaration on International Migration and Development that reaffirmed their commitment to protection of the human rights of all migrants and they agreed to work together on an inclusive agenda on migration by integrating development and respecting human rights.[107] The declaration also committed member states and other stakeholders to recognise that 'human mobility is a key factor to sustainable development.'[108]

Following the MDGs, which are assessed to fall somewhat short of addressing the migration issue,[109] the 2030 Agenda for Sustainable Development provides clear targets for migrants. Thus, it is generally evaluated that the 2030 Agenda integrated migration well into the SDGs, by explicitly referring to migration and migrants in seven targets.[110] Migration is closely related to specific rights comprising the right to development. In particular, in terms of the right to health, migrants draw more attention. For instance, the 2030 Agenda requests the international community to address health inequalities by linking safe, dignified and regular

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[105] Ibid at 7.
[106] Global Forum on Migration & Development Background Paper 'Roundtable 2.2 Migration in the context of the 2030 Development Agenda –Implementing a diverse and cross-cutting issue through follow-up and review' (2015) at 1, available at *https://www.gfmd.org/files/documents/GFMD_Turkey2014-2015_RT_Session_2_2_Background_Paper_EN.pdf*, accessed on 11 February 2020.
[107] Declaration on International Migration and Development para 3.
[108] Ibid para 8.
[109] William Lacy Swing 'Forward' in Gervais Appave & Neha Sinha (eds) *Migration In the 2030 Agenda* (2017).
[110] The 2030 agenda, among its 17 Goals and 169 targets, explicitly includes 7 targets in relation to migrants and migration.

migration to equitable access to health services.[111]

The 2030 Agenda is understood to serve as the first international development platform to include and recognise migration as a dimension of development.[112] The 2030 Agenda articulates in its resolution[113] that the international community recognises 'the positive contribution of migrants for inclusive growth and sustainable development.'[114] In other words, the 2030 Agenda not only embraces migration and migrants explicitly in the context of human rights, but also recognises migrants as enablers of development in states of origin, transit and destination.[115]

By another illustration, the UN General Assembly held a landmark summit on refugees and migrants and adopted the historic New York Declaration for Refugees and Migrants in September 2016, in which the relationship between sustainable development and migrants is directly addressed. It is noteworthy that the New York Declaration recognises that migrants, as proactive actors, 'make significant contributions to economic growth and development, both in destination countries and in their countries of origin.'[116]

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[111] Eliana Barragan, Poonam Dhavan & Julia Puebla Fortier et al 'Migration and health in the Sustainable Development Goals' (2017) in Gervais Appave & Neha Sinha (eds) *Migration in the 2030 Agenda* 39-58 at 40.

[112] Marta Foresti, Jessica Hagen-Zanker & Helen Dempster 'Overview' in Swiss Agency for Development and Cooperation(eds) *Migration and the 2030 Agenda for Sustainable Development* (2018) 5.

[113] The Resolution of the UN General Assembly 'Transforming our world: the 2030 Agenda for Sustainable Development Declaration' (2015) para 29. 'We recognize the positive contribution of migrants for inclusive growth and sustainable development. We also recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses. We will cooperate internationally to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status, of refugees and of displaced persons. Such cooperation should also strengthen the resilience of communities hosting refugees, particularly in developing countries. We underline the right of migrants to return to their country of citizenship, and recall that States must ensure that their returning nationals are duly received.'

[114] This demonstrates strong international commitment to change the current *status quo* regarding the human rights of vulnerable migrants. It has been strengthened in the Addis Ababa Action Agenda, which in paragraph 111 reaffirms 'the need to promote and protect effectively the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their migration status.'

[115] In my view, since the 2030 Agenda was adopted, migrants have been understood to become contributors to sustainable development. Previously, migrants had been regarded as only objects of international human rights and thus their roles in promoting sustainable development had attracted little attention.

[116] Bavo Stevens 'Development Aid Alone Won't Reduce Migration' *Global Daily* 11 August 2017. Also, para

In essence, the international community acknowledged the role of migrants in achieving sustainable development. Besides, the international community seems to focus mainly on the migrant as a beneficiary of the ends of sustainable development or a right holder enjoying the right to development, not as only a facilitator to achieve the purpose of sustainable development itself.[117]

(e) Children

Children make up more than half of the world's extremely poor, with roughly 570 million children living below the international poverty line of $1.25 per day. More than 76 million of these children live in developed nations. As one can imagine, such material poverty leads to malnutrition, hunger and death. Fifty-one million children under the age of five suffer acute malnutrition. Approximately 100 million children in low- and middle-income countries are underweight, with 3.1 million dying each year because of poor nutrition. Sixty-six million children of primary school age attend classes hungry. On average, over one billion children - six in 10 in the world — experience physical punishment. Nearly 230 million young children worldwide have not been registered at birth, making them even more vulnerable to violence, since they do not legally exist. In education, great strides have been made since 2000, with 50 million more children given access to schooling, but much more progress is necessary. Almost

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46 of the 2016 New York Declaration reads as follows: 'We also recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses. Migrants can make positive and profound contributions to economic and social development in their host societies and to global wealth creation. They can help to respond to demographic trends, labour shortages and other challenges in host societies, and add fresh skills and dynamism to the latter's economies. We recognize the development benefits of migration to countries of origin, including through the involvement of diasporas in economic development and reconstruction. We will commit to reducing the costs of labour migration and promote ethical recruitment policies and practices between sending and receiving countries. We will promote faster, cheaper and safer transfers of migrant remittances in both source and recipient countries, including through a reduction in transaction costs, as well as the facilitation of interaction between diasporas and their countries of origin. We would like these contributions to be more widely recognized and indeed, strengthened in the context of implementation of the 2030 Agenda for Sustainable Development.'

[117] Liesl Riddle 'Diaspora engagement and the Sustainable Development Goals' (2017) in Gervais Appave and Neha Sinha (eds) *Migration in the 2030 Agenda* 1-22 at 3.

58 million children of primary school age worldwide cannot attend school, more than 50 per cent of whom are girls.[118] In sub-Saharan Africa, only one in five girls advances to secondary school and 17 million girls in this region are never expected to go to school at all.[119]

It is at the global and regional levels that the rights of children are recognised and reaffirmed in many international instruments.[120] In relation to the right to development, there are two instruments explicitly mentioning the term development for children, namely Article 6 of the CRC[121] and Article 5.2 of the African Charter on the Rights and Welfare of the Child.[122] The SDGs contain a specific target (SDG 16.2) in relation to children and other children-related targets. However, SDG 16.2 principally addresses all forms of violence against children and does not deal with the right to development of children. This notwithstanding, as an implementing international instrument, the 2015 Addis Ababa Action Agenda (AAAA) 'establishes a clear link between investing in children and the post-2015 agenda's overall goal of achieving inclusive and sustainable growth.'[123]

Contrary to previous agreements,[124] the 2015 AAAA is understood to recognise 'children as no longer being viewed as passive recipients of social support, but as agents of future growth

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[118] Anika Rahman 'Our Collective Global Future: Children and the United Nations' Sustainable Development Goals' *Huffpost* 24 February 2015.
[119] Ibid.
[120] At the global level, the UDHR contains two articles expressly referring to child for special care and education. The ICESCR also makes special reference to children for special protection from economic and social exploitation as well as health, respectively in articles 10 and 12. Besides reference to children's human rights in these two general human rights instruments, there are two specialised global instruments, addressing exclusively and comprehensively the rights of children, namely the 1959 UN Declaration on the Rights of the Child and the 1989 UN Convention on the Rights of the Child (CRC). At the regional level, there are two specialised instruments. The 1999 African Charter on the Rights and Welfare of the Child and the 1996 European Convention on the Exercise of Children's Rights make comprehensive and specialised reference to the protection of children's human rights and the obligations of states. There are also regional general human rights instruments containing specific provisions of the right of children, such as Article 18.3 of the ACHPR, Article 19 of the ACHR, and Article 16 of the Protocol to the ACHR.
[121] 'Article 6.2 States Parties shall ensure to the maximum extent possible the survival and development of the child.'
[122] 'Article 5(Survival and Development) 2. State Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.'
[123] See Olav Kjorven, Nalinee Nippita, and Frank Borge Wietzke 'The Addis Ababa Action Agenda: strengths, weaknesses, and the way ahead' *UNICEF Blog* 18 August 2015.
[124] For instance, the 2002 Monterrey Consensus, an outcome of the UN International Conference on Financing for Development and its follow-up 2008 Doha Conference.

and development.'[125] The AAAA stresses 'the vital importance of promoting and protecting the rights of all children, and ensuring that no child is left behind' in the context of inclusive, equitable and sustainable development for present and future generations.[126]

When it comes to case-law of international tribunals or semi-tribunals, at the global level, the right to development has gained increased attention at the jurisprudence of the UN Committee on the Right of Child.[127] Based on an analysis of the jurisprudence of the Committee, it can be argued that the Committee conceptualises the right to development as a collateral right, meaning that when other rights of children, for instance, the right to education, are violated, it also constitutes a violation of the right to development.[128]

Turning to African cases,[129] one noticeable case is worth examining. In *the Centre for Human Rights (University of Pretoria) and la Rencontre Africaine pour la Défense des Droits de l'Homme (Senegal) v Government of Senegal* case,[130] the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) was supportive of 'the conceptualisation of the right to life survival and development as a general principle that serves to reinforce the *raison d'être* of each of the rights enshrined' in the African Charter on the Rights and Welfare of the

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[125] Kjorven op cit note 123.
[126] The 2015 AAAA, in its para7, states that 'We recognize that investing in children and youth is critical to achieving inclusive, equitable and sustainable development for present and future generations, and we recognize the need to support countries that face particular challenges to make the requisite investments in this area. We reaffirm the vital importance of promoting and protecting the rights of all children, and ensuring that no child is left behind.'
[127] Noam Peleg 'Developing the Right to Development' (2017) 25 (2) *The International Journal of Children's Rights* 380-395 at 383.
[128] Ibid at 384.
[129] At the regional level, two regional human rights tribunals, namely the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR), are understood to have created case law from the rights of children under international human rights agreements, becoming a new 'children's common law.' In *Case Concerning the Children's Rehabilitation Institute*, the IACtHR granted Article 19 (rights of child) an integrating character, considering it in terms of what it added to other Convention rights, rather than as an isolated provision; it has express recourse to the CRC and the San Salvador Protocol in interpreting the Convention.[129] In the ECtHR, the *Sampanis v Greece* case and the *ORŠUŠ and others v Croatia* case are both related to education for children in Roma-only classes. In particular, the *ORŠUŠ and others v Croatia* case is related to the right to education (Article 28 of the CRC) and children of minorities or indigenous populations (Article 30 of the CRC). See *Sampanis and Others v Greece* Application no 32526/05 Judgment of 5 June 2008 and *Oršuš and Others v Croatia* Application no15766/03 Judgment of 6 March 2010.
[130] *The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme (Senegal) v Government of Senegal*, ACERWC (African Committee of Experts on the Right and Welfare of the Child) No 003/Com/001/2012 Decision of 15 April 2014.

Child[131] and underlined that 'the principle of the best interest of children aims at safeguarding the realisation of children's rights effectively and contributing to children's holistic development.'[132] This case involves the violation of the human rights of 100000 pupils who were sent to stay in 'Qur'anic schools known as daaras' in Senegal allegedly for the purpose of religious education.[133] In 2012, the Centre for Human Rights jointly with La Rencontre Africaine pour la Defense des Droits de l'Homme, submitted a communication on this matter to the ACERWC.[134] The complaint claimed that in spite of the pupils of Qur'anic schools not only being 'deprived of any contact with their families' but also being forced by their instructors to beg on the streets, to secure their own survival and enrich the instructors,[135] the government of Senegal had 'not provided minimum standards to regulate' the schools and that it did 'not conduct inspections' to check if the rights of pupils attending the schools were violated.[136] The ACERWC found multiple violations of the African Children's Charter, in particular violations of Article 5 (survival and development), Article 11 (the right to education), Article 14 (health and health services) and Article 15 (child labour).[137] This case indicates that it is essential for the right to development to be realised for the benefit of its subjects by ensuring effective implementation of domestic or international laws,[138] because the nature of socio-economic rights comprising the right to development requires such rights to be transformed into tangible reality.[139]

In essence, the right to development of children is perceived holistically at the global and regional level alike. In particular, in the area of development law, children are a key driver of economic and social development, but are easily left behind in the various areas of development such as education, health, labour, food and water. Accordingly, ensuring the right to

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[131] Ibid para 41.
[132] Ibid para 34.
[133] Ibid para 2.
[134] Ibid para 1.
[135] Ibid paras 9-10.
[136] Ibid para 7.
[137] Ibid para 82.
[138] ESCR-Net 'The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme (Senegal) v Government of Senegal, ACERWC, DECISION: N° 003/Com/001/2012' (2015), available at from *https://www.escr-net.org/caselaw/2015/centre-human-rights-university-pretoria-and-rencontre-africaine-pour-defense-droits*, accessed on 8 February 2020.
[139] Ibid.

development of children is closely related to realising the different rights composing the right to development.

3.3 The Areas of Application of the Right to Development

The human rights belonging to the right to development are interdependent, indivisible and thus mutually reinforcing. For instance, the improvement in an individual's right to water or right to food will potentially also result in an improvement in an individual's other human rights, such as the right to health. A few studies have been conducted on specifying the areas where the right to development applies. For instance, the Investment Policy Framework for Sustainable Development of the UN Conference on Trade and Development (UNCTAD) illustrates power, transport, telecommunication, water and sanitation, food security and agriculture, climate change mitigation and adaption, the eco-system, health, and education as priority sectors for sustainable development in the context of international investment agreements.[140] The areas of application discussed below are areas where the right to development is often implicated in the course of foreign investment.

3.3.1 Protection of the Environment

At a time when the international community attaches great significance to sustainable development, indicated by post-2015 development co-operation[141] and post-2020 climate change in the context of international human rights, FDI is indispensable to achieve sustainable development and a carbon-free world. It is not surprising that sustainable development and climate change require to be addressed together, since the concept of sustainable development has its roots in the environment. Nor is it surprising that the success of sustainable development and climate change can be ensured through sufficient financing.[142] By some estimates,

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[140] UNCTAD 'Investment Policy Framework for Sustainable Development' (2015) at 21, available at *https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf*, accessed on 11 March 2020.

[141] In October 2015, the international community adopted a historic document to achieve sustainable development goals, the 2030 Sustainable Development Agenda.

[142] The Financial Innovation Platform was launched in October 2016 with a view to identifying and piloting innovative finance instruments that can drive investment and support SDG interventions. See 'UN and Private Sector to Create New Partnership Platform to generate Financing Solutions for the Sustainable Development

additional investment of $2.5 trillion per year - equivalent to the nominal GDP of France - is required for the next 15 years in order to achieve the SDGs and 'leave no one behind.'[143] Furthermore, 'low- and lower-middle-income countries may need to increase public and private expenditure by some $1.4 trillion per year ($343-360 billion for low-income countries and $900-944 billion for lower-middle-income countries) in order to reach the SDGs.'[144]

As the concept of sustainable development originates in environmental protection, environmental protection is one of the core elements in applying the human right to sustainable development. Human rights and the environment are closely interconnected and mutually supportive. Human rights cannot be fully ensured without a healthy environment and in the same way sustainable and environmental governance cannot be established with no respect for human rights.[145] The importance of environmental protection in the context of human rights is well represented in the observation of Justice Weeramantry of the ICJ, in his separate opinion in *the Gabcikovo-Nagymaros Project,* that protection of the environment is 'a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself.'[146]

Against this backdrop, the first important statement on the link between human rights and environmental protection appeared in the 1972 Stockholm Declaration on the Human

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Goals' *UN News* October 2016, available at *http://www.un.org/sustainabledevelopment/blog/2016/10/un-private-sector-to-create-platform-for-financing-sdgs/*, accessed on 28 January 2020. Also, the Green Climate Fund (GCF) was established by the 194 countries that are parties to the United Nations Framework Convention on Climate Change (UNFCCC) in 2010, as part of the Convention's financial mechanism and was given an important role in serving the agreement and supporting the goal of keeping climate change well below 2 degrees Celsius when the Paris Agreement was reached in 2015; Green Climate Fund 'who we are', available at *https://www.greenclimate.fund/who-we-are/about-the-fund*, accessed on 27 January 2020.

143 Johannes Jütting & Shaida Badiee 'Financing the SDG Data Needs: What Does It Cost?' *Huffpost* 23 September 2016.

144 Guido Schmidt-Traub 'Investment Needs to Achieve the Sustainable Development Goals' (2015) *A working paper of Sustainable Development Solutions Development* at 5, available at *http://unsdsn.org/wp-content/uploads/2015/09/151112-SDG-Financing-Needs-Summary-for-Policymakers.pdf*, accessed on 28 April 2019.

145 UNEP 'What are environmental rights?' available at https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what#:~:text=Environmental%20rights%20means%20any%20proclamation,conditions%20of%20a%20specified%20quality, accessed on 21 August 2020.

146 *The Gabčikovo-Nagymaros Project (Hungary v Slovakia)* Judgment of 25 September 1997, Separate opinion of Vice-President Weeramantry at 91.

Environment.[147] Principle 1 of the Stockholm Declaration laid the foundation for connecting human rights and environmental protection.[148] Since the Stockholm Declaration, the established links between human rights and environmental protection have been reinforced in a variety of international legal instruments[149] and the decisions of international courts or tribunals.[150] It is argued that the Rio Declaration provides strong evidence of a rule of customary international law recognising the right to environment.

The tendency of considering the environmental component in international tribunals has been demonstrated in many cases. The concept of sustainable development in the context of environmental protection has already emerged in various international tribunals, either globally or regionally. For instance, at the global level, as expressed in the *Pulp Mills* case, sustainable development came to be perceived as a link between the right to a healthy environment and the right to development; environmental and developmental considerations were jointly considered in relation to the issues of elimination of poverty and satisfaction of 'basic human needs.'[151] At the regional level, in *Hamer v Belgium*,[152] the European Court's decision[153] was ground-breaking in the sense that it was the first explicit reference to 'the environment as having value in itself and that economic interests and even a fundamental right, the right to property, should not be given priority over environmental interests.'[154]

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[147] Lynda Collins 'Are We There Yet? The Right to Environment in International and European Law' (2007) 3 (2) *McGill International Journal Sustainable Development & Policy* 119-153 at 124.
[148] Ibid at 131.
[149] At the regional level, two important instruments recognise the right to the environment. Article 24 of the African Charter on Human and Peoples Rights states that 'all peoples shall have the right to a general satisfactory environment favourable to their development.' More than 50 states are party to the African Charter, which shows the prominent status of the right to environment. Turning to the Americas, the Additional Protocol to the American Convention on Human Rights in the area of Economic Social and Cultural Rights (the Protocol of San Salvador) recognises the right to a healthy environment and obliges the state parties to 'promote the protection, preservation, and improvement of the environment.'
[150] Ibid at 132.
[151] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgement of 20 April 2010, Separate opinion of Judge Cançado Trindade ICJ Reports 2010 135-205 at 184.
[152] *Hamer v Belgium* Application No 21861/03 Judgment of 27 November 2007.
[153] Ibid Judgment (Extracts) para 79. 'The environment is a cause whose defence arouses the constant and sustained interest of the public, and consequently public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the state has legislated in this regard. The public authorities therefore assume a responsibility that should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective.'
[154] European Court of Human Rights *Environment and the European Convention on Human Rights* 26, available at *https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf*, accessed on 8 April 2020.

Among these cases, this thesis will take a brief look at the leading three cases, namely *Unglaube v Costa Rica*[155] where both parties to the dispute appear to be in agreement, at least in principle, concerning the merit of protecting the nesting area for leatherback turtles and the need for environmentally sensitive development;[156] *Clayton and Bilcon v Canada*[157] in which the Tribunal notes that 'this case involves environmental regulation, and that there is substantial concern among the public and state authorities that investor-state treaty provisions should not be used as obstacles to the maintenance and implementation of high standards of protection of environmental integrity'[158] and that 'the concepts of promoting both economic development and environmental integrity are integrated into the North American Free Trade Agreement (NAFTA) Preamble's endorsement of the principle of sustainable development';[159] and *Perenco v Ecuador,*[160] according to which 'Proper environmental stewardship has assumed great importance in today's world and the Tribunal agrees that if a legal relationship between an investor and the State permits the filing of a claim by the State for environmental damage caused by the investor's activities and such a claim is substantiated, the State is entitled to full reparation in accordance with the requirements of the applicable law.' The Tribunal further recognises that 'a State has wide latitude under international law to prescribe and adjust its environmental laws, standards and policies in response to changing views and a deeper understanding of the risks posed by various activities, including those of extractive industries such as oilfields.'[161]

The introduction of the right to the protection of the environment lays an initial and solid foundation for the establishment and evolution of the right to development and goes

[155] *Marion Unglaube v Republic of Costa Rica* ICSID Case No ARB/08/1 and *Reinhard Unglaube v Republic of Costa Rica* ICSID Case No ARB/09/20 Award of 16 May 2012 ('Unglaube v Costa Rica').
[156] Ibid para 39.
[157] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc v Government of Canada* PCA Case No 2009-04 Award on Jurisdiction and Liability of 17 March 2015.
[158] Ibid para 595.
[159] Ibid para 596.
[160] *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* ICSID Case No ARB/08/6 Interim Decision on the Environmental Counterclaim of 11 August 2015.
[161] Ibid paras 34-35.

considerably further than other rights examined in this section in that the recognition of such a right will have, and has already had, major implications for economic development planning.[162]

3.3.2 The Right to Health

Since the right to health made its first appearance in the WHO Constitution, its content has been elaborated with significant detail in many international instruments.[163] In particular, the UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No 14 stresses that states should ensure that international agreements do not have an adverse impact on the right to health. The MDGs also made a great contribution to improving the global health situation. For instance, child mortality and maternal mortality have significantly reduced by 53 per cent and 44 per cent respectively since 1990. Furthermore, in the context of the right to development, the SDGs have 17 health-related goals; particularly Goal 3 directly concerns health matters.

There has been growing recognition that the right to health is related to a human rights issue as well as constitutes 'a fundamental building block of sustainable development.'[164] Thus Judge Koroma, in his dissenting opinion in the *Advisory Opinion of the ICJ Nuclear Weapons* case, concludes that 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being.'[165] The right to health is 'interpreted as an inclusive right,' providing individuals and communities with a substantial voice 'in all health-related decision-making at the community, national and international levels,'[166] which underscores the importance of participation, a major factor in inclusive development.

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[162] Michele Jacquart 'Economic, Social and Cultural Rights' in Mohammed Bedjaoui (ed) *International Law: Achievements and Prospects* (1991) 1090.

[163] See Maya Prabhu 'International Health and Sustainable Development Law' in Marie-Claire Cordonier Segger & Ashfaq Khalfan (eds) *Sustainable Development Law: Principles, Practices, and Prospects* (Oxford, Oxford University Press; 2005) 323-339.

[164] Paul Hunt 'Report of the Special Rapporteur on the Right to Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health,' *UN Doc A/HRC/7/11 (2008)* para 12.

[165] *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion of 8 July 1996 Dissenting Opinion of Judge Koroma at 93.

[166] UN Committee on Economic, Social and Cultural Rights 'General Comment 14: The Right to the Highest Attainable Standard of Health' (2000) UN Document E/C12/2000/4, available at *http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument*, accessed on 1 April 2019.

As some experts indicated, sustainable development, which has an interrelationship with human rights and social, economic and environmental objectives, has the potential to help elaborate the content of the right to health[167] pertaining to international trade and investment regimes. In this respect, the right to health is closely interconnected to other constituent human rights of the right to development, in particular the right to food, the right to education, and the right to labour. [168] For instance, in both the CRC[169] and the CEDAW, the right to food is considered to be part of the right to health of children and women, respectively. In addressing the right of children to health, the CRC also links the right to health to the right to education.[170]

The right to health is also to be understood to impose three types of obligations on states to respect, fulfil and protect the right. In particular, as regards states' obligation to protect the right to health, states must ensure that third parties (non-state actors) do not infringe upon the enjoyment of the right to health.[171] The obligation of non-state actors, including investors and corporations, is also reflected in General Comment No 14, which emphasises that all members of society, including the private business sector, have responsibilities regarding the realisation of the right to health.[172]

Such obligations imposed on states or the private sector are more significant in the current unprecedented global COVID-19 pandemic. To cope with the spread of COVID-19, individual states have been taking emergency measures, mainly based on the assumption that the right to

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167 Maya Prabhu 'International Health and Sustainable Development Law' in Marie-Claire Cordonier Segger and Ashfaq Khalfan (eds) *Sustainable Development Law: Principles, Practices, and Prospects* (2004) 323-339.

168 Many ILO conventions cover occupational health issues. For instance, one can refer to Convention No 155, Convention No 161 and Convention No 148.

169 Article 24(2)(c) of the CRC.

170 Article 24(2)(e) of the CRC.

171 *Sudan Human Rights Organisation, Centre on Housing Rights and Evictions v Sudan*, ACHPR Communication No 279/03 and 296/05 Decision of 27 May 2009 para 209.

172 CESCR General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4). Para 42 of the General Comment No 14 provides that 'while only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organisations, civil society organisations, as well as the private business sector - have responsibilities regarding the realization of the right to health. States parties should therefore provide an environment which facilitates the discharge of these responsibilities.'

health is a fundamental human right and states should fulfil their obligations to realise this right. For instance, several measures have been enacted by the Italian government, which are argued to give rise to *de facto* expropriation claims, including the mandatory lock-down of all business activities of foreign investors,[173] in particular potential bankruptcy of foreign airlines. As such, the right to health is not an abstract right, but may serve as a substantive right in international disputes.

3.3.3 The Right to Water

Given that, as countries develop and world populations increase, it is estimated that the global demand for water will rise by 55 per cent by 2050, about 884 million people lack access to safe drinking water and more than 2.6 billion do not have access to basic sanitation, the international community has recognised the right to safe and clean water as a human right for the full enjoyment of life and all human rights.[174] As the international community attaches great significance to water, investment in the water sector is big business to MNCs and the governments of developing countries tend to invite MNCs to invest in their water-related projects, mostly by privatisation. According to research, roughly 10 per cent of global water consumers today receive their water from private enterprises. More importantly, the 2030 Agenda for Sustainable Development explicitly uses the term the human right to safe drinking water and sanitation,[175] different from the wording of MDGs in relation to water. The MDGs simply state that the target is to 'halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation.'[176]

In the 1990s, privatisation of water supply and withdrawal of privatisations took place in many Latin America countries. Most expropriations during this period ended up at international arbitrations such as the International Centre for Settlement of Investment Disputes (ICSID). One can find many cases in this field.[177] Among these, for the purpose of this study, special

[173] See Massimo Benedetteli 'Could COVID-19 emergency measures give rise to investment claims? First reflections from Italy' *Global Arbitration Review* 26 March 2020.
[174] The UN General Assembly Resolution 'The human right to water and sanitation' (2010) *A/RES/64/292*.
[175] Declaration 7.
[176] Target 7 C of the MDGs.
[177] In addition to these two cases, there are more leading cases such as the *Azurix v Argentina case, the Agua del*

attention will briefly be paid to two cases, namely *the SAUR International SA v Republic of Argentina* case[178] *and the BGF v Tanzania* case[179]. First, in the *SAUR* case, the Tribunal recognised, in an isolated international investment arbitration, the human rights argument put forward by Argentina that human rights in general are a source of law applicable even to investment arbitration and the right to water constitutes a human right within the meaning of the human rights law applicable to the present proceedings.[180] Secondly, the amicus in its brief in *BGF v Tanzania* pointed out that 'water is a key to sustainable development and access to water is characterised as a basic human right by the UN Committee on Economic, Social and Cultural Rights (CESCR) in 2002.'[181] Most importantly, it was argued in this case that MNCs' responsibility should be addressed in the context of sustainable development and human rights.[182]

It is widely recognised that the right to water is a legally binding norm under international law, and that it involves and is part of sustainable development. Despite an increase in international agreements that recognise the right to water,[183] some may argue that those agreements only underline the importance of water in realising the SDGs, rather than explicitly recognising the right to water. However, these international agreements are understood to explicitly recognise the right to water by placing it in their substantive list of state obligations.[184] Among many

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Tunari v Bolivia case. In the first case, Azurix filed a request for arbitration against Argentina with ICSID, claiming that Argentina had violated its obligation in respect of Azurix's investment in a utility distributing drinking water. See *Azurix Corp v The Argentine Republic* ICSID Case No ARB/01/12. In the second case that was brought to ICSID but in which the parties reached an agreement before the Tribunal considered the merits, the Bolivian government privatised water supply to a private water utility, Aguas del Tunari, but nationalised the water industry a few months after signing the privatisation faced, eliciting strong opposition of the residents of Cochabamba resulting in civic commotion. See *Aguas del Tunari S A v Republic of Bolivia* ICSID Case No ARB/02/3 Decision of 21 October 2005.

178 *SAUR International S A v The Argentine Republic* ICSID Case No ARB/04/4 Decision on Jurisdiction and Liability of 6 June 2012.

179 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No ARB/05/22.

180 Bree Farrugia 'The human right to water: defences to investment treaty violations' (2015) 31 (2) *Arbitration International* 261-282 at 272

181 Ibid para 379.

182 Ibid. The obligations of corporations will be examined in chapter 5.

183 For instance, in article 14(2)(h) CEDAW 'obliges states to ensure women the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.' The Convention on the Right of the Child (CRC), in article 24(2)(c), provides that 'state parties shall pursue full implementation of these rates and, in particular, shall take appropriate measures to combat disease and malnutrition, including within the framework of primary health care, through the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water.'

184 William Schreiber 'Realizing the Right to Water in International Investment Law: An Interdisciplinary

international norms pertaining to the right to water,[185] the UN Human Rights Council (HRC), at an early stage, recognised the right to water as a human right 'indirectly' by stating human rights obligations related to access to safe drinking water.[186] However, the HRC, in its recent resolutions, explicitly recognised the right to water by referring to the right to water itself.[187] It is also noted that the CESCR affirms that realisation of the right to water requires ensuring that there is sufficient and safe water for present and future generations.[188] The CESCR goes as far as asking states to consult with those affected when state action can interfere with the enjoyment of the right to water, as a means to protect the right to water.[189] The same is true of General Comment 15, which focuses on the right to water of marginalised and specific groups such as women, children, the disabled, indigenous peoples and migrants, including refugees, asylum-seekers and internally displaced persons.[190] Furthermore, General Comment 15 articulates that 'the obligation to protect requires States to prevent third parties from interfering in any way with the enjoyment of the right to water.'[191] The right to water is closely related to other human rights belonging to the right to development. In particular, the right to water is inextricably linked to the rights to health and food.[192]

Approach to BIT Obligations' (2008) 48(2) *Natural Resources Journal* 431-478 at 439.

185 Many soft laws underscore the significance of water as a human right, such as the 1992 International Conference on Water and Sustainable Development (Dublin Conference) and 1992 UN Conference on Environment and Development (Rio Summit).

186 Human Rights Council Decision 2/104 (November 2006), 7/22(March 2008), 12/8(October 2009)

187 A/HRC/RES/15/9.

188 General Comment No 15: The Right to Water (Arts. 11 and 12 of the Covenant) Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C 12/2002/11 para 28.

189 'The Committee on Economic, Social and Cultural Rights has asserted that, in the case of the rights to social security, housing, and water, state action that could interfere with the enjoyment of the right must be preceded by an opportunity for genuine consultation with those affected, timely and full disclosure of information on the proposed measures, reasonable notice of proposed actions, legal recourse and remedies for those affected, and legal assistance for obtaining legal remedies.' See Report of the Secretary-General on the question of the realisation in all countries of economic, social and cultural rights (2013) A/HRC/25/31 para 9.

190 General Comment 15 para 16 states: 'Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum-seekers, internally displaced persons, migrant workers, prisoners and detainees.'

191 The Committee on Economic, Social and Cultural Rights 'The Right to Water (Arts. 11 and 12 of the Covenant) (2003) *General Comment No 15* para23. Para 23 also states that 'Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, *inter alia,* adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.'

192 UN Office of the High Commissioner for Human Rights 'The Right to Water' (2010) Fact Sheet No 35 at 4.

3.3.4 The Right to Food

The absolute number of people in the world affected by chronic food deprivation began to rise in 2014 – going from 775 million people to 777 million in 2015[193] – and is estimated to have increased further to 820 million in 2018.[194] Sub-Saharan Africa remains the region with the highest prevalence of undernourishment, affecting an alarming projected 22.8 per cent of the population in 2018.[195] The situation is especially urgent in conflict-affected states in sub-Saharan Africa, where the number of undernourished people grew by 23.4 million between 2015 and 2018.[196] Lack of access to adequate food can be due to two reasons: There is no food available, or food is available but not accessible to marginalised people. In the past, the international community has put more emphasis on the overall availability of adequate food. However, in the context of contemporary human rights, priority has been given to marginalised people.

Many international instruments recognise the right to food. Most importantly, in the area of international development, the MDGs are aimed at eradicating extreme poverty and hunger by 2015. The 2030 Agenda for Sustainable Development, in its Goal 2, envisages ending hunger, achieving food security and improved nutrition, promoting sustainable agriculture and ending poverty in all its forms everywhere. The UN CESCR, in General Comment 12, provides that the right to food is 'indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights.'[197] It also articulates that 'the right to adequate food is realised when everyone, alone and in community, has physical and economic access at all times to adequate food.'[198] In terms of international tribunals, a significant case in a regional tribunal, namely the ACHRPR, is noteworthy. In its decision in the *SERAC* case *(Ongoni* case), the ACHRPR concluded that the right to food is inferred from the right to

[193] FAO, IFAD, UNICEF, WFP & WHO *The State of Food Security and Nutrition in the World 2017* (2017) 6.
[194] Ibid 3.
[195] Ibid 8.
[196] Ibid 7.
[197] CESCR 'The right to adequate food (art 11 of the Covenant)' (1999) *General Comment No 12* para 4.
[198] Ibid para 6.

development, by affirming as follows:

> 'The Communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (article 4), the right to health, and the right to economic, social and cultural development (article 22). By the violation of these rights, the Nigerian government trampled upon not only the explicitly protected rights, but also upon the right to food implicitly guaranteed.'[199]

The right to food is interconnected with other human rights, in particular the right to education, the right to health, and the right to water and with the protection of the human rights of marginalised people, particularly children. For instance, in the case of the right to education, hunger and malnutrition result in undermining children's learning abilities and have a negative impact on their continuation of attending school and force them to work instead, which may lead to violation of the right to education.[200] In this context, ensuring the right to food is understood to be key to the fulfilment of the right to education.

More importantly, as a human right, the right to food is widely and generally accepted to impose three types of obligations on states – the obligations to respect, protect and fulfil the right to food. As General Comment 12 articulates, violations of the right to food can occur through the direct action of states or other entities insufficiently regulated by states.[201] In this context, the right to food and relevant obligations of stakeholders may be more significant in contemporary international politics and law. For instance, food security is understood to be a key component of the right to food, to which General Comment 12 has added a requirement that food be accessible for both present and future generations.[202] Given such importance of food security,

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[199] *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights, Comm No 155/96 (2001) para 64.

[200] See UN Office of the High Commissioner for Human Rights 'the Right to Adequate Food' (2010) *34 Fact Sheet* at 6. Also, according to this report, the relations between the right to food and other human rights are as follows: as far as the right to health is concerned, 'nutrition is a component of both the right to health and the right to food. When a pregnant or breastfeeding woman is denied access to nutritious food, she and her baby may be malnourished even if she receives pre- and post-natal care. When a child is suffering from diarrhoeal disease but is denied access to medical treatment, it cannot enjoy adequate nutritional status even if it has access to food.' When it comes to the right to water, 'the right to food cannot be realised if people lack access to safe drinking water for personal and domestic use, defined as water for drinking, washing clothes, food preparation and personal and household hygiene.'

[201] CESCR 'The right to adequate food (art 11 of the Covenant)' (1999) *General Comment No 12* para 19.

[202] Sarah Joseph *Blame it on the WTO?: A Human Rights Critique* (Oxford, Oxford University Press;2011) 182.

individual states may invite foreign investment to produce sufficient crops in order to feed a growing population and ensure the right to food of their citizens, or may rescind their green light to foreign investors' use of agricultural lands for the purpose of food sovereignty. Some argue that foreign investments in agriculture in developing states can be a tool for improving food security[203] by offering a stable food supply, while others argue that excessive foreign investment in this sector can increase dependency of developing states on MNCs, which leads to unstable food security and eventually undermines the right to food of the nationals of host states.[204] In this vein, many attempts by international organisations have been made to balance the conflict of interests or to place positive obligations on agro-foreign investors to respect the human rights, mostly the right to food, of any local producers and indigenous people.[205]

3.3.5 The Right to Natural Resources

The right to development was arguably rooted generally in the right to permanent sovereignty over natural resources. That right, as related to development, had meaning only insofar as developing states were able actually to extract and exploit their resources to achieve development.[206] The key role of natural resources in global economic development has meant that ownership and control over natural resources have been at the forefront of legal, territorial and political disputes between states, particularly between developing states and developed states. At the same time, the links between natural resource depletion and environmental degradation, impoverishment and human rights violations mean that the governance and management of natural resources remains a critical arena for local and transnational contestation. More importantly, permanent sovereignty over natural resources can be understood to be an essential component in both international investment law and international development law, through which it can play a significant part in the combination of these two

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203 James Zhan, Hafiz Mirza, & William Speller 'International Investment and Local Food Security' in *2018 Global Food Policy Report* (Washington, International Food Policy Research Institute; 2018).

204 For instance, the Africa National Congress of South Africa argues that expropriation without compensation will improve food security. See Strom Simpson 'SA food security and Land Expropriation' *medium* 4 November 2017.

205 See the OECD Guidelines for Multinational Enterprises 1976.

206 Daniel J Whelan 'Under the Aegis of Man: The Right to Development and the Origins of the New International Economic Order' (2015) 6 (1) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 93-108 at 104.

areas of international law with a view to promoting sustainable development.[207]

Over the last 50 years, material extraction of natural resources has more than tripled from 27 billion tons in 1970 to 92 billion tons in 2017, with the rate of extraction accelerating since the year 2000.[208] Unsustainable patterns of development and use of natural resources have deteriorated consequent to unequal distribution of the benefits of natural resource use and its increasingly severe global impacts on economic, social and environmental development of human beings as well as the ecosystem.[209] The excessive extraction and exploitation of natural resources amount to more than 90 per cent of global biodiversity loss and water stress impacts and cause approximately 50 per cent of global greenhouse gas emissions.[210]

Natural resources have played a crucial role in driving economic development at the national and global levels. It is obvious that natural resources are the most important driving force of development on the African continent, endowed with both renewable (water, land, forest) and non-renewable (minerals, metals, oil) natural resources that may be discovered, remain undiscovered, or may rarely be harnessed. Thus, the right to natural resources or the principle of permanent sovereignty over natural resource[211] has been at the heart of debate in international development law, international investment law, and international human rights law.

The notion of permanent sovereignty over natural resources itself was first introduced by Chile

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[207] Schrijver op cit note 40 376.

[208] UNEP *Global Resources Outlook 2019* (2019) 6.

[209] Ibid 9.

[210] Ibid.

[211] The UN resolutions and provisions of relevant international instruments were 'not always consistent' in this respect. The principle of permanent sovereignty over natural resource, as recognised under the Charter of Economic Rights and Duties and the UN Resolution 523, UNCLOS, and the 1992 Rio Declaration, is considered 'a right belonging to states.' On the contrary, UN Resolution 1803, UN Declaration on the Rights of Indigenous Peoples, ICCPR/ICESCR and the African Charter 'recognise the right as belonging to peoples or nations' as a part of international human rights. 'As a result, there have been different interpretations regarding the rightful bearers of the right of permanent sovereignty over natural resources. The right has variously been viewed as belonging solely to the state, or jointly to the state and peoples, or solely to peoples.' See Yolanda T Chekera & Vincent O Nmehielle 'The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds' (2013) *African Journal of Legal Studies 6* 69-101 at 76-77. However, in spite of different interpretations, the concept of the right to natural resources and the principle of permanent sovereignty over natural resource can be used interchangeably.

in the UN Commission on Human Rights in 1952 and has subsequently been incorporated into various resolutions and declarations of international organisations, which led to its evolvement into a declared right vested in 'states as well as peoples.'[212] The right to natural resources or the principle of permanent sovereignty over natural resources gained its legitimacy from various declarations and resolutions, mostly of the UN General Assembly, while the key components of the right to natural resources or the principle of permanent sovereignty over natural resources have been incorporated in various international agreements.[213] Numerous resolutions and declarations of the UN General Assembly and relevant international bodies have made a great contribution to laying a solid foundation for establishing the right to natural resources.

At the global level four UN General Assembly resolutions are important. First, Resolution 523 recognised the right of under-developed states to 'determine freely the use of their natural resources.'[214] Secondly, Resolution 1803, which is understood to constitute the broadest and most explicit declaration from the UN on the subject,[215] has three important provisions:[216] 'peoples or nations' are also beneficiaries of the right to permanent sovereignty;[217] 'the right of peoples and nations to permanent sovereignty over their natural resources must be exercised

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[212] Fritz Visser 'the principle of permanent sovereignty over natural resources and the nationalisation of foreign interests' (1998) 21(1) *Comparative and International Law Journal of Southern Africa* 76-91 at 76.

[213] Most notable are leading human rights covenants and international agreements relating to specific sectors, namely ICCPR and ICESCR in 1966; the African Convention on Human and Peoples' Rights in 1981; the UN Convention on the Law of the Sea (UNCLOS) in 1982; the Biodiversity Conventions in 1992; and the International Labour Organisation Indigenous and Tribal Peoples Convention No 169 in 1989. The ICCPR and ICESCR, in Article 1 respectively, provide evidence of state practice recognising the sovereign rights of peoples by stipulating that 'all people may freely dispose of their natural wealth and resources.' Also, Article 47 of the ICCPR and Article 25 of ICESCR state that 'nothing in the present Covenant shall be interpreted as impairing the inherent right of all people to enjoy and utilise full and freely their natural wealth and resources.' The 1981 African Charter of Human and Peoples' Rights recognises a right of peoples to free disposal of natural resources. According the 1981 African Charter, 'in no case shall a people be deprived of the right to freely dispose of their wealth and natural resource.'
In specific areas, the UN Convention on the Law of the Sea expressly recognises 'the sovereign rights of all states to exploit their marine nature resources, and the Biodiversity Convention reaffirms the sovereign rights of states over biological resources and underlines the sovereign right of states to exploit resources as its main principle.' The ILO Convention 169 contains meaningful provision as to the Right of indigenous people to natural resources, whereby 'the right shall be specifically safeguarded.'

[214] UN General Assembly 523 (VI) 'Integrated economic development and commercial agreements' (1952).

[215] See Chekera & Nmehielle op cit note 211 at 76.

[216] The meaning of the three provisions for this thesis will be explained in (3) Significance of the Right to Natural Resources in this section.

[217] Resolution 1803 (XVII) para 1.

in accordance with a national development plan and for the people;[218] and the inflow of the foreign investment required for exploiting natural resources should be in conformity with the rules and conditions the peoples and nations freely consider to be necessary in relation to the restriction or prohibition of such activities.[219] Thirdly, Resolution 3201, which elaborated on the principle of permanent sovereignty over natural resources expressed in Resolution 1803, articulated that the sovereignty of every state over its natural resources is full and permanent and recognised the right of states to nationalise or transfer ownership, which is 'an expression of the full permanent sovereignty of the State.'[220] Fourthly, Resolution 3281 expressly recognises the permanent sovereignty of states over their natural resources by stating that 'every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.'[221]

In addition to the above-mentioned UN resolutions directly related to the right to natural resources, cross-sectoral declarations have been issued. The 1992 Rio Declaration on Environment and Development, in Article 2 also recognised the sovereignty of states to exploit their natural resources pursuant to their own environmental and developmental policies and stressed the imperative of protection of the 'natural resources of people under oppression, domination and occupation' in article 23. The 1986 UNDRTD indicates that the human right to development is also closely related to the right of peoples to full sovereignty over natural resources,[222] and stressed that measures for realising the right to development shall ensure equality of opportunity for all in their process to basic resources.[223] The UN Declaration on the Rights of Indigenous Peoples recognises the right of indigenous people to natural resources by stating that 'indigenous peoples have the right to lands, territories and resources which they have traditionally owned.'[224]

The right to natural resources initially focused on the full recognition of the sovereign right of

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218 Ibid.
219 Resolution 1803 (XVII).
220 Resolution 3201 para 4(e).
221 Article 2.
222 Article 2.
223 Article 8.
224 Article 26.

a state or the entire people belonging to the sovereign state and the protection of the right from foreign influence, including foreign investors. There is no doubt that the right to natural resources or the principle of permanent sovereignty over natural resources is in line with the general principles of international law, and is on a par with other core international norms such as the principle of self-determination. However, over time the right to natural resources has been understood to be limited for the purpose of environmental protection or sustainable development. Thus, the right to natural resources, which is implemented mostly through extracting and making use of natural resources for the purpose of economic development, has increasingly been placed in the context of environmental protection[225] and sustainable development. Furthermore, 'as global interest in developing countries' natural resources increases, it is imperative that affected people also have stronger rights. In relative terms, affected people have more to lose from weak protection than large foreign investors, because the loss of a small plot of land can make them vulnerable to destitution and loss of social identity.'[226] The right to natural resources has recently put more emphasis on specific groups, including indigenous people, rather than the whole people of a state. In accordance with the provisions of the ILO Convention and the UNDRIP, it is rightly noted that 'the substantive and procedural rights of indigenous peoples to natural resources of their land are similar to those of States to be derived from the principle of permanent sovereignty over natural resources.'[227] This is in line with the trend that the right to development is paying more attention to vulnerable or marginalised people, particularly indigenous people. For instance, the Brazilian government can claim its sovereign right to develop its vast natural resources, including the Amazon forest, but should consider the rights and interests of the indigenous people who have been living there for a long time.

As far as case law of international tribunals is concerned, the principle of permanent sovereignty over natural resource has been recognised in a series of arbitral awards. For

[225] Frank Dietrich 'Natural Resources, Collective Self-Determination, and Secession' (2018*) LEAP 2018 V6 02* 28-56 at 33.
[226] Lorenzo Cotula 'Law at two speeds: Legal frameworks regulating foreign investment in the global South' (2012) 73 *Columbia FDI Perspectives*.
[227] Endalew Lijalem Enyew 'Application of the Right to Permanent Sovereignty over Natural Resources for Indigenous Peoples: Assessment of Current Legal Developments' (2017) 8 *Arctic Review on Law and Politics* 222-245 at 230.

example, against the background of the adoption of the 1962 Declaration on Permanent Sovereignty over Natural Resources, Dupuy, as arbitrator in the *Texaco versus Libya* Case (awarded in 1977), concluded that this 1962 Declaration expressed the *opinio juris commuais* (translated into customary international law) on nationalisation of foreign property under international law.[228] Moreover, in the *Armed Activities on the Territory of the Congo* case,[229] the ICJ declared unequivocally that the principle of permanent sovereignty over natural resources is part of customary international law.[230] In the *Sumo* case, the IACtHR made clear in its judgment that indigenous peoples' rights to their lands include the right to resources[231] on it and these rights are held by the community. More importantly, land mark decisions of regional tribunals concerning the right of indigenous people to natural resources is found in the decision of the ACtHPR in *Ogiek*e and *SERAC* examined above. In the *Ogiek* case, the Court found Kenya in violation of the Ogiek indigenous peoples' right to natural resources as incorporated under Article 21 of the African Charter.[232] In its decision in *SERAC (or* the *Ongoni case*), the Court also held that Nigeria had violated the right of the Ogoni people to dispose freely of their natural wealth and resources by issuing oil concessions on Ogoni lands.[233]

In essence, the principle of permanent sovereignty over national resources has evolved from the right of states to their natural resources as an integral part of sovereign integrity to a human right of all peoples[234] as part of the human right to sustainable development. Furthermore, it has shifted its focus to marginalised peoples, in particularly indigenous peoples.

3.3.6 The Right to Education

[228] *Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic* Ad Hoc Award of 19 January 1977 para 87.
[229] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment of 19 December 2005 at 168-283.
[230] Ibid para 244 at 251.
[231] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Judgment (Merits, Reparations and Costs) of 31 August 2001 para 153.
[232] *African Commission on Human and Peoples' Rights v Republic of Kenya*, ACtHPR, Application No 006/2012 (2017) para 227.
[233] *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights, Comm No 155/96 (2001) para 58.
[234] Enyew op cit note 227 at 225.

Across the world, 58 million children still do not have the opportunity to attend schools, particularly in the areas of sub-Saharan Africa and south Asia.[235] Because of the necessity to create more financing resources to promote education in developing states, foreign investment has increasingly been required and accordingly the concern of potential conflict between the protection of foreign investors and the promotion of the right to education has been on the rise.[236] In general, the right to education has been accepted as a human right and defined in numerous international human rights instruments.[237]

It was previously alleged that the international community and individual states rarely recognised and invested in the full potential and enabling power of education as a catalyst for human development. However, it has recently been obvious that attaining quality education is crucial to realise sustainable development. It is thus asserted that one component that can act as a facilitator of development is education.[238] It cannot be denied that recognising the right to education is one of the key drivers and enablers of sustainable development,[239] and it has also been prominent in the SDGs, which underscore education for sustainable development, human rights and gender equality.

The right to education pays particular attention to vulnerable or marginalised groups. The most challenging factor in realising sustainable development is vulnerability or marginalisation, that is, individuals not being equipped with enough resilience and resources to overcome inequalities and discrimination. This challenge is clearly reflected in the right to education since education must be both inclusive and non-discriminatory to avoid the exclusion of some groups

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[235] Kishore Singh 'Education is a basic human right – which is why private schools must be resisted' *the Guardian* 23 April 2015.

[236] It is noted that the World Bank's current policy of encouraging and supporting profit-seeking multinationals that provide education is a matter of serious concern, given the devastating impact this strategy has on the right to education.

[237] See Jootake Lee 'The Human Right to Education: Definition, Research and Annotated Bibliography' (2020) 34(3) *Emory International Law Review* 757-823.

[238] Gianna Alessandra Sanchez Moretti 'Education and Human Rights for Sustainable Human Development' (2015) *International Policy Centre for Inclusive Growth One Pager 307.*

[239] The Dakar Framework for Action states that 'education is a fundamental human right' and education is 'the key to sustainable development' (para 6).

from mainstream society.[240] Accordingly, the right to education is emphasised in instruments dealing with the rights of children,[241] persons with disabilities,[242] indigenous peoples,[243] women and girls,[244] and the right to work (labour), which includes technical and vocational training.[245] It has accordingly been argued that the right to education is 'inclusive and participatory as a human right' in its relation to the rights of the vulnerable, and that it is essential for the realisation of all human rights, including the human right to sustainable development.[246]

The right to education can also be closely related to foreign investment in addition to human rights. It is significant that the international community became aware of the importance of regulating private education providers or investors at a time when many foreign investors have eyed private education opportunities abroad. For instance, Johannesburg Stock Exchange-Adv-Tech has built a diversified company with numerous basic and tertiary education brands such as Curro in South Africa.[247] Another apposite example is found in South Korea, where the government decided to abolish elite private schools gradually by 2025 with a view to eliminating disparity in education.[248] There are a few cases that address this matter in international tribunals. However, one can imagine what would happen if host states that attracted foreign investors in the sector of education, then withdrew the permits given to foreign private school providers as an excuse to ensure a public-school system.[249]

3.3.7 The Right to Labour

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[240] Ibid.
[241] CRC Articles 28 and 29.
[242] CRC Article 23(3) and CRPD Article 24.
[243] UNDRIP Article 14.
[244] CEDAW Article 10.
[245] ICESCR Article 6.
[246] See Gauthier de Beco, Shivaun Quinlivan & Janet E Lord 'Introduction' in Gauthier de Beco, Shivaun Quinlivan & Janet E Lord (eds) *The Right to Inclusive Education in International Human Rights Law* (2019) 1.
[247] Justin Probyn 'Investors eyeing Africa's private education opportunity' *Africa Business Insight* 15 August 2017.
[248] 'South Korea to abolish elite high schools in 2025 to fix education disparity that causes social inequality' *The Straitstimes* 8 November 2019.
[249] This assumption, which is high possible, involves the discussion this thesis will develop in terms of the relations of the international investment law regime and the human rights law regime in the following section.

According to the ILO, 20.9 million people are vulnerable to forced labour, 'trapped in jobs into which they were coerced or deceived and which they cannot leave.'[250] Women and girls represent the greater share of this total (11.4 million or 55 per cent), while children aged 17 years and below represent 26 per cent of the total (or 5.5 million). Since of the total number of 20.9 million forced labourers, 18.7 million (90 per cent) are exploited in the private economy by individuals or enterprises, the responsibility of private companies is particularly critical in achieving this human right.

Since forced labour is a leading cause of poverty and a hindrance to economic development,[251] the right to labour has recently been understood to be part of the right to development in various international instruments, and by different international tribunals and international bodies. For instance, the EU clearly introduced the fostering of sustainable economic, social and environmental development as one of its external policy objectives in Article 21 of the Treaty of Lisbon and has concluded free trade agreements (FTAs) with provisions related to the right to labour, which are regrouped under a sustainable development chapter.[252]

Interestingly, the protection of the right to labour has commonly been invoked by home states of foreign investors, mostly Western states from the EU or USA. For instance, the Ugandan government has endeavoured to attract foreign investment with a view to boosting economic growth by taking advantage of low labour cost in Uganda, which is more attractive to MNCs than any other East African state.[253] However, as investments are increasing considerably, labour rights have recently continued to be violated. Thus, most labour provisions that are at present found in IIAs require contracting parties to refrain from relaxing labour rights as an incentive to attract foreign investment.[254]

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[250] ILO '2012 Global estimate of forced labour – Executive summary' (2012) available at *http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_181953.pdf*, accessed on 1 April 2019.

[251] ILO 'Rules of the Game: A brief introduction to International Labour Standards' (2009) at 30.

[252] See Areg Navasartian 'EU-Vietnam Free Trade Agreement: Insights on the Substantial and Procedural Guarantees for Labour Protection in Vietnam' (2020) 5(1) *European Papers* 561-571.

[253] David Obot Deniva 'Investment and labour rights: a case study' (2008) *Social Watch Reports from Uganda.*

[254] Vid Prislan & Ruben Zandvliet 'Mainstreaming Sustainable Development into International Investment Agreements: What Role for Labor Provisions?' (2014) *Grotius Centre Working Paper* 2014/023-IEL at 5.

There is one good example to show the implementation of the right to labour in realising sustainable development at the bilateral level. In 2018, the EU initiated relevant dispute settlement measures to address the alleged breach of South Korea in her obligations[255] pertaining to labour rights, which are stipulated in Article 13.4 under the title of sustainable development in the EU-Korea FTA. This case indicates that labour rights-related issues are clearly addressed in the context of sustainable development: those rights are not perfunctory, and violation of relevant obligations can cause international disputes.

3.4. Responsibilities in the Case of Violation of the Right to Development

Human rights, for what they are worth, are legal rights, which are meaningful only if they can be closely connected to the corresponding legal duties.[256] It is well known that every human right-holder must have one or more correlative duty bearers to respect, fulfil and implement the right.[257] The same is true for the human right to sustainable development.

The right to development has an internal and an external dimension. The internal dimension refers to the obligation of individual states to ensure the realisation of the right to development, while the external dimension entails the obligation of all states, that is, the international community, to cooperate in ensuring the right to development at the global level.[258] Dinah Shelton has indicated that 'one valuable aspect of the Right to Development is that it encompasses a more broadly-based legal obligation of States: the duties corresponding to the right to development are not exclusively domestic in nature but have an international component.'[259] Thus, it is argued that 'the primary focus of the Declaration on the Right to Development is upon the responsibilities of State at both the national and international levels.'[260] The *Endorois* case explicitly demonstrated who is first responsible for violation of

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[255] According to the EU-Korea FTA, the Korean government is obliged to ratify some key ILO conventions.
[256] Sompong Sucharitkul 'Multi-Dimensional Concept of Human Rights in International Law' (2014) *62 Notre Dame L Rev* 305-317 at 311.
[257] Ibid.
[258] Arne Vandenbogaerde 'The Right to Development in International Human Rights Law: A Call for its Dissolution' (2013) 31 (2) *New Journal of European Criminal Law* 187-208 at 198.
[259] Dinah Shelton 'A Response to Donnelly and Alston' (1985) 15(3) *California Western International Law Journal* 524–527 at 527
[260] Isabella D Bunn 'The Right to Development: Implications for International Economic Law' (2000) 15 (6)

the right to development by articulating the obligation of the domestic state to ensure the realisation of the right to development. The ACHPR found that the Kenyan government 'bears the burden for creating conditions favourable to a people's development'[261] and consequently considered that 'the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process.'[262]

Furthermore, in the context of the right to development, states have 'collective obligations' arising from the principle of solidarity, which 'espouse a shared or collective responsibility for the realisation of human right around the globe'[263], such as co-operating in ensuring development and eliminating obstacles to development, taking steps to formulate international development policies with a view to facilitating the full realisation of the right to development, and promoting universal respect for and observance of all human rights. From this collective nature of obligations, it is also argued that the international community as a whole is obliged to ensure an enabling environment and act through international cooperation for the achievement of the right to development.[264]

Most importantly, in international human rights scholarship and international tribunals,[265] obligations are normally conceived of as comprising three types: obligations to respect, protect and fulfil human rights.[266] These obligations are based on a state-centric presumption, in that they are understood to be incumbent primarily upon the state.[267] This state-centric approach in the discourse of subjects under international law has been well represented by Oppenheim's

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American University International Law Review 1425-1467 at 1439.

[261] *The Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* ACHPR Communication 276/2003 Decision of 4 February 2010 para 298.

[262] Ibid.

[263] Vandenbogaerde op cit note 258 at 188.

[264] Serges Djoyou Kamga 'Realizing the right to development: Some reflections' (2018) 16 (7) *History Compass* at 4.

[265] For instance, as demonstrated above in the *SERAC* case, whether they are positive or negative, all rights including social and economic rights, indeed including the right to development, obligate each state to accept the duty to respect, protect, promote, and fulfil those rights. See *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria* (Communication No 155/96) para 44.

[266] Asbjørn Eide 'Realization of Social and Economic Rights and the Minimum Thresholds Approach' (1989) 10 *Human Rights Law Journal* 35-51 at 37.

[267] Sucharitkul op cit note 256 at 311.

famous analysis that 'since the law of nations is based on the common consent of individual States, States solely and exclusively are subjects of international law.'[268] Thus, private entities were regarded as only objects of international law, meaning that 'they were deprived of international legal personality and did not enjoy rights or bear obligations under international law.'[269] The obligation to respect is conceived as a negative obligation whereby states are required not to take any measures that would result in preventing individuals from having access to, or enjoying human rights. In terms of the obligation to protect, states are required to prevent third parties from interfering with the rights of the individual, but the core responsibility in this regard rests with states themselves, not with non-state actors such as individuals or MNCs.

However, negative impacts of MNCs on international human rights have led to global recognition of the need to introduce international norms, and the international community has gradually incorporated activities of non-state actors, in particular MNCs, in various international instruments such as the Charter of Economic Rights and Duties of States of the UN General Assembly (1974), the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights by the UN Sub-commission on the Promotion and Protection of Human Rights (2003) and the Guiding Principles on Business and Human Rights of the UN Human Rights Council (2011).[270] As far as case law is concerned, the Permanent Court for International Justice (PCIJ) in its *Danzig* advisory opinion is understood to pave the way for recognising an MNC as an object or a subject or both under international law.[271] Furthermore, given that the ICJ indicated in its *Reparation* advisory

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[268] Oppenheim *1 International Law: A Treaties* 2ed (1912).
[269] Bantekas & Oette op cit note 54 657.
[270] 'These guiding principles are grounded in recognition of: (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) The role of business enterprises as specialised organs of society performing specialised functions, required to comply with all applicable laws and to respect human rights; (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.' See the Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' *A/HRC/17/31* (March 21 2011) at 6.
[271] This is the case with the US court, which in *Kiobel v Royal Dutch Petroleum Co* held that 'customary international human rights law does not recognise the liability of corporations and consequently MNCs cannot be held liable under the Alien Tort Statute 1789 (ATS) which gives the US courts' jurisdiction in cases alleging international human rights violations.' In contrast, there is an important international case in this regard. The 1928 Advisory Opinion of the PCIJ in the *Jurisdiction of the Courts of Danzig* case has played a role in

opinion that an entity that international law treats as a person is something that can be affected by international law, possessing objective international personality and can enforce international law by bringing international claims'[272], it is argued that an MNC seems as much an object and subject as an individual or an international organisation under international law.[273]

Thus, it is argued that as subjects, MNCs would not only enjoy international legal rights, but they would also be responsible for international legal duties.[274] In particular, given that MNCs have become increasingly influential in international law and this increasing influence has resulted in undermining human rights, it has become obvious that if MNCs have more rights, by parity of reasoning, then they have more duties under international law.[275] In the context of the right to development, it is also clear that there is an important individual dimension and all subjects of international law, including MNCs, accordingly have a duty, individually or collectively, to promote and protect an appropriate social and economic order for development, as stipulated in Article 2.2 of the UNDRTD.[276]

The study on the interconnection of international human rights law, including the right to development examined in this chapter and international investment law to be explored in the next chapter, is at the heart of the role of foreign investors, mostly MNCs. As demonstrated in this section, the contemporary international human rights law obligates not only sovereign

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analysing the question of the corporation as a potential bearer of international law obligations. On the surface, the advisory opinion appears to recognise MNCs as only the object of international law when it states that 'according to a well-established principle of international law an international agreement cannot create direct rights and obligations for private individuals,' which seems to be in line with the above decision of the US court in *Kiobel v Royal Dutch Petroleum Co.* However, the Advisory Opinion leaves room of recognizing potential subjectivity of MNCs by stating that 'but it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts.'

[272] ICJ *Reparation for Injuries Suffered in the Service of the United Nations* Advisory Opinion of 11 April 1949 at 186.

[273] José E Alvarez 'Are Corporations Subjects of International Law' (2011) 9(1) *Santa Clara Journal of International Law* 1-36 at 3.

[274] Julian G Ku 'The Limits of Corporate Rights Under International Law' (2012) 12 (3) *Chi J Int'l L* 729-54 at 731.

[275] Harold Hongju Koh 'Separating Myth from Reality about Corporate Responsibility Litigation' (2004) 7(2) *Journal of International Economic Law* 263–74 at 265.

[276] See Bunn op cit note 260 at 1439-40.

states but also MNCs to comply with international norms.[277] Thus, if one is to confer human rights obligations on private actors, including MNCs other than states, then one should reconsider the entire architecture and rationale of the international human rights regime, since it has traditionally been premised on the notion that only states violate human rights by abusing their power.[278] In particular, as critical contributor to international investment, MNCs have gained more significance in their duties in terms of fulfilling international human rights concerning this study's attempts to reconcile the three clusters of international law. In the context of the right to development and the investment law regime, MNCs can be held liable for cases that arise from a claim of violation of obligatory and universal norms of international human rights.[279]

3.5 Conclusion

The prime focus of the international law governing development is not only on promoting economic prosperity, but also on enhancing human rights, which led to the creation of the human right to sustainable development with a wide range of applications to specific groups. The human right to sustainable development proposed by this thesis places various dimensions of development at the forefront, while recognising that human rights need to be protected and sustained to enable the legitimisation of sustainable development.

Given the current legitimacy crisis of international law owing to fragmentation and the negative impact of unfettered economic development on the environment and human rights, competing claims between North and South, states and MNCs, states and their nationals over development and its benefits must be effectively and legitimately reconciled before any strategy to promote development can be implemented.

In this respect, this thesis enables the human right to sustainable development to provide a framework in which the potential competing claims of economic value and human rights value

[277] The narrative of the duty bearer in relation to the right to development including MNCs is significant in elaborating on this thesis.
[278] Bantekas & Oette op cit note 54 656.
[279] See Koh op cit note 275 at 267.

can be reconciled in relation to international development law and international human rights and in that of other sub-branches of international law, such as international investment law, which is the topic of the next chapter.

CHAPTER 4 INTERNATIONAL INVESTMENT LAW AND ITS INTERACTION WITH INTERNATIONAL DEVELOPMENT LAW AND INTERNATIONAL HUMAN RIGHTS LAW

4.1 Background: From Fragmentation to Harmonisation

There is no doubt that international investment law is now moving towards being a mainstream branch of international law because of economic globalisation, which refers to the deepening interdependence of isolated world economies owing to the large scale of cross-border transactions of goods and services, the flexible flow of international capital, the wide distribution of information, and the rapid transfer of technologies.[1] Compared with commodity and labour markets and technologies, the financial market, which entails flows of global capital, is understood to have realised globalisation in the true sense of the word.[2] As a result of this, combined with the rise in foreign direct investment, economic globalisation has led to investment law becoming a key area of international law.[3]

However, this is only part of the picture, and overlooks the role of sustainable development as a linchpin to align development with foreign investment, which plays a critical role in achieving the comprehensive and inclusive well-being of host states' people beyond economic development. In the face of unprecedented economic globalisation and the increasing flow of FDI, international investment law has put more profound legal questions to the international law community: how and why the international community should or could address sustainable development in discussion on foreign investment, and what the relationship between the emergence of sustainable development and the legitimacy of the international investment regime is.

[1] Gao Shangquan 'Economic Globalization: Trends, Risks and Risk Prevention' (2000) *CDP Background Paper* No 1, available at *https://www.un.org › desa › policy › cdp › cdp_background_papers*, accessed on 4 December 2019.
[2] Ibid at 2.
[3] Valentina Vadi *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (2018) 1.

Traditionally international law has been understood to be divided into distinct legal regimes by reference to the subject matter that is regulated in each. Accordingly, special regimes in international law involving trade, the environment, human rights, development, armed conflicts and others, have created their own mechanisms to deal with particular subject matters encountered in their respective fields, which has resulted in fragmentation of international law. The fragmentation of international law has recently been conceived of as a stumbling block to international law as a legal system, and the extent and degree of fragmentation may indeed have posed such a threat. Less attention is paid to the move towards harmonisation.[4]

The relationship between international development law, international human rights law and international investment law is no exception. In particular, international investment law has existed for decades on its own platform in disregard of other regimes of international law. This is because international investment law mostly operates on the basis of IIAs, which primarily target unilateral protection of foreign investors.

However, the international investment law regime has been criticised for being overly detached from other international law regimes. The more this fragmentation continues to pose a serious threat to united international law, the more international legal scholars pay attention to the necessity of reconciling various regimes in international law.

International investment arbitral tribunals have frequently established their own equivocal standards of international investment law (such as the notion of indirect expropriation, which will be explained in the next chapter), which excessively protect the rights of foreign investors and fail to interact with standards from other bodies of international law. In particular, it has been criticised that international investment tribunals have made few efforts to coordinate principles, guidance, and standards imposed on states by other international tribunals, such as international human rights tribunals or trade-related international tribunals (mostly represented by the WTO).[5]

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[4] Mads Andenas 'Reassertion and Transformation: from Fragmentation to Convergence in International Law' (2015) 46 *Georgetown Journal of International Law* 685-734 at 691-2.

[5] Benedict Kingsbury & Stephan W Schill 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions In the Public Interest-the Concept of Proportionality' in Stephan W Schill (eds)

The interrelation of international investment law and international human rights law may arise when third-party stakeholders, who may have a substantial and direct stake in the results of foreign investment under a BIT, 'are left to fend for themselves if their rights are violated as a consequence.'[6] This concerns especially marginalised people, whose international 'human rights could be violated by circumstances deriving from upholding BITs.'[7] To be more specific, the two sub-fields of international law have the potential to interrelate in mainly two ways.

First, the protection afforded to foreign investors in the international investment law regime can clash with the rights of third parties protected in the international human rights law regime. Host states may 'face parallel cases in both human rights and investment jurisdictions on the same set of fact,' and such dual litigation could put host states 'in the position of having to justify compliance of their international commitments in both fields.'[8] As a matter of fact, international investment protection standards (such as the national treatment standard, protection from denial of justice by the host state and protection from unlawful expropriation) correspond to the protection of foreign investors' rights (such as the right of not being discriminated against, the right to fair trial and the right to property). Secondly, the business conduct of foreign investors may have a detrimental impact on the rights of the population in host states. In that respect, the obligation of the host state to respect and protect human rights may intersect with its obligations arising from the international investment law regime. While the first type of interrelation signals a possible convergence between these two regimes regarding the rights of investors, the latter brings about competition between the obligations deriving from them.

International Investment Law and Comparative Public Law (2010) at 77.

6 Jorge Daniel Taillant & Jonathan Bonnitcha 'International Investment Law and Human Rights' in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe (eds) *Sustainable Development in World Investment Law* (2009) at 62.

7 Ibid.

8 Rodrigo Polanco Lazo 'Investment arbitration and human rights cases in Latin America' at 2, available at https://law.yale.edu/sites/default/files/area/center/kamel/sela17_polanco_cv_eng.pdf, accessed on 7 February 2021.

The recent practice of international investment tribunals has shown that they cannot avoid addressing the relationship between the international investment and international human rights regimes. The tribunals face human rights claims brought by foreign investors, host states, or third parties, and are asked to choose whether to keep the international investment law regime isolated from the international human rights law or to treat them together. Although the tribunals have mostly refrained from responding to the human rights claims, recent case law shows that they may indeed welcome and apply human rights standards.

Against this backdrop, this chapter provides an overview of how the isolated international investment law regime has established unique mechanisms that have long protected the rights of foreign investors. Thereafter, the impact of the emergence of international human rights law on the international investment regime will be examined, with particular focus on the international community's reactions to efforts to incorporate international human rights, including sustainable development, in the international investment regime. The aim is to provide an analysis of how a fragmented system of international investment law is moving towards being assimilated into international law by means of international human rights law.

4.2 The Fragmented International Investment Law Regime

The international investment law regime consists of customary international law, IIAs (including BITs, FTAs) and other international agreements containing investment chapters), and jurisprudence of international investment arbitration. In addition to being isolated from other international law regimes, the current investment regime is typically characterised as being asymmetric, in the sense that it establishes a range of protections for foreign investors and obligations for host states, but does not impose any obligations on foreign investors.[9]

To this effect, this section traces shifts in the source of international investment law, the content of IIAs and the awards of international investment tribunals.

[9] Roundtable Outcome Document 'Impacts of the International Investment Regime on Access to Justice' (2018) *Columbia Centre on Sustainable Investment* at 6.

4.2.1 Diplomatic Protection Mechanism

The evolution of international investment law is characterised by developing 'a law of foreign investment protection against the background of a clash of interests between capital-exporting and capital-importing countries, which is often equated with the clash' between the protection of foreign investors and the right to development of host states.[10]

Traditionally, the international investment regime has used the following instruments for solving disputes with foreign investors: foreign investors' access to domestic courts, state-to-state dispute settlement via diplomatic protection, and investor-state dispute settlement via international arbitral proceedings.[11] Access to domestic courts is often discarded by foreign investors and international tribunals, since it is almost purely domestic in nature rather than international, while the other two ways are related to international law. Thus, diplomatic protection and investor-state dispute settlement mechanisms are examined in this section.

Why is it necessary in the first place for researchers to look into diplomatic protection when exploring international investment law? Current developments in international investment law have been based on IIAs, rather than diplomatic protection. However, the isolation of the international investment law regime originated in the diplomatic protection regime and culminated in the current IIAs regime. Traditionally, international law directed host states to abide by the international minimum standard[12] in the treatment of foreign investors and their property, in particular in the process of expropriation. Thus, if a host state breaches this standard, the host state has not only assumed state responsibility to the foreign investor, but the home

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[10] Stephan W Schill, Christian J Tams & Rainer Hofmann 'International investment law and development: Friends or foes?' in Stephan W Schill, Christian J Tams & Rainer Hofmann (eds*) International Investment Law and Development* (2015) at 21.
[11] Laura Puccio & Roderick Harte 'From arbitration to the investment court system (ICS): The evolution of CETA rules' (2017) *European Parliamentary Research Service* at 4.
[12] See UNCTAD 'Fair and Equitable Treatment UNCTAD' *Series on Issues in International Investment Agreements II* (2012) at 44-45. The international minimum standard of treatment 'is a set of customary international law norms that governs the treatment of aliens. States, regardless of their legislation and practices, must respect these norms when dealing with foreign nationals and their property. The MST is often understood as a broad concept intended to encompass the doctrine of denial of justice along with other aspects of the law of State responsibility for injuries to aliens. However, specific meaning of the concept is still rather indeterminate.' 'tribunals have interpreted the MST in a variety of ways, some more strict and conservative, others more creative and liberal.'

state of the foreign investor also has legal rights to protect its nationals abroad through diplomatic protection. It can be argued that the institution of diplomatic protection can rather be seen as 'a mechanism or a procedure for invoking the international responsibility of the host state.'[13] Thus, it is useful to delve into the background of the emergence and nature of diplomatic protection for better understanding of the necessity of international investment agreements that replaced diplomatic protection, which used to be an important concept serving as an international investment protection tool.

Diplomatic protection dates back to the 19th century when (mostly) Western countries wanted to create a system to protect the rights of investors in order to encourage their commerce sectors to be more engaged in foreign markets. The International Law Commission (ILC) delineates the definition and scope of diplomatic protection as follows:

> 'Diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of former State with a view to the implementation of such responsibility.'[14]

Diplomatic protection is widely recognised as being part of international customary law.[15] Thus, under a state-centric traditional international law, the mechanism of diplomatic protection through foreign investors' home state was the only peaceful remedy available to a foreign investor that had suffered damage at the hands of a host state.[16] More importantly, the approach of ensuring foreign investors' rights via diplomatic protection is premised on the notion that investment protection is perceived as the only objective of international investment law, which has been criticised for ignoring one of the main objectives of international investment law, namely to promote host states' development.[17]

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[13] Bennouna 'Preliminary Report on Diplomatic Protection' (1998) UN ILC Special Rapporteur *UN Doc A/CN 4/484* para 10.
[14] The International Law Commission 'Draft Articles on Diplomatic Protection with commentaries' *Yearbook of the International Law Commission* (2006) vol II Part Two at 26.
[15] See Surya P Subedi *International Investment Law* 2ed (2012) 55.
[16] See Melaju Geboye Desta 'Sovereignty over natural resources and international investment law: The elusive search for equilibrium' in Stephan W Schill (eds) *International Investment Law and Development* (2015) at 231.
[17] See Yannick Radi, 'International investment law and development: A history of two concepts' in Stephan W Schill(eds) *International Investment Law and Development* (2015) at 69.

4.2.2 Treaty-based Mechanism: The Provisions in IIAs

The emergence of BITs resulted from the concern of home states of foreign investors that the then-existing system for the protection of the rights of foreign investors, diplomatic protection, was insufficient. Over time there have been concerns that diplomatic protection does not adequately protect foreign investors from host states' interference. This has occasioned a gradual move rather to regulate international investment relationships by way of IIAs. In general terms, an IIA is a legally binding agreement or treaty between sovereign states to address 'issues concerning the protection, promotion and liberalisation of cross-border investments.'[18] The most common types of IIAs are standalone BITs and FTAs that contain investment chapters.[19] UNCTAD defines BITs as 'agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country.'[20]

Unlike the diplomatic protection mechanism discussed above, which relies on the actions of the home state against the host state to protect the rights of a foreign investor, BITs allow foreign investors themselves to bring cases against host states by claiming breaches of their substantive rights. Under this mechanism, the large amount of protection that host states offer to foreign investors tends to include BIT provision for investor-state dispute settlement through an international tribunal composed of independent arbitrators.[21] Obviously, this deviates from the traditional mechanism where a foreign investor had to seek diplomatic protection from its home state to deal with wrongs committed by a host state.[22] International investment arbitral tribunals that are established in accordance with relevant provisions of IIAs have acknowledged that diplomatic protection mechanisms had been replaced by treaty-based investment protection mechanisms. To some extent, diplomatic protection now plays only a

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[18] Kavaljit Singh & Burghard Ilge 'Introduction' in Kavaljit Singh & Burghard Ilge (eds) *Rethinking Bilateral Investment Treaties* (2016) at 1.
[19] Ibid.
[20] Ibid.
[21] See Subedi op cit note 15 32.
[22] See Rahim Moloo & Alex Khachaturian 'The Compliance with the Law Requirement in International Investment Law' (2011) 24(6) *Fordham International Law Journal* 1473-1501 at 1474.

substitute role in protecting investments, and is only resorted to in the absence of other agreements referring to the autonomous substantive rights of investors. For instance, the *Loewen* Tribunal[23] emphasised that 'the claim system under the NAFTA, was meant to replace the possibility of states pursuing breaches of international law through diplomatic protection.'[24]

The view of treaty-based rights of investors acknowledges the possibility that foreign investors enjoy 'autonomous substantive rights arising from investment protection treaties under international law.'[25] This view has been reflected in many international investment arbitral tribunals. For instance, the *El Paso*[26] Tribunal stated that 'the claims filed by El Paso in these proceedings are those of an investor requesting compensation for the breach by the State of a certain number of guarantees provided by the BIT, an international treaty.'[27] Also, an increase in the conclusion of IIAs and relevant disputes have been widely recognised in the international investment law regime. According to the data of UNCTAD on IIAs, there are 2896 BITs (2337 in force) and 416 other IIAs (322 in force).[28] In terms of dispute settlements, since its establishment in 1966 and its first case in 1972, ICSID has had 1061 cases registered, while 347 cases have recently been initiated and are pending.[29] Clearly, foreign investment-related disputes have been on the rise.

4.3 Emergence of International Human Rights Law and its Impact on International Investment Law

This section seeks to present an overview of the current status of acceptance of international human rights law by the international investment law community. This overview is traced back to the increasing compatibility between the international law of sustainable development and

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[23] *Loewen Group, Inc and Raymond L Loewen v United States of America* ICSID Case No ARB(AF)/98/3 Award of 26 June 2003.
[24] See Anne Peters *Beyond Human Rights: The Legal Status of the Individual in International Law* (2016) 306.
[25] Ibid at 307.
[26] *El Paso Energy International Company v The Argentine Republic* ICSID Case No ARB/03/15 Award of 31 October 2011.
[27] Ibid para 550.
[28] UNCTAD homepage, available at https://investmentpolicy.unctad.org/international-investment-agreements, accessed on 31 January 2021.
[29] UNCTAD homepage, available at https://investmentpolicy.unctad.org/investment-dispute-settlement, accessed on 31 January 2021.

international human rights law, as considered in the previous chapter.

It is noteworthy that international human rights law fulfils an increasingly diverse range of functions in the international legal regime, such as ensuring consistent interpretation, bridging the gap between various sub-fields of international law, favouring a humanised interpretation of international law and progressively developing international law.[30] Interestingly, as far as substantive law is concerned, foreign investors raised human rights issues in international investment arbitral tribunals by arguing that the right to property, as a human right, equates to the right to compensation in the occurrence of expropriation. Hence, some scholars stress that thanks to the international law of human rights, both domestic and foreign investors enjoy the protection available under international human rights instruments,[31] and view international investment law as being actively supportive of human rights.[32] In particular, the evolving law on international human rights of recognising sustainable development has given impetus to addressing a fundamental challenge (fragmentation) in international investment law as well as international human rights law and international development law. Mainly, this is attributable to the salient features of sustainable development, which include multi-faceted factors concerning international human rights and development.

International investment law and sustainable development need each other. The international investment regime faces a legitimacy crisis due to inconsistent decisions, as observed by UNCTAD[33] and criticised by experts.[34] The legitimacy crisis is also caused by the failure of international arbitration to reflect the current evolution of development. If international investment arbitration provides inconsistent consequences contrary to reasonable expectations among stakeholders, for instance, if serious health or environmental concerns caused by development activities are always underestimated by the interests of foreign investors in the

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30 See Başak Çalı, Lorna McGregor & Alexandre Skander Galand et al 'The Effects of International Human Rights Law on other Branches of Public International Law: An Annotated Compilation of Case Law' (2017), *Human Rights Centre of the University of Essex.*

31 See Subedi op cit note 15 177-8.

32 See Taillant & Bonnitcha op cit note 6 at 53-80.

33 UNCTAD 'World Investment Report 2010: Investing in a Low-CARBON Economy' (2010) at 83.

34 See Hans Morten Haugen 'Trade and Investment Agreements' in Eibe Riedel, Gilles Giacca & and Christophe Golay(eds) *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014) at 253.

decisions of arbitral tribunals, the long-term consequence may prove detrimental to the relevance and legitimacy of the international investment regime.[35]

As will be discussed in the following subsections, international investment arbitral tribunals have increasingly relied upon sustainable development in assessing foreign investment's contribution to the development of host states. In this process, they may also address international human rights law on which the concept of sustainable development is intrinsically premised.

Most importantly, as the international investment regime is heterogeneously fragmented, the notion of sustainable development itself is understood to be a heterogeneous normative concept, consequently having multi-faceted factors, which can hence be in full operation, combined with other rules and principles of international law.[36] To the extent that the current isolated international investment regime remains highly fragmented, there are limited prospects for achieving homogeny and recognition of legitimate development concerns.[37] Likewise, in as far as the significance of sustainable development lies in a confined international development regime, it might be left behind in light of practical benefits and legal relevance in others areas of international law, in particular the international investment regime. Consequently, sustainable development tends to make itself accepted, beyond the international development law regime, in other legal regimes of international law, as the international investment regime has recently been referring to international human rights tribunals in order to overcome the legitimacy crisis caused by such isolation. Accordingly, as some scholars stress, on the part of proponents of sustainable development, one of the most relevant other legal regimes of international law is the international investment law regime.[38]

The lack of a broader discourse on the relationship between foreign investment protection and sustainable development is on the whole attributable to the fact that most arbitrators have a

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[35] Erlend M Leonhardsen 'Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration' (2011) 3(1) *Journal of International Dispute Settlement*.
[36] Schill, Tams & Hofmann op cit note 10 at 20.
[37] James Zhan 'Preface, International Investment Law and Development' in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe(eds) *Sustainable Development in World Investment Law* (2011) at 13.
[38] Schill, Tams & Hofmann op cit note 10 at 20.

background in international investment law, without having in-depth awareness of the development implications and significance of international human rights.[39] This has fostered alienation of the discourse within international investment arbitration from the underlying development objectives of international investment law[40] and human rights law. The more sustainable development gains justification in international law, the more the legitimacy of the international investment law regime is questioned, at least to the extent that the international investment regime ignores sustainable development.

It is argued that the debate about the legitimacy crisis of international investment law focuses mainly on the extent to which the interpretation and application of IIAs restrict the right to regulate of the host state in the public interest relating to environmental and social development concerns.[41] The legitimacy crisis of international investment law or the potential clash between foreign investment protection and sustainable development notwithstanding, various attempts have been made to make international investment law more attentive to sustainable development concerns,[42] not only in international tribunals but also in international agreements. To be more specific, recent international agreements in various areas have frequently been linking their own subjects to other subjects. For instance, as far as environmental commitments of developing states to the provision of financial assistance by developed states are concerned, the European Bank for Reconstruction and Development, one of the largest investment-driving international entities, is required by its constituent instrument to 'promote environmentally sound and sustainable development in the full range of its activities'.[43] 'Such linkages between the environment and development and between development assistance and social and political standards would have been almost unthinkable just a short time ago, and have led to a radical transformation'[44] in the realm of international law.

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[39] Ibid at 27.
[40] Ibid.
[41] Ibid at 28.
[42] Ibid at 29.
[43] Article 2 of the Agreement Establishing the European Bank for Reconstruction and Development
[44] Philippe Sands 'Treaty, Custom and the Cross-fertilization of International Law' (1998) 1 (1) *Yale Human Rights and Development Journal* 85-106 at 90.

In spite of the increase in IIAs that are aimed at attracting more foreign investments by protecting foreign investors, there has been controversy about the nexus between the existence of IIAs and the increase in foreign investments or potentially increased foreign investments' contributions to the development of host sates, eventually to ensure the right to sustainable development of individuals, specifically marginalised groups in host states. Some argue that IIAs are an important instrument of protection of foreign investors and that developing countries are trading their sovereignty for acquiring more credibility from foreign investors.[45] However, others argue that studies on IIAs and the flow of FDI, regarded as a main driving force to boost the development of host states, have indicated that the direct interaction between IIAs and FDI is ambiguous and IIAs are 'neither necessary nor sufficient' to attract more FDI.[46] For instance, according to a study of the Economic Commission for Africa's Committee on Regional Cooperation and Integration, 'the impact of bilateral investment treaties on economic and social development in Africa remains debatable' and 'there is no conclusive evidence regarding the effect' of these international agreements on foreign investment and the subsequent development of host states.[47]

'Paradoxically, it seems that the current IIA regime is at a crossroads, in spite of the rapid proliferation of IIAs in recent years.'[48] As will be demonstrated in the following sections, the exponential increase in the number of IIAs and the concomitant international arbitral awards has generated an increasing body of scholarship that addresses various aspects of the emerging global investment protection regime. Initially confined to the doctrinal analyses of treaty and arbitration practice, the focus of mainstream international investment law literature has gradually shifted to a critical examination of the field from various points of view, particularly of international human rights and sustainable development.

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[45] Elkins Z, Guzman A T & Simmons B. 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000' (2004) *UC Berkeley: International Legal Studies Program* at 4.

[46] Mary Hallward-Dreimeier 'Do bilateral investment treaties attract FDI? Only a bit' in Karl Sauvant & Lisa Sachs (eds) *The Effect of Treaties on Foreign Direct Investment* (2009) at 22.

[47] UN Economic Commission for Africa, Committee on Regional Cooperation and Integration, Investment Agreements Landscape in Africa, 7–9 December 2015 at 1, available at from *http://www.uneca.org/sites/default/files/uploadeddocuments/RITD/2015/CRCI-Oct2015/report-on-investment-agreements.pdf*, accessed on 27 March 2019.

[48] Singh & Ilge op cit note 18 2.

‘There are signs of growing unease with the current regime’[49] across individual states and regions. In particular, the IIA regime is not free from the criticism that it operates only for the benefit of foreign investors, often at the expense of the people of host states and other societal values.[50] Nevertheless, it has contributed to assuring foreign investors of full protection from messy and excessive privatisation conducted by incompetent and inefficient political leaders of host states and from illegal, arbitrary and faulty contracts concluded by governments of host states under the influence of corrupt officials.

Given the increased criticism of IIAs and increased awareness of the importance of sustainable development in international law, the legitimacy of the fragmented system of international law, exemplified by the collision between the investment law regime and the international human rights law regime, has increasingly been questioned.[51]

The concerns about existing and typical IIAs’ potential to ensure sustainable development have garnered differing reactions from the international community. The first reaction is rather radicalised, to terminate IIAs and replace IIAs with domestic legislation on the protection of foreign investment, which this thesis calls *domestication*. The second reaction is to upgrade existing IIAs by incorporating several obligations upon the foreign investors, including the obligation to ensure environmental protection, labour rights and more broadly, sustainable development or human rights, and to comply with internationally accepted standards of business and corporate social responsibility with a view to striking a balance between the interests of foreign investors and those of host states, eventually those of individuals (the vulnerable) of host states. The third reaction is to impose more obligations on foreign investors to ensure sustainable development by means of interpreting existing IIAs in international arbitration tribunals, namely jurisprudence.[52]

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[49] Ibid.
[50] Subedi op cit note 15 32.
[51] Horatia Muir Watt ‘The contested legitimacy of investment arbitration and the human rights ordeal’ (2012) *hal-00972976* at 5.
[52] Ranjan Prabhash, Singh Harsha Vardhana & James Kevin et al ‘India’s Model Bilateral Investment Treaty: Is India Too Risk Averse?’ (2018) *Brookings India IMPACT Series* No 082018 at 7.

4.4 Termination of IIAs or *Domestication*?

4.4.1 Introduction

Some states have announced their intention to review and terminate existing BITs. Among these, five states have drawn attention from the international community at a time when concerns about the current investment regime have been on the rise. These include South Africa and Tanzania in Africa; India and Indonesia in Asia; and Ecuador in Latin America.

As long as IIAs are rising in number, concerns about them will rise. Some sceptic states view IIAs mainly as restrictions on host states in favour of foreign investors, which has led the five states mentioned to take action to terminate their existing IIAs.

First, in the case of South Africa, the country has recently decided to review and terminate her existing BITs and adopted a new domestic Act[53] on the promotion and protection of investment. The Act reflects the government of South Africa's disconnect from the BIT structure, which is perceived as undermining the sustainable development programmes of the state.[54] The BITs of South Africa with Austria, the Belgium-Luxembourg Economic Union, Denmark, France, Germany, the Netherlands, Spain, Switzerland and the United Kingdom (UK) have all been terminated by unilateral action of the South African government. By way of illustration, the treaty between South Africa and Germany concerning the Reciprocal Encouragement and Protection of Investment entered into force on 10 April 1998 and remained valid for 10 years.[55] After 10 years, since the treaty may be terminated at any time by one party with 12 months' advance notice in accordance with a relevant provision of the treaty,[56] South Africa notified Germany of her intention to terminate the treaty, which was officially invalidated on 31 August

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[53] South Africa's Protection of Investment Act 22 of 2015 in GN 395 GG 41766 of 13 July 2018.

[54] Gazzini Tarcisio 'Rethinking the Promotion and Protection of Foreign Investments: The 2015 South Africa's Protection Investment Act' at 33.

[55] The Treaty between the Federal Republic of Germany and the Republic of South Africa concerning the Reciprocal Encouragement and Protection of Investment, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1416/download, accessed on 3 February 2021.

[56] Ibid Article 13 (2).

2014.[57]

South Africa's critical reconsideration of IIAs arose from the 2006 *Foresti c*ase[58] in which a group of Italian and Luxemburg investors filed an unlawful expropriation claim for their mineral rights against the government of South Africa. The claimants argued that the South African laws, which required the investors to sell shares of their businesses, constituted a breach of the expropriation clauses of South Africa's bilateral investment agreements. To be more specific, the claimants argued that their shares had been expropriated by operation of the black economic empowerment equity divestiture requirements established the Mining Charter and Mineral and Petroleum Resources Development Act (MPRDA), in particular noting that the Mining Charter requires foreign investors to sell 26 per cent of their shares in relevant mining companies to historically disadvantaged South Africans.[59] Since the case was settled on merit without any decision of the Tribunal on substantial matters, one cannot jump to the conclusion that the Tribunal was in favour of investors. However, it is obvious that the case prompted the government of South Africa to take negative steps in respect of international arbitration.

Secondly, as far as Tanzania is concerned, the government of Tanzania notified the Dutch government of its intention to terminate the Agreement on Encouragement and Reciprocal Protection of Investment, which entered into force on 1 April 2004 and was supposed to remain valid for 15 years, until 1 April 2019.[60] According to its Article 14, the treaty would be extended for 10 years after 15 years of its entry into force[61] if six months' advance notice of termination was not given,[62] and thus the government of Tanzania notified the Dutch

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[57] UNCTAD Investment Policy Hub International Investment Agreement Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1757/germany---south-africa-bit-1995-, accessed on 4 February 2021.

[58] *Piero Foresti, Laura de Carli and others v Republic of South Africa* ICSID Case No ARB(AF)/07/1 Award of 4 August 2010.

[59] Ibid para 64.

[60] Christopher Kidanka 'Tanzania ends investment treaty with Netherlands' *The EastAfrican* 6 October 2018.

[61] Article 14 1) states that 'the present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that their constitutionally required procedures have been complied with, and shall remain in force for a period of fifteen years.'

[62] Article 14 2) provides that 'unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years, whereby each Contracting Party reserves the right to terminate the Agreement upon notice

government of its intention to terminate the treaty before 1 October 2018, meaning that it would be invalidated from 1 April 2019. It is not clear at this moment whether Tanzania is pursuing new BITs or domestic laws.

Thirdly, India is reported to have started to terminate its existing BITs unilaterally by issuing notices to around 50 countries,[63] in particular after its loss in the *Industries v India* case[64] in 2011, in which White Industries, an Australian investor, filed a case against India under the India-Australia BIT owing to inordinate judicial delays in enforcing a commercial arbitration award against Coal India Limited in India and argued that because of the judicial delays India had failed to provide effective means of asserting its claims and enforcing its rights. The Tribunal found that India had violated its obligations under the India-Australia BIT. After a long process of reviewing existing BITs, India adopted a model BIT in early 2016 to provide appropriate protection to foreign investors in India while maintaining a balance between investor's rights and the government's obligations.

Fourthly, in 2014 the Indonesian government announced its intention to terminate 60 bilateral treaties because of its concerns, in particular about dispute settlement provisions in favour of foreign investors, after claims by foreign investors against Indonesia in *Churchill Mining and Planet Mining Pty Ltd v Indonesia.*[65] The *Churchill Mining* case was initiated by the claim of a UK-based company, Churchill Mining, of unlawful expropriation by the government of Indonesia of the company's investments in coal mining sites, but the main issue was forged documents related to an exploration license issued to Churchill. The Tribunal found that the claimants had failed to conduct adequate due diligence on their investments when indications of forgery first came to light. At present the Indonesian government, which would potentially have been liable to pay compensation exceeding US $1.35 billion, could withdraw its intention to terminate BITs after the Tribunal made a decision in favour of Indonesia in the *Churchill*

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of at least six months before the date of expiry of the current period of validity.'

[63] Prabhash Ranjan & Pushkar Anand 'More than a BIT of protectionism', available at *http://www.thehindu.com/todays-paper/tp-opinion/More-than-a-BIT-of-protectionism/article16802711.ece*, accessed on 28 March 2019.

[64] *White Industries Australia Limited v Republic of India* UNCITRAL Final Award of 30 November 2011.

[65] *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40 Award of 6 December 2016.

Mining case. Moreover, considering that on 4 March 2019 Australia and Indonesia signed the Australia-Indonesia Comprehensive Economic Partnership Agreement, including an investment chapter, Indonesia seems to be pursuing a new BIT instead of domestic legislation. One the other hand, the Indonesian government hinted at converting to new BITs by concluding a recent BIT with Singapore, which includes provisions on corporate social responsibility and the right to regulate.[66]

Fifthly, Ecuador[67] is reported to have finalised its process of termination of all of its BITs, with the Ecuadorian president on 16 May 2017 announcing Ecuador's withdrawal from BITs with 16 states.[68] The denunciation by Ecuador of BITs goes back to 2010 when Ecuador approved the termination of BITs then in force with Finland, the UK and Germany, to be followed by the termination of ones signed with Sweden and France in 2011 after the 2007 *Occidental Exploration and Production Company* case.[69] The Tribunal in that case found that Ecuador had breached its obligation to accord the investor treatment no less favourable than that accorded to nationals or other companies in accordance with the standard of national treatment.[70] This case represented the traditional and typical position of international investment tribunals, which are rather favourable to investors based on the national treatment provision itself in a BIT, by stressing that the objective of national treatment is to protect foreign investors compared to domestic vendors.

The five states above defended their acts of termination of IIAs for several reasons: there is no

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66 Meeting Report 'Shifting International Investment Law Toward Sustainable Development: Strategies for renegotiation, reform and defence' (2019) at 18.

67 The three countries in South America (Ecuador, Bolivia and Venezuela) started to terminate their BITs. To date, since Venezuela gave notice of intention to terminate its BIT with the Netherlands in 2008, two BITs have been terminated and there are 25 BITs still in force. In the case of Bolivia, there are six BITs in force and 16 BITs have been terminated. Among them, this thesis has chosen Ecuador as an example of South America, given that the case of Ecuador is relatively new and comprehensive. See UNCTRAD homepage, available at https://investmentpolicy.unctad.org/international-investment-agreements/by-economy, accessed on 31 January 2021.

68 'Ecuador denounces its remaining 16 BITs and publishes CAITISA audit report' *Investment Treaty News* 12 June 2017. These 16 states include Argentina, Bolivia, Canada, Chile, China, France, Germany, Italy, the Netherlands, Peru, Spain, Sweden, Switzerland, the UK, the United States of America (USA) and Venezuela.

69 *Occidental Exploration and Production Company v The Republic of Ecuador* LCIA Case No UN3467 Final Award of 1 July 2004.

70 Ibid para 200.

link between the existence of IIAs and increased influx of FDI,[71] IIAs unduly restrain the exercise of host states' sovereignty and IIAs do not contribute to achieving sustainable development. Those reasons appear to be disconnected at a first glance. However, the purpose of host states in concluding IIAs is to achieve sustainable development by attracting FDI under the power of their sovereignty and therefore those reasons are indeed inter-connected.

Some remarks need to be noted, in order to understand the reasons for terminating IIAs better. The Ecuadorian president revealed that IIAs had not only failed to attract foreign investment or advance the country's development plan, but also diverted millions of dollars of government money to fighting costly lawsuits, and urged other states to consider whether their IIAs were truly beneficial to their citizens.[72] Also, from what the South Africa Protection of Investment Act[73] presents in its preamble, one can infer the reasons why South Africa decided to terminate her IIAs. The Act takes note of the important role that investment plays in sustainable development[74] other than economic growth, the importance of balancing the rights and obligations of investors,[75] the government's right to regulate in the public interest,[76] and most importantly the government's commitment in respect of international law to ensure human rights,[77] including the right of participation of vulnerable or marginalised peoples in the process of development.

The positions of South Africa and Ecuador are more inclined to encourage domestic regimes to address foreign investment and these countries have hence adopted an approach in favour of investment regulation through domestic laws instead of through IIAs, which they find more appropriate for achieving sustainable development enshrined in their own constitutions. South

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[71] Singh & Ilge op cit note 18 at 104 and the South African Bilateral Investment Treaty Policy Framework Review June 2009 at 22.
[72] Kate Cervantes-Knox and Elinor Thomas 'Ecuador terminates 12 BITs - a growing trend of reconsideration of traditional investment treaties?' *DLA PIPER* 15 May 2017, available at http://pdf.dlapiper.com/pdfrenderer.svc/v1/ABCpdf9/GetRenderedPdfByUrl//Ecuador%20terminates%2012%20BITs%20a%20growing%20trend.pdf/?url=https://www.dlapiper.com:443%2Fen%2Fmexico%2Finsights%2Fpublications%2F2017%2F05%2Fecuador-terminates-12-bits-a-growing-trend%2F%3F%26pdf%3D1&attachment=false, accessed on 5 February 2021.
[73] The Protection of Investment Act 22 of 2015.
[74] Ibid Preamble.
[75] Ibid Article 4.
[76] Ibid Article 12.
[77] Ibid Preamble.

Africa's and Ecuador's bold positions on domestication notwithstanding, they still fall short of explicitly presenting sustainable development as an international human right as reason for terminating BITs, which would have been more tenable. Actually, South Africa was known to conclude new IIAs to replace old IIAs, subject to her Constitution and domestic legislation.[78] However, at the time of writing, given that there has been no unequivocal indication that the South African government is about to establish a new IIA regime in addition to her national regulation being in operation, for instance through proposals of a new IIA or commencement of negotiations with other states, the South African government seems to stick to domestication policy as a matter of principle until there are exceptionally compelling economic and political circumstances to do so.[79] It is not clear either whether the Ecuadoran government will pursue domestication or replace old IIAs with new ones. According to a news report, Ecuador introduced a new domestic law, titled Ley Para Fomento Productivo, Atraccion Inversiones Generacion Empleo (Productive Promotion and Attraction of Foreign Investment Law), in August 2018,[80] while it has been reported that the Ecuadoran government proposed new investment agreements aiming to strike a balance of rights and obligations between the state and investors and to abandon the old model providing only investors' rights by acquiring obligations related to respecting human rights and environmental rights.[81]

As far as the other three states are concerned, India and Indonesia seem to be trying to create new model IIAs pertinent to their goals to achieve sustainable development, which will be addressed in the following section. It is still too early to gauge or examine the position of Tanzania, given that the Tanzanian government has recently announced the termination of an IIA with only one state.

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78 Mills Soko and Mzukisi Qobo 'SA's cancellation of bilateral investment treaties - strategic or hostile?' *fin24* 28 September 2018.

79 In 2012, then South African Trade Minister Rob Davies mentioned that 'Cabinet has concluded that South Africa should refrain from entering into Bilateral Investment Treaties (BITs) in future, except in cases of compelling economic and political circumstances.' See 'Trade and Industry Minister Rob Davies launched United Nations Conference on Trade and Development (UNCTAD) investment policy framework' *South African Government's Media statement* 26 July 2012.

80 Ben Sanderson and Raúl Partido 'Ecuador reforms investment law' *DLA PIPER* 24 September 2018.

81 'Ecuador model BIT gives state space to regulate' *Global Arbitration Review News* 16 March 2018 and Juan Carlos Herrera-Quenguan 'Explaining Ecuador's shifting position on FDI, investment treaties, and arbitration' *Investment Treaty News* 5 October 2020.

4.4.2 A Case Study: South Africa

In line with developments in the South African government's investment policy, a recent landmark decision by the North Gauteng High Court of South Africa in *Duduzile Baleni and 128 Others v Minister of Mineral Resources*[82] is worth examining.

The case concerns community opposition to an application by an Australian corporation for mining rights in South Africa, Transworld Energy and Mineral Resources (TEM) for a mining license for exploiting minerals, including titanium, in the Xolobeni area of the Eastern Cape in South Africa.[83] The applicants were members of the Umgungundlovu community living in close proximity to the disputed area and holding informal title to the land in terms of the Interim Protection of Informal Land Rights Act (IPILRA). The applicants did not want TEM to mine on their ancestral land[84] and their consent in the process of granting the green light to TEM was never sought. As a result, there was a continued land dispute in the area, as some of the community members opposed the establishment of the mining activities for fear that the mining activities of TEM would not only bring about physical displacement from their homes, but also lead to disastrous social, economic and ecological consequences[85] completely destroying their cultural way of life.[86] The community therefore decided to bring the dispute before the High Court, arguing that the Minister's decision to permit mining operations was unlawful. In response, the South African government argued that no such consent was required, as the MPRDA merely required that the communities be consulted, a requirement it suggested creates a lower burden on the state than free, prior and informed consent.

In this case, the Court took a more proactive and internationalised position than the South African government on the grounds of protecting the rights of the affected groups from foreign investments. It affirmed the principle of free, prior and informed consent of the affected community in relation to mining activities of foreign investors in light of the South African

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82 *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP).
83 Ibid para 4.
84 Ibid para 11.
85 Ibid para 14.
86 Ibid para 18.

Constitution and international human rights law principles. The decision of the Court demonstrated its willingness to protect the rights of marginalised communities from the excesses of the host state in favour of the foreign investor. More importantly, against the position of the South African government of protecting foreign investment under domestic laws (domestication), the Court relied on international law in interpreting relevant domestic laws (IPILRA and MPRDA)[87] by referring to the provision of the Constitution of South Africa, which states that 'every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'[88] The Court based its decision on domestic laws as well as international jurisprudence and international documents, in particular the decision by the Human Rights Committee in *Angela Poma Poma v Peru*[89] and General Recommendation No 23 of the Committee on the Elimination of Racial Discrimination relating to Indigenous Peoples.[90] Informed consent from marginalised communities is crucial for economic activities to bring about development that enriches the lives of the communities where the companies operate.

4.4.3 The Future of Domestication

International investment law began by protecting the interests of foreign investors and capital-exporting states; then, in response to challenges of the international investment law regime, it moved to protecting the interests of host states, but it seems that in effect communities are still side-lined. The case of the Xolobeni community may present the next frontier for international

[87] Ibid para 37.
[88] Section 233 of the Constitution of South Africa.
[89] *Baleni* supra note 82 para 81. 'The Human Rights Committee, in terms of the International Covenant on Civil and Political Rights, held in a matter that served before it, *Angela Poma Poma v Peru,* that it constituted a violation to culture and religion where the indigenous Aymara people's consent was not obtained prior to depriving them of access to water.'
[90] Ibid para 78. 'Lastly, granting special protection to these communities by requiring consent as opposed to mere consultation is in accordance with international law. Multiple international instruments require that communities such as the applicants have the right to grant or refuse their free, prior and informed consent to any mining development that will significantly affect them. In terms of the *General Recommendation No 23: Indigenous Peoples* issued in terms of the Convention on the Elimination of All Forms of Racial Discrimination it is recognised that: 3. The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.'

investment law in terms of reflecting the voice of the community, which is key to sustainable development. The South African experience further suggests that the purpose of sustainable development may be more fairly pursued by abandoning the current IIA regime and opting instead for domestication. However, this policy moves away from solving investment disputes through established international norms and may boost the fragmentation of international investment law and thereby undermine the potential unifying role of sustainable development. Thus, it is important for the international community to incorporate the concerns of the above-mentioned states and the decisions of local courts into the international law regimes.

4.5 The Evolution of IIAs

4.5.1 Introduction

The second reaction of the international community against the criticism of IIAs is to modify IIAs to make them more legitimate and appropriate for achieving sustainable development and protecting international human rights, while still aiming to attract more foreign investment. Most cases pertaining to the conflict of interests between foreign investors and host states have emanated from host states' intention to take measures for the purpose of serving the public interest based on the relevant provisions of IIAs, which will be addressed in detail in the next chapter.

Typically, IIAs do not explicitly refer to international human rights obligations of the contracting parties, nor do they contain substantive clauses on international human rights or any kind of investor obligations to respect human rights. However, more scholars have acknowledged the significance of international human rights in considering international investment law.[91] As will be shown in the following section, it is not surprising that international investment arbitral tribunals deal with human rights issues by referring to the jurisprudence of international human rights tribunals, because the underlying principle in relation to protecting the right of foreign investors in IIAs is rooted in the notion of protecting

[91] Eric De Brabandere 'Human Rights and International Investment Law' (2018) *Grotius Centre Working Paper Series* 2018/075 at 1-2.

human rights, in particular the right to property of foreign investors.

Against this backdrop, it is useful to delve into the development of IIAs so as to understand the character of the international investment regime in light of the protection of international human rights.

The importance of understanding IIAs in the context of human rights protection notwithstanding, thus far only scant attention has been paid to analysing the types of IIAs. For instance, an author came up with a generation approach by proposing seven generations of IIAs based on major historic events,[92] which can be called a chronological method. This purely chronological approach is useful to some extent as a track record of the development of IIAs, but it is too focused on the relations of the USA with other countries and is insufficient to indicate the progress of the contents of IIAs, in particular in terms of the relationship between international investment law and international human rights law. To overcome the limitations of the chronological approach, another author explored the evolution of IIAs in light of the roles of international investors in the process of economic development.[93] This approach has been conducive to analysing states' roles in economic development and in particular the interaction between international investment and economic development. However, this approach is still constrained by traditional thinking of understanding development in the economic context and has not sufficiently explained the increased inclusion of sustainable development and human rights elements in the current IIAs and jurisprudence of international investment tribunals.

On the one hand, the factors for substantive and procedural protection that typical IIAs offer in

[92] Subedi op cit note 15 113.

[93] Genevieve Fox 'A Future for International Investment? Modifying BITs to Drive Economic Development' (2014) 46 *Georgetown Journal of International Law* 229 at 236. I will call this approach the functional or economic development-based approach. According to this approach, 'countries with the poorest investment environment should seek to sign on to a Level 1 BIT with developed states. Because of the risks involved in investing in these developing states, this BIT will provide the greatest investor protection of the three model BITs by substantially limiting the developing states' ability to interfere with foreign investment. A Level 2 BIT is designed for moderately investor-friendly developing states, which, for the purposes of this model, are those with strong foreign but weak domestic investment. A Level 3 BIT is intended to serve as the pinnacle of the developed-developing state BITs: it strikes the greatest balance between protecting foreign investors and promoting economic development.'

common are national treatment (providing that foreign investments cannot be treated less favourably than domestic ones); most favoured nation treatment (preventing a host state from favouring one state over another); the minimum standard of treatment (providing for a minimum set of principles that a state, regardless of its domestic legislation and practices, must respect when dealing with foreign nationals and their property);[94] and the right to transfer profits in hard currency from the host state to the home state of investors. Most importantly, almost all recent IIAs have established a dispute settlement process, which offers a special favour to foreign investors. The so-called 'investor-state arbitration' mechanism grants foreign investors the special right to 'initiate international arbitration directly against the host state for alleged breaches of IIA rights.'[95]

On the other hand, as will now be discussed, IIAs differ in various ways, depending on whether they contain provisions for the protection of the environment, labour rights, other human rights or corporate social responsibility, as well as on the extent to which they protect the rights or interests of host states.

4.5.2 Review of the Evolution of IIAs from the Perspective of Human Rights Protection[96]

As Howard Mann stressed, 'the initial generations of IIAs were focused solely and exclusively on investor rights and made no reference to social or economic issues such as labour and the environment and human rights issues.'[97] No explicit reference to human rights has been made in traditional IIAs, which are exclusively focused on how to ensure the rights of foreign

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[94] OECD 'Fair and Equitable Treatment Standard in International Investment Law' (2004) *OECD Working Papers on International Investment* Number 2004/3 at 8.

[95] Howard Mann 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities' (Paper prepared for Prof John Ruggie, UN Special Representative to the Secretary General for Business and Human Rights) at 4, available at *https://iisd.org/library/international-investment-agreements-business-and-human-rights-key-issues-and-opportunities*, accessed on 18 April 2019.

[96] IIAs are divided into four categories, taking into account the extent to which an IIA embodies human rights. In the first-generation IIAs, no explicit reference to human rights is made. The IIAs in the second generation have provisions on environmental protection and labour standards but do not go further to refer explicitly to the comprehensive wording of human rights or investors' obligations (the agreement between Japan and Oman for the reciprocal promotion and protection of investment, 2015). Third-generation IIAs contain comprehensive provisions on human rights other than the protection of the environment and labour rights by imposing obligations on investors in relation to human rights. Fourth-generation IIAs include a clear expression of the obligations of investors in relation to human rights (the Protocol on Finance and Investment of SADC, 2010).

[97] Mann op cit note 95 at 10.

investors.[98] In these IIAs, foreign investors are awarded substantive and procedural rights without being subject to any obligations.

In the 1980s, the USA and Canada, which had thought of themselves primarily as capital-exporting states, began being sued by foreign investors under the investment treaties they had negotiated. For example, in the *Methanex* case the US State of California took measures against a Canada-based company, based on environmental considerations.[99] By then, the international community had realised the importance of environmental protection and labour issues. Those capital-exporting states realised that those IIAs could substantially 'limit their own policy space as host states.'[100] Most capital-exporting states concluded that it was essential to retain and exercise their rights to regulate foreign investment and to establish their model and new BITs accordingly.[101] For example, 'they added specifications and limitations to the most far-reaching substantive obligations relating to expropriation' for the purpose of ensuring environmental and labour rights,[102] which implies that foreign investors would be forced to

98 These IIAs can be called first-generation IIAs. The Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (the Germany-Pakistan BIT) in 1959 has been well known to be typical of its kind. First-generation IIAs are not limited to relatively older IIAs; there are recent IIAs that retain the characteristics of first-generation IIAs. For instance, the model BIT of France in 2006 (the 2016 France model BIT) is a prototype of first-generation IIAs. To be more specific, the former contains typical provisions of national treatment (article 1), a limitation on expropriation without compensation (article 3), transfer of the invested capital (article 4), MFN (article 7), international arbitration (article 11), while the latter includes national treatment and MFN (article 4), limitation on expropriation without compensation (article 5), free transfer of interest, dividends, profits etc. (article 6), and investor-state arbitration(article 7). Thus, what the Germany-Pakistan BIT and the 2016 France Model BIT have in common are that they make no explicit reference to human rights and their provisions are focused on how to ensure the rights of investors.

99 The case will be explored in the next section on jurisprudence.

100 See Nathalie Bernasconi-Osterwalder Lise Johnson 'Belgium's Model Bilateral Investment Treaty: A review' (2010) Draft for Discussion at 2, available at *https://www.iisd.org/pdf/2011/belgiums_model_bit.pdf*, accessed on 4 April 2019.

101 Ibid.

102 Ibid. The 2012 USA Model BIT includes provisions for the protection of the environment and labour rights, article 12 and article 13 respectively. The 2012 Model BIT is considered to strengthen the importance of environmental protection and labour rights. The NAFTA, which is a benchmark in the international investment area, might be in this category. In particular, the US has been known to put the interests of its investor before any human rights in other NAFTA countries. However, awareness of the environment and labour on the US side has been faced with challenges of curbing the activities of investors to undermine the environment and labour standards. For instance, on 6 January 2016 a Canadian company (TransCanada) invoked the denial of the US government based on climate change to permit a pipeline project of this company to international proceedings under the investment chapter of the NAFTA. The Model BITs of Columbia in 2007(2017 Columbia Model BIT) includes an article on investment and the environment. The latest one in this category is the agreement between Japan and Oman for the reciprocal promotion and protection of investment in 2015, which incorporates provisions in relation to the environment and labour. A new development in this area has been found in the Investment Agreement for the COMESA Common Investment Area, which stipulates that member countries

abide more strictly by their obligations in accordance with local or international regulations. According to research undertaken by the OECD, no investment treaties concluded between 1958 and 1985 contained any reference to the environment and fewer than 10 per cent of treaties concluded between 1985 and 2001 contained provisions about the environment.[103] Since 2002, the number of treaties referring to the environment has risen remarkably to reach a level where the share of newly concluded investment treaties with explicit environmental terms reached 89 per cent in 2008.[104] A growing trend on the part of states to reflect their concerns about environmental and labour issues led more IIAs to contain provisions strengthening the host state's right to regulate in these matters,[105] but they do not go further to explicitly reflect the perspectives of human rights or investors' obligations to address environmental and labour issues.

The new millennium marked the unprecedented enhancement of global awareness of sustainable development, which led sustainable development to expand its scope profoundly and enrich its contents beyond only environmental protection. Inclusion of sustainable development has become a dominant IIA practice since 2000.

The latest development regarding IIAs is found in the IIAs that directly or indirectly impose obligations upon foreign investors. This trend has arisen from concerns of the international community about the superiority of the role of MNCs to sovereign host states and the potential breach of obligations under international human rights by MNCs, as well as from increased awareness of sustainable development or the right to development in the process of development on the side of the international community, including host states, home states and MNCs alike. One can find variations in these IIAs as to how and to what extent the obligations

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shall not derogate from measures in respect of labour and the environment in expense of investment. The way COMESA deals with the relationship between investment and the environment and labour is somewhat different from what the above-mentioned ones do. In other words, the COMESA agreement clearly underscores the importance of labour and the environment, which cannot be ignored for the purpose of protecting investment, while other agreements have merely incorporated the wording referring to the environment and labour in IIAs.

103 See Kathryn Gordon & Joachim Pohl 'Environmental concerns in international investment agreements: The 'new era' has commenced, but harmonisation remains far off' (2011) 44 *Columbia FDI Perspectives* at 1.

104 Ibid.

105 See Mary E Footer 'Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment'18(1) *Michigan State Journal of International Law* 33-62 at 36.

of foreign investors are addressed and inserted.

Some IIAs oblige host states to ensure protection of human rights.[106] For instance, the BIT between Canada and Côte d'Ivoire obliges parties to encourage enterprises to incorporate internationally recognised standards of corporate social responsibility voluntarily.[107] Other IIAs impose obligations upon foreign investors simply to comply with the laws of host states. This is the case with the Protocol on Finance and Investment of the Southern African Development Community, which provides in Article 10 that foreign investors shall abide by the laws, regulations, administrative guidelines and policies of the host state.

More interestingly, the number of IIAs that directly obligate foreign investors to respect human rights and to comply with obligations relating to human rights has increased. For instance, the 2016 Morocco–Nigeria BIT[108] is assessed to be a remarkable endeavour by two developing states to bring investment treaties in line with the recent evolution of international law.[109] This IIA makes explicit reference to sustainable development in the preamble and introduces a series of obligations imposed upon investors. Foreign investors must 'maintain an environmental management system' and 'uphold human rights' in accordance with core labour and environmental standards, as well as labour and human rights obligations of the host state or home state,'[110] and must 'meet or exceed national and internationally accepted standards of

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[106] Some recently concluded IIAs include provisions to ensure corporate social responsibility (CSR) of companies. A UN Global Compact training guide notes that CSR 'is the continuing commitment by business to behave ethically and to contribute to economic development, while improving the quality of life of the workforce and their families, as well as the local community and society at large.' UNEP and the Global Compact *United Nations Global Compact – Environmental Principles Training Package, Trainer's Manual (2005)* 48.

[107] Article 15 of the Canada-Côte d'Ivoire Foreign Investment Promotion and Protection Agreement.

[108] Other examples of this kind will be found in Supplementary Act on the Common Investment Rules for the Community of ECOWAS adopted in 2008, which contains a designated chapter dealing with the obligations and duties of investors. The investors have the obligation to protect human rights and respect fundamental labour standards. Also, the Protocol on Finance and Investment of the Southern African Development Community, which entered into force in 2010, provides for obligations of investors regarding corruption, environmental and social impacts, transparency, and human rights and labour standards.

[109] See Tarcisio Gazzini 'the 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties' *Investment Treaty News* 26 September 2017, available at *https://www.iisd.org/itn/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini*, accessed on 28 March 2019.

[110] Morocco–Nigeria BIT (2016) Article 18.

corporate governance.'[111]

Among recently developed IIAs, two examples are noteworthy. One is the Model Bilateral Investment Treaty released by India in March 2015 (2015 model BIT) and the other is the 2019 Model Bilateral Investment Treaty (2019 model BIT) that the Dutch government published in March 2018 to replace its 2004 model BIT.[112] The analysis and comparison of two states' current practices will be helpful in understanding the trend in the international community to align the three clusters of international development law, international investment law and international human rights law, because India represents capital-importing states and the Netherlands is one of the leading capital-exporting states.

The 2015 model BIT explicitly states the intention to reconcile investment with sustainable development. The preamble provides that the parties seek to 'align the objectives of Investment with sustainable development and inclusive growth of the Parties.' Secondly, the preamble states that the parties reaffirm 'the right of Parties to regulate Investments in their territory in accordance with their Law and policy objectives including the right to change the conditions applicable to such Investments.' Thirdly, the model BIT incorporates provisions ensuring the obligations of investors and responsible investments. Article 8 states that 'the conduct, management and operations of Investors and their Investments are consistent with the Law of the Host State, and enhance the contribution of Investments to inclusive growth and sustainable development of the Host State.' Fourthly, in terms of the relationship of investment with human rights, this model BIT obliges foreign investors and their investments to be subject to and comply with law relating to conservation of natural resources, law relating to human rights and relevant national and internationally accepted standards of corporate governance and accounting practices of the host state.[113] Fifthly, in terms of procedural matters, this model BIT

[111] Ibid Article 19.

[112] The 2019 model BIT is a refined version of the initial draft that the Dutch Ministry of Foreign Affairs published on 16 May 2018. This initial draft was subject to public consultation. Based on this input, the Ministry amended the draft. The amended draft was discussed in parliament, pursuant to which further changes, including on empowerment of women, were included in the 2019 model BIT.

[113] Article12. 'Article 12: Compliance with Law of Host State 12.1 Investors and their Investments shall be subject to and comply with the Law of the Host State. This includes, but is not limited to, the following: (i) Law concerning payment of wages and minimum wages, employment of contract labour, prohibition on child labour, special conditions of work, social security and benefit and insurance schemes applicable to employees; (ii)

gives host states the right to initiate counter-claims in international arbitration for violations of some obligations imposed on investors,[114] and to subject foreign investors to civil action in their home states for non-compliance with obligations in host states.[115]

Likewise, the 2019 model BIT explicitly recognised the importance of sustainable development. The preamble stressed the commitment of states to 'sustainable development and to enhancing the contribution of international trade and investment to sustainable development.' Secondly, the 2019 model BIT takes a balanced approach to achieving its goals by reconciling the protection of foreign investors' rights and the right of host states to regulate. It states that 'these objectives can be achieved without compromising the right of the Contracting Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment, public morals, labour rights, animal welfare, social or consumer protection or for prudential financial reasons.'[116] Thirdly, the issues of human rights and corporate social responsibility of MNCs remain at the core of the final version of the 2019 model BIT. The final version refers to these issues more explicitly in the sense that respecting them is binding on investors as well as on states. Regarding obligations of investors, Article 7(1) explicitly states that 'Investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labour laws.' Regarding

information sharing requirements of the Host State concerning the Investment in question and the corporate history and practices of the Investment or Investor, for purposes of decision making in relation to that Investment or for other purposes; (iii) environmental Law applicable to the Investment and its business operations; (iv) Law relating to conservation of natural resources; (v) Law relating to human rights; (vi) Law of consumer protection and fair competition; and (vii) relevant national and internationally accepted standards of corporate governance and accounting practices.'

[114] Article14.11. '(i) A Party may initiate a counterclaim against the Investor or Investment for a breach of the obligations set out under Articles 9, 10, 11 and 12 of Chapter III of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation.'

[115] Article13. 'Home State Obligations 13.1 Without prejudice to the jurisdiction of the Courts located in the Host State, Investors and its Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State. 13.2 The Home State shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before their domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investments or Investors in relation to their Investments in the territory of the Host State.'

[116] Preamble of the 2019 model BIT.

obligations of states, Article 5(3) provides that as part of their duty to provide protection against business-related human rights abuse, states 'must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. These mechanisms should be fair, impartial, independent, transparent and based on the rule of law.' Fourthly, the 2019 model BIT considers the importance of compliance of foreign investors in their business activities in host states under international human rights obligations. International arbitral tribunals may, 'in deciding on the amount of the compensation, take into account any noncompliance with the investor of its commitments under the UN Guiding Principles on Businesses and Human Rights as well as the OECD Guidelines for Multinational Enterprises.'[117]

Both model BITs have made significant progress in acknowledging the right of host states to regulate sustainable development, and obligations of foreign investors in broad terms. When it comes to the right of host states to regulate, the 2015 model BIT stressed the right of states to change the conditions applicable to such investments, while the 2019 model BIT enumerated specific areas in which states are able to take measures for policy objectives, including public health, the environment, and labour rights which, as will be recalled, are closely connected to the right to sustainable development.

By comparison, as far as sustainable development is concerned, the 2015 model BIT is more proactive than the 2019 model BIT, in that it incorporates the concept of inclusiveness to reconcile foreign investment with the development and growth of host states.

Regarding obligations of foreign investors, in spite of their development, the 2015 model BIT and the 2019 model BIT fall short of fully reconciling the international investment law regime and the international human rights regime. At a time when a growing number of states and regions have been focusing on articulating binding obligations for foreign investors, in the interest of sustainable development, both BITs fail to impose articulate obligations upon

[117] Article 23 of the 2019 model BIT.

foreign investors to comply with international human rights norms. Mostly, obligations imposed upon foreign investors in those IIAs seem to be based on the domestic human rights laws of host states, not international human rights. It is noteworthy that both model BITs have introduced the notion of corporate social responsibility (CSR), which may be intended to lessen criticism caused by their failure to compel foreign investors to accept their obligation to comply with international human rights norms. In such a modest model, the parties merely reaffirm the importance of international human rights by encouraging (not obliging) foreign investors operating in the territory or subject to the jurisdiction of a party to voluntarily incorporate into their internal policies those internationally recognised CSR standards, guidelines and principles that have been endorsed or are supported by that party.[118] Thus, the model fails not only to establish a binding obligation, but also to at least raise the bar by holding foreign investors to the most stringent level of CSR applied by either party.

In conclusion, the current IIAs represented by both model BITs are moving towards reflecting the concerns and challenges raised by the five states mentioned above. It seems that the international community is concerned that the South African and Ecuadorian domestication cases may accelerate the decision of many states to leave the international investment regime and to rely instead on domestic courts.

4.6 Evolution of the Jurisprudence of International Investment Arbitration

Ambiguities in IIAs with respect to applying international human rights or sustainable development in international investment arbitration can be clarified by reference to recent developments in the jurisprudence of international investment tribunals. According to a study by Jorge E Viñuales, evolution in the number of investment disputes with environmental components has been outstanding over the last few years. There was a steep increase in the number of investment disputes with environmental components filed in the period 2012-2015; 60 disputes were filed after 2012, amounting to more than half of the entire 114-set of environment-related disputes compiled.[119] More international investment tribunals, in their

[118] Article 7 of the 2019 model BIT.
[119] See Viñuales J E 'Foreign investment and the environment in international law: The current state of play'

reasoning, have been incorporating environmental factors in an increasingly articulate way, even in cases where the relevant measures of host states to protect the environment have been found to be in breach of international investment law.[120]

This section examines the jurisprudence of international investment arbitration to determine the extent to which the selected cases before international investment arbitral tribunals have addressed international human rights and sustainable development issues. It seeks to demonstrate that the development of the content of IIAs has been mirrored by a shift towards rights, development and the interests of host states in dispute resolution. It is pointed out that the selected cases in this section do not comprise an exhaustive list.

4.6.1 Initial Awareness of the Importance of International Human Rights under International Investment Arbitration

The five cases discussed in this section have significantly hinted that the international investment law regime is not isolated from other international law regimes, particularly the international human rights law regime. It is demonstrated that human rights factors can be addressed if the parties involved in a case base their claims appropriately on international human rights law.

(a) *Copper Mesa Mining Corporation v Republic of Ecuador*[121]

This case was brought before the Permanent Court of Arbitration under the UN Commission on International Trade Law Rules in accordance with the relevant provisions of the Agreement between Canada and Ecuador for the Promotion and Reciprocal Protection of Investments (the BIT). The claimant was Copper Mesa Mining Corporation, a Canadian corporation. The dispute resulted from three mining concessions granted by the respondent to its associated Ecuadorian project companies that were subsequently revoked or terminated by the

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(2016) *C-EENRG Working Papers* 2016-1 1-42 at 35.

[120] Ibid at 25.

[121] *Copper Mesa Mining Corporation v Republic of Ecuador* PCA No 2012-2 Award of 15 March 2016.

respondent.[122]

The claimant alleged that Ecuador unlawfully revoked or terminated the concessions, thereby depriving the claimant of the entire value of its investments in its project companies and causing it to suffer substantial damage, which violated Ecuador's obligations to the claimant and the claimant's investments in accordance with the BIT and international law.[123] In particular, as regards expropriation, the claimant contended that there were unlawful expropriations under the BIT in four points: no compensation was paid; the assets were not taken for a public purpose; the process was not carried out according to due process of law; and the expropriation singled out the claimant's investments in a discriminatory manner.[124]

In responding to the claimant's arguments, Ecuador contended that 'it is well established under international law that a non-discriminatory regulation, adopted for a public purpose and enacted in accordance with due process, does not amount to expropriation, and even less, to unfair and inequitable treatment.'[125] Ecuador also argued that its relevant domestic laws were measures issued 'in the exercise of its legitimate regulatory authority and police powers, responding to a compelling public policy consideration (the need to consult the affected local population), seeking to address many unresolved social, economic and environmental issues.'[126] Moreover, Ecuador argued that its measures were 'for the legitimate public policy purposes of protecting public health and the environment where the requirement to consult the local population was specifically intended to protect the residents and local communities and to reduce the environmental impact of mining activities.'[127]

The Tribunal decided that the expropriation measures taken by Ecuador were no mere regulatory measures, but were made in an arbitrary manner and without due process,[128] meaning that the measures were unlawful expropriations.[129]

[122] Ibid para 1.8.
[123] Ibid para 1.9.
[124] Ibid para 6.7.
[125] Ibid para 6.9.
[126] Ibid para 6.11.
[127] Ibid para 6.16.
[128] Ibid para 6.66.
[129] Ibid para 6.67.

It is noteworthy that the Tribunal indicated that as regards the interconnection of general 'international law, international public policy and human rights, not a single complaint was made by the Respondent against the Claimant at the time; such a complaint surfaced for the first time after the commencement of the arbitration.'[130] Although the tribunal dismissed the claim of Ecuador, by recognising the factor of human rights in international investment arbitration, it hinted that this case should have been dealt with in the context of human rights if the respondent had put forward human rights-based arguments.

The Tribunal also made it clear that Ecuador could have expropriated the relevant concessions lawfully under both its domestic law and international law, on condition that it met a requirement that such measures be consistent with its obligations under the BIT.[131]

Furthermore, the Tribunal recognised a balanced approach in assessing the obligation of a host state according to a BIT and measures of the host state to regulate foreign investment by stressing that 'either standard as expressed in the Treaty imposes an absolute obligation on the host State,' and that 'there is a balancing exercise permitted to the host State, weighing the legitimate interests of the foreign investor with the legitimate interests of the host State and others, including (especially) its own citizens and local residents.'[132]

Ecuador's argument further presented the two components of sustainable development: inclusiveness and its tripod of social, economic and environmental considerations. To be more specific, Ecuador argued that its measure, the mining mandate, was taken in exercising its legitimate regulatory authority and responding to a compelling public policy consideration, that is, the need to consult the affected local population, which reflects inclusiveness, as well as seeking to deal with many unsolved social, economic and environmental issues. Although the Tribunal eventually did not accept the argument of Ecuador, one should pay attention to the fact that it did not deny the measure itself, but subsequent termination resolutions ordered by

130 Ibid para 5.63.
131 Ibid para 6.64.
132 Ibid para 6.81.

the relevant authority based on the mining mandate were made in an arbitrary manner.[133] By inference, the Tribunal would have accepted the argument of Ecuador based on considerations of inclusiveness and social, economic and environmental factors constituting sustainable development, if Ecuador had taken the subsequent measures in a proper way.

Finally, the Tribunal, in assessing causation and damages, applied the principle of clean hands (which will be elaborated on in chapter 6) by considering the claimant's contribution to damage in the proceedings, finding that the claimant's injury was caused both by its own contributory negligent acts and omissions and Ecuador's unlawful expropriation. For the tribunal, Ecuador had presented a considerable amount of expert testimony and materials relating to the principle of clean hands under international law, including the obligations of foreign investors towards human rights in the broadest sense.[134] The Tribunal found that the claimant had engaged in violence, particularly by employing organised armed men and firing weapons at local villagers and officials,[135] against human rights obligations. However, the Tribunal blamed the local company officers for such actions, and found that senior management in Canada were merely negligent. Instead of dismissing the case as a result of this finding, the Tribunal reduced the compensation by 30 per cent.[136] This decision indicates that, since the actions of foreign investors in relevant international investment arbitration may be considered based on the principle of clean hands even in the event that expropriation of the host state is deemed unlawful, foreign investors' violation of international human rights obligations may be considered in order to calculate damages from such an unlawful expropriation in a balanced way.

(b) *Sempra v Argentina*[137]

This case was brought before ICSID by Sempra Energy International (Sempra, the claimant), a US company, about the application of ICSID rules in accordance with relevant provisions of

[133] Ibid para 6.66.
[134] Matthew Levine 'Ecuador ordered by PCA tribunal to pay $24 million to Canadian mining company' *Investment Treaty News* 12 December 2016.
[135] *Copper* supra note 121 para 4.265.
[136] Ibid para 7.32.
[137] *Sempra Energy International v The Argentina Republic* ICSID No ARB/01/16 Award of 28 September 2007.

the Argentina-US BIT. This case is related to the investment made by Sempra in natural gas distribution companies in Argentina and various measures taken by the Argentine government, which, 'in the claimant's view, modified the general regulatory framework established for foreign investors under which Sempra made its investment.'[138] More specifically, the main subject matter in this arbitration was whether a series of measures that the Arginine government had taken in accordance with its Emergency Law to cope with the financial crisis in 2002 had 'both directly and indirectly expropriated' Sempra's investment 'in a manner contrary to the protection granted' under the BIT.[139]

Sempra argued that the various measures taken by Argentina had violated the specific commitments and obligations, which Argentina made and undertook under the licenses, 'all in a manner contrary to the applicable legal and regulatory framework and the specific guarantees provided under the BIT.'[140] Most importantly, as regards expropriation, Sempra argued that the illegitimate expropriation had been caused by the repeal of the licenses by Argentina 'in the form of direct and indirect expropriation,'[141] and the measures of Argentina, in particular, constituted 'the direct expropriation of the rights' that Sempra enjoyed 'by law and contract, in that all of these rights have been repudiated by the Emergency Law of Argentina.'[142]

In response, Argentina contended that its responsibility claimed by Sempra had been ruled out not only under its domestic laws on emergency, but also 'by the rules of international law governing the state of necessity, whether customary or contained' in the BIT.[143] In particular, Argentina argued that its measures, including emergency measures, were temporary and did 'not qualify as expropriation' because they did 'not entail a permanent deprivation of earnings or corporate rights,' and 'no such effects' could be revealed in the dispute.[144]

The Tribunal finally decided that Argentina had 'breached its obligations to accord the investor

[138] Ibid para 4.
[139] Ibid para 271.
[140] Ibid para 94.
[141] Ibid para 95.
[142] Ibid para 273.
[143] Ibid para 98.
[144] Ibid para 276.

the fair and equitable treatment guaranteed' in the BIT and 'to observe the obligations entered into with regard to the investment guaranteed' in the BIT and should pay Sempra compensation.[145] However, it is noteworthy that the Tribunal did not ground its decision on direct[146] or indirect[147] expropriation in accordance with the BIT.

It was obvious that one of the key issues in this case was related to human rights. When one examines a series of cases pertaining to the measure of Argentina during its economic and financial crises, the *Sempra* case is different from other cases in their awards. Previous leading cases, such as the *CMS gas* case, the *Azuriz* case and the *Siemens* case, demonstrated that investment tribunals are very conservative in addressing human rights by dismissing human rights issues on a procedural basis rather than on a substantive basis.[148] Unlike these cases, the *Sempra* case had taken more progressive positions on human rights issues in international investment arbitration. In response to the request of Argentina to the Tribunal to take into account the fact that the concession dealt with water and affected the human right to that resource, the Tribunal addressed this human rights issue on a substantive basis and acknowledged that 'this debate raised the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners.'[149]

Although the Tribunal made a final award in favour of the foreign investor, it put the obligation of the host state to respect human rights on a par with the obligation of the host state to ensure the right of the foreign investor. While the Tribunal rejected the argument that a government's human rights obligations to assure its population the right to water trump its obligations to foreign investors under BITs, it stressed that both obligations had been considered equally. Thus, according to the Tribunal, host states must respect their human rights and treaty obligations equally.

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145 Ibid at 139.
146 Ibid para 280.
147 Ibid para 283.
148 See Clara Reiner & Christoph Schreuer 'Human Rights and International Investment Arbitration' at 10, available at *www.univie.ac.at/intlaw/h_rights_int_invest_arbitr.pdf,* accessed on 29 March 2019.
149 *Sempra* supra note 137 para 332.

Finally, the Tribunal understood that 'international law is not a fragmented body of law,'[150] although it indicated that such understanding is limited to basic principles of international law and 'did not follow either that necessity is no doubt one such basic principle in the sense that it must be interpreted and applied in exactly the same way in all circumstances, or that international law will become fragmented if States contract otherwise.'[151]

(c) *Metalclad v Mexico*[152]

Metalclad, an American corporation, purchased COTERIN, a Mexican subsidiary company of Metalclad, which built a hazardous waste transfer station with a permit issued by the Mexican federal government in 1993. Before Metalclad purchased COTERIN, the subsidiary, the Mexican government, promised Metalclad that it would issue all the necessary permits for the landfill. However, shortly after Metalclad purchased COTERIN, the municipal authority denied the permission. In essence, Metalclad was granted a federal permit by the Mexican Federal Government to construct a hazardous waste landfill, but its application for a municipal level construction permit was rejected. Accordingly, in 1996 Metalclad requested arbitration in accordance with NAFTA and argued that the series of acts of denying the permission by the Mexican authorities amounted to indirect expropriation and constituted a breach of the relevant NAFTA provisions. Mexico denied all the arguments presented by Metalclad. In 2000, the Tribunal held that Mexico had indirectly expropriated Metalclad's investment by denying the construction permit without providing compensation to Metalclad for the expropriation.[153]

The *Metalclad* case is a good example of conflict that may arise in the relations between a foreign investor and a host state in light of environmental concerns. In particular, this case involved numerous debates in the international law community about the limitation of host states' right to regulate such an obviously hazardous material. First and foremost, it would be inappropriate to require the payment of compensation for regulatory adjustments in environmental regulation because the use of public funds for the payment by the host state

[150] Ibid para 378.
[151] Ibid para 202.
[152] *Metalclad Corp v United Mexican States* ICSID Case No ARB(AF)/97/1 Award of 30 August 2000.
[153] Ibid para 112.

would lead to an entirely perverse result in light of the well-established polluter-pays principle in international law.[154] Some scholars assessed that 'this case is interesting because the State attempted to bring in third party rights and State obligations to the investment dispute resolution.'[155] However, it is criticised that the Mexican government failed to invoke the international human rights issue fully. In spite of water being seriously contaminated from a hazardous waste landfill, Mexico had not been fully aware of the legal significance of the right to water in the context of international human rights and it did not base its argument on the right to water of the communities in accordance with the normative content of the right to water as described by various international norms such as Article 23 of General Comment 15, which obliges state parties to prevent third parties from interfering in any way with the enjoyment of the right to water.

The award of the tribunal in favour of Metalclad has paradoxically heightened the awareness of the international community of environmental concerns. Many criticisms have been attributable to concerns that the award downgraded global environmental concerns and undermined domestic, regional, and global environmental protection norms, thereby deterring environmental regulators from implementing essential measures to protect the environment and health whenever these affect a foreign international investor of a contracting party state to BITs negatively.[156] Principally, the underlying fear resulting from the award in the *Metalclad* case is that such an award might be used as precedent to justify lower environmental standards in host states in response to threats from foreign investors to make claims under BITs.[157] The confirmation of growing fear that Metalclad had demonstrated by focusing on the effects that regulatory measures of a host state have on foreign investors rather than focusing on the motivations or necessity of the host state for enacting the measure[158] paved the way for subsequent international investment tribunals to accept a broad definition of regulatory expropriation and to consider international human rights.

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154 Lucien J Dhooge 'the North America Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v United Mexican States' (2001) 10(2) *MINN j Global Trade* 209-289 at 280.
155 See Taillant & Bonnitcha op cit note 6 at 63.
156 Diego Bernal-Corredor 'Regulatory expropriation developments: Did Metalclad comply with all the dark premonitions?' (2009) 15 *International Law Revista Colombiana de Derecho Internacional* 279-314 at 298.
157 Ibid.
158 Ibid at 300.

(d) *Methanex v United States*[159]

Methanex Corporation (Methanex, the complainant) is a Canadian-based manufacturer of methanol, an ingredient in a gasoline additive commonly called MTBE (methyl tert-butyl ether). Although Methanex does not manufacture MTBE itself, a significant percentage of the methanol it produces is used in making MTBE.[160] Because of concerns raised by environmental groups and noted in expert studies, the State of California banned the use of MTBE as a gasoline additive because 'the use of this chemical presents a significant risk to the environment.'[161]

In 1999, in a response to the measure of the State of California, Methanex alleged that 'the US measures taken by the State of California restricting the use of MTBE' constituted a breach of the obligations on the host state under the relevant provisions of NAFTA, including the obligation not to take measures 'tantamount to expropriation' without paying compensation.[162] Meanwhile, the State of California maintained its position that banning MTBE was crucial to protect human health and the environment. Two NGOs submitted an *amicus curiae* brief, which reminded the Tribunal that California had 'an obligation under international law to protect human health and the environment' and argued that the Tribunal had to 'give substantial deference to measures implemented to achieve these goals.'[163] In August 2005, the Tribunal released its final award, rejecting all of the claims of Methanex in favour of the USA and ordering Methanex to pay the USA approximately $4 million in legal fees and arbitral expenses on each claim since 'the USA has emerged as the successful party, as regards both jurisdiction and the merits.'[164]

The *Methanex* case set precedents for accepting environment justification of the host state and

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[159] *Methanex Corp v United States* Final Award of the Tribunal on Jurisdiction and Merits of 9 August 2005.
[160] Ibid para 1.
[161] *Methanex Corp v United States* Partial Award (Preliminary Award on Jurisdiction and Admissibility) of 7 August 2002 para 33.
[162] Ibid paras 11 and 22.
[163] *Methanex Corp v United States* Submission of Non-Disputing Parties Bluewater Network, Communities for a Better Environment and Centre for International Environmental Law of 9 March 2004.
[164] *Methanex* supra note 159 part V-4.

allowing *amicus* submissions in which NGOs argued the obligations of host states towards human rights under international law. The Tribunal received *amicus* submissions mentioning that the substantive issues were undoubtedly related to a public interest far beyond issues 'raised by the usual transnational arbitration between commercial parties.'[165] Furthermore, this case is significant in allowing a measure to be taken by the host state in the interests of the community without compensation, as the claimants' argument seems to be in line with the reasoning that 'it is an accepted principle of customary international law that where economic injury results from a *bona fide* regulation within the police powers' taken by a host state in pursuit of a host state's political, social or economic ends, compensation is not required.[166]

(e) *Técnicas Medioambientales S A v Mexico (Tecmed)*[167]

The claimant, Técnicas Medioambientales, TECMED S A, a Spanish commercial company, brought this case against Mexico before an arbitration tribunal in accordance with the BIT between Spain and Mexico.[168] Tecmed had established Cytrar,[169] a controlled landfill, to dispose of hazardous industrial waste in the State of Sonora, Mexico. Cytrar was issued a license for its operation by the Mexican agency for hazardous waste known as the National Ecology Institute of Mexico (INE) at the request of Tecmed.[170] The license was renewed each year till 1998 when INE 'refused to renew the authorisation to operate the landfill' and instead 'requested Cytrar to submit a program for the closure of the landfill.'[171]

The claimant alleged that the refusal to renew the license constituted expropriation and sought compensation for damage to reputation and interest in connection with damages alleged to have

[165] *Methanex Corp v United States* Decision of the Tribunal on Petitions from Third Persons to Intervene as "amici curiae" of 15 January 2001 para 49.
[166] See Muthucumaraswamy Sornarajah *The Investment Law on Foreign Investment* 2ed (2004) 309-310 and OECD 'Indirect Expropriation and the Right to Regulate in International Investment Law' (2004) 4 *OECE Working Paper on International Investment* at 10.
[167] *Técnicas Medioambientales Tecmed, S A v The United Mexican States* ICSID Case No ARB (AF)/00/2 Award of 29 May 2003.
[168] Ibid para 4.
[169] For simplicity, this thesis uses Tecmed to refer to Tecmed itself and its affiliates. including its subsidiary, Cytrar.
[170] *Tecmed* supra note 167 para 38.
[171] Ibid paras 38-39.

accrued by the date INE rejected the renewal application. On the contrary, the Mexican government argued that it refused to renew the licence because of the infringements that Tecmed had committed in operating a landfill, considering that community groups became opposed to the operation and existence of the landfill, which dealt with hazardous waste. Mexico also stated that its resolution not to renew the permit to operate the landfill was 'a regulatory measure issued in compliance with the State's police power within the highly regulated and extremely sensitive framework of environmental protection and public health,' not constituting expropriation under international law.'[172]

The Tribunal held that although the Mexican government's decision not to renew the permit and to demand landfill closure was legitimate under domestic law, the measure permanently deprived Tecmed of the value of its investment, was not sufficiently justified by environmental concerns and, consequently, indirectly expropriated Tecmed's property in violation of the BIT and international law.[173] Although the Tribunal awarded in favour of the foreign investor, this case is relevant in understanding the role of international human rights law in international investment law for a number of reasons.

It is assessed that integration of public international law into international investment law on the basis of human rights was demonstrated in the *Tecmed* case.[174] The Tecmed Tribunal relied on case law of international human rights tribunals other than that of international investment arbitration in determining whether a resolution of INE constituted an expropriation by depriving a foreign investor of its property right, one of the basic and traditional human rights. The Tribunal, in determining whether a certain type of expropriation took place, referred to the decision of the IACtHR in *Baruch Ivcher Bronstein v Peru*, where the Court was asked to determine whether the respondent, Peru, had deprived the complainant of his property and interfered in some way with his legitimate right to its use and enjoyment.[175] The Tribunal reiterated the decision of IACtHR, which stated that it should not 'restrict itself to evaluating

[172] Ibid para 97.
[173] Ibid para 151.
[174] Yadira Castillo 'the Appeal to Human Rights in Arbitration and International Investment Agreements' (2012) VII *en Anuario Mexicano de Derecho Internacional* 47-84 at 68.
[175] Inter-American Court of Human Rights Case of *Ivcher-Bronstein v Peru* Judgment of February 6, 2001 (Merits, Reparations and Costs) para 121.

whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced.'[176]

The *Tecmed* tribunal again relied on international human rights tribunals,[177] in particular the ECtHR, in order to examine whether the measures of the host state or Mexico were legitimated by applying the proportionality test. This case is understood to be the first one in international investment arbitration that applied the proportionality principle that international human rights tribunals have often employed to resolve the conflicts of competing values between human rights and public interests. Thus, it can be argued that the case was significant in considering whether the impact of the host state's measure on the foreign investor was proportionate to the legitimate aim pursued by the measure in question.[178] The standards put forward by the tribunal in terms of applying proportionality in international investment arbitration are significant in two points. One is that public interest should be considered in addressing the legitimacy of expropriation. By referencing a decision in the ECtHR, the Tribunal considered whether the regulatory actions or measures of INE 'are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.'[179] The other is related to reasonableness, which is a significant factor to be considered in cases involving expropriation. Citing other ECtHR cases,[180] the Tribunal in *Tecmed* further developed the applicable rule on regulatory expropriation by pointing out that 'there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realised by any expropriatory measure.'[181]

4.6.2 Reassuring Obligations of Host States towards International Human Rights

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[176] *Tecmed* supra note 167 para 116.
[177] See James D Fry 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 *Duke Journal of Comparative & International Law* 77-150 at 84.
[178] Ibid para 122. See Taillant & Bonnitcha op cit note 6 at 63.
[179] Ibid para 122.
[180] *Mellacher and Others v Austria* nos 10522/83, 11011/84 and 11070/84 Judgment of 19 December 1989 at 24; *Pressos Compañía Naviera and Others v Belgium* no 17849/91 Judgment of 20 November 1995 at 19.
[181] *Tecmed* supra note 167 para 122.

The following four cases have shown the unequivocal willingness of all participants in international investment arbitration, namely host states, foreign investors and arbitrators, to consider international human rights in the proceedings. In particular, it is noteworthy that the obligations of host states under international human rights law have been articulated in these international investment tribunals.

(a) *Philip Morris v Uruguay*[182]

This case concerns a dispute submitted to ICSID in accordance with Article 10 of the BIT between Switzerland and Uruguay.[183] For the purpose of public health, the government of Uruguay adopted two measures. The first measure[184] required each cigarette brand to have a single presentation and prohibited different packaging or variants for cigarettes sold under a given brand.[185] The second measure[186] aimed to impose an increase in the size of prescribed health warnings on the front and back of cigarette packages from 50 per cent to 80 per cent of the surface, leaving only 20 per cent of the cigarette pack for trademarks, logos and other information.[187]

The claimants argued that these measures constituted breaches of the respondent's obligations under relevant provisions of the BIT,[188] 'entitling the Claimants to compensation under the Treaty and international law.'[189] In response, Uruguay argued that the challenged 'measures were adopted in compliance with Uruguay's international obligations, including the BIT, for the single purpose of protecting public health.'[190] Uruguay also held that 'both regulations

[182] *Philip Morris Brands Sàrl, Philip Morris Products S A and Abal Hermanos S A v Oriental Republic of Uruguay* ICSID Case No ARB/10/7 Award of 8 July 2016.
[183] Ibid para1.
[184] The 2008 Single Presentation Requirement
[185] *Philip Morris* supra note 182 para 10.
[186] The 80/80 Regulation, which was implemented through the enactment of Presidential Decree No 287/009.
[187] *Philip Morris* supra note 182 para 11.
[188] The relevant provisions are Articles 3(1) (impairment of use and enjoyment of investments), 3(2) (fair and equitable treatment and denial of justice), 5 (expropriation) and 11 (observance of commitments).
[189] *Philip Morris* supra note 182 para 12.
[190] Ibid para 13.

were applied in a non-discriminatory manner to all tobacco companies, and amounted to a reasonable, good faith exercise of Uruguay's sovereign prerogatives.'[191]

The Tribunal finally rejected all the claims made by Philip Morris and concluded that the two tobacco control measures were 'a valid exercise by Uruguay of its police power for the purpose of protecting public health and cannot constitute an expropriation.'[192]

This case is significant for its recognition of the obligations of host states under multilateral international agreements in dealing with international investment disputes. The tribunal acknowledged that the tobacco control measures were taken to comply with international obligations under a multilateral international agreement, the WHO Framework Convention on Tobacco Control (FCTC).[193] Accordingly, the Tribunal held that 'the FCTC was a point of reference on the basis of which to determine the reasonableness of the two measures, and in the end the claimants did not suggest otherwise.'[194] A host state's police power, which is related to the right of the state to regulate, was also considered in terms of international customary law, in spite of the absence of explicit provisions in the Switzerland–Uruguay BIT.[195] More importantly, the Tribunal, as an international investment tribunal, applied the jurisprudence of other tribunals. The Tribunal agreed with Uruguay that 'the "margin of appreciation" is not limited to the context of the ECtHR, but "applies equally to claims arising under BITs", at least in contexts such as public health.'[196] In particular, the Tribunal held that 'the responsibility for public health measures rests with the government and that investment tribunals should pay great deference to governmental judgments on national needs in matters such as the protection of public health.'[197]

(b) *SAUR International v Argentina*[198]

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[191] Ibid.
[192] Ibid para 307.
[193] Ibid para 401.
[194] Ibid.
[195] Stefanie Schacherer 'Philip Morris v Uruguay' *Investment Treaty News* 18 October 2019.
[196] *Philip Morris* supra note 182 para 399.
[197] Ibid.
[198] *SAUR International S A v The Argentine Republic* ICSID Case No ARB/04/4 Decision on Jurisdiction and Liability of 6 June 2012.

This case concerns a dispute submitted to ICSID based on the 1991 BIT between France and Argentina. In 1997 the Province of Mendoza, Argentina had decided to privatise the Argentine company Obras Sanitarias Mendoza (OSM) and signed a concession agreement with the claimant, Société d'Aménagement Urbain et Rural (SAUR), a French company 'specialising in water production, treatment, distribution and management.'[199] According to the concession agreement, OSM would act as the agent for 'treatment, distribution of drinkable water and the treatment and disposal of the sewerage.'[200] However, because of the financial crisis in 2002 and the subsequent measures taken by Argentina, OSM experienced significant losses. In 2003 the complaint argued that Argentina had unlawfully expropriated its investment. In response, Argentina contended that the most basic human rights obligation compelled it to intervene in the investors' business and that the measures pertaining to human rights norms, particularly the right to water, cannot constitute an expropriation.[201]

Although the Tribunal awarded in favour of the claimant and found that Argentina had expropriated the claimant's investment, the finding is significant in two respects.

The Tribunal stated that both obligations were compatible, since Argentina could comply with its human rights obligations while compensating the investor.[202] On the surface, the Tribunal seemed to prioritise the obligation of the host state to protect foreign investments. However, as a matter of fact, given that international investment tribunals in previous cases had mostly disregarded obligations of host states towards international human rights, it can be argued that this case demonstrated that the human rights obligation of the host state was weighed against its investment protection obligation in the BIT.

Furthermore, it is rather significant that the Tribunal recognised the right to water in the context of human rights and acknowledged that international investment arbitration should consider international human rights in legal proceedings if international human rights issues were raised

[199] Ibid paras 25-6 and 35.
[200] Ibid paras 37-38.
[201] Ibid para 328.
[202] Ibid para 331.

by any party in the arbitration and were required to resolve the dispute. More specifically, the Tribunal emphasised that 'that human rights in general, and the right to water in particular, are one of the various sources that the tribunal should take into account to resolve the dispute.'[203]

(c) *Suez, Sociedad General de Aguas de Barcelona S A and Vivideni S A v Argentina*[204]

The case was brought before ICSID against Argentina by four MNCs.[205] The case 'concerned the claimants' investments in a concession for water distribution and waste water treatment services in the city of Buenos Aires and some surrounding municipalities and a series of alleged acts and omissions by Argentina, including Argentina's alleged failure or refusal to apply previously agreed adjustments to the tariff calculation and adjustment mechanisms.'[206] The Tribunal found that, 'given the nature of the severe crisis facing the country, those general measures were within the general police powers of the Argentine state, and did not constitute a permanent and substantial deprivation of the claimants' investments.'[207] The Tribunal accordingly held that such measures were not in breach of the relevant provisions of the BIT pertaining to expropriation.[208]

The Tribunal made significance strides towards recognising human rights in international investment arbitration. It examined the argument made by Argentina that 'Argentina' s human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs,' and 'implicitly gives Argentina the authority to take actions in disregard of its BIT obligations.'[209] Although the Tribunal held this argument groundless,[210] it hinted that public purpose or public interest that host states apply as excuse for their measures against IIA

[203] Ibid para 330.
[204] *Suez, Sociedad General de Aguas de Barcelona, S A and Vivendi Universal, S A v Argentine Republic* ICSID Case No ARB/03/19 Award of 9 April 2015.
[205] The four MNCs were *Aguas Argentinas S A (AASA), Suez, Sociedad General de Aguas de Barcelona S.A. (AGBAR), Vivendi Universal S A (Vivendi), and AWG Group Ltd (AWG). AASA was a company incorporated in Argentina. Suez and Vivendi, both incorporated in France, AGBAR, incorporated in Spain, and AWG, incorporated in the United Kingdom, were shareholders in AASA.*
[206] *Suez, Sociedad General de Aguas de Barcelona, S A and Vivendi Universal, S A v Argentine Republic* ICSID Case No ARB/03/19 Decision on Liability of 30 July 2010 para 1.
[207] Ibid para 140.
[208] Ibid.
[209] Ibid para 262.
[210] Ibid.

obligations is also related to human rights issues. More interestingly, the Tribunal decided that Argentina was 'subject to both international obligations,' namely the human rights obligation and IIA obligation, and had to 'respect both of these equally,' since its human rights obligations under international law and its IIA obligations were 'not inconsistent, contradictory, or mutually exclusive.'[211] Thus, according to the Tribunal, 'Argentina could have respected both types of obligations.'[212] In essence, this case demonstrated that human rights obligations have to be respected in the context of the international investment regime.

(d) *Bernhard von Pezold and others v Zimbabwe*[213]

Bernhard von Pezold and his family (von Pezold), dual Swiss and German nationals, bought farmland in Zimbabwe, starting in 1988 under the Switzerland-Zimbabwe and Germany-Zimbabwe BITs. In 2005, when the constitution was amended, the Zimbabwean government acquired title to most of von Pezold's land, removed von Pezold's right to 'challenge the acquisition of land,' and 'criminalised the continued possession or occupation of land' by von Pezold.'[214] In the meantime, a new constitution enacted into law in early 2013 reaffirmed that foreign nationals protected by a BIT 'are entitled to full compensation.'[215]

The complainants argued that Zimbabwe had 'breached the expropriation provisions'[216] of the BITs. In response, Zimbabwe contended that it had done nothing 'to interfere with the use and enjoyment' of relevant properties and, although expropriations took place, the expropriations were lawful because 'the expropriations were carried out for an overarching public purpose' in an unavoidable situation of necessity and 'the Claimants received full compensation.'[217] The Tribunal dismissed all claims of Zimbabwe, finding that the expropriating acts by Zimbabwe were unlawful and in breach of the relevant provisions of the BITs.[218]

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[211] Ibid.
[212] Ibid.
[213] *Bernhard von Pezold and others v Zimbabwe* ICSID Case No ARB/10/15 Award of 28 July 2015.
[214] Ibid para 117.
[215] Ibid para 162.
[216] Ibid para 488.
[217] Ibid paras 480-81.
[218] Ibid para 521.

This case demonstrated that the obligations of host states under international law can be invoked either by host states themselves to justify their acts to interfere with foreign investors' property or by foreign investors or their home states to preclude other justifications by host states, such as public interest and necessity, which will be discussed more fully in the next chapter.

Furthermore, the claimants contended that, even if the necessity defence were established, it did not preclude 'the wrongfulness of an act that breaches an obligation arising under a peremptory norm,'[219] and the activities of Zimbabwe 'were a breach of obligations *erga omnes*, as well as a peremptory norm.'[220] In dealing with this matter, the Tribunal hinted that a breach of an obligation *erga omnes* or a peremptory norm under international law, mostly including human rights, should be fully considered in international investment arbitration.[221] It is very significant from the perspective of the harmonisation of international law. Since the peremptory norms are usually discussed in general international law or international human rights law outside of international investment law, the acceptance of the peremptory norms in international investment arbitrations can contribute to applying consistent standards relating to international human rights in international human rights law and international investment law on a par.

4.6.3 Recognising Obligations of Foreign Investors to International Human Rights

The following three cases form part of the established and ever-expanding case law of international investment arbitral tribunals on the relationship between the international investment law regime and the international human rights law regime in light of foreign investors' obligations to international human rights norms. Beyond clearly accepting international human rights and obligations of host states thereto in the previous cases, international investment arbitrations have gone as far as to impose obligations under international human rights law upon foreign investors.

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[219] Ibid para 621.
[220] Ibid para 649.
[221] Ibid para 657.

(a) *Urbaser v Argentina*[222]

The *Urbase*r case was brought before ICSID against Argentina in respect of applying ICSID rules of procedure for arbitration proceedings in accordance with the Spain-Argentina BIT.[223] The dispute concerned 'a Concession for water and sewage services to be provided in the Province of Greater Buenos Aires, granted in early 2000 to Aguas Del Gran Buenos Aires S A (AGBA), a Company established by foreign investors and shareholders,' including Urbaser SA.[224] 'The Concession was running into deadlock when Argentina suffered an economic crisis beginning in mid-2001,' deteriorating 'in emergency measures taken in January 2002.'[225] The situation reached the point where 'the Province declared AGBA's concession terminated in July 2006.'[226]

The claimant contended that the termination measure constituted several violations by Argentina of relevant provisions of the Spain-Argentine BIT, such as 'the obligation to protect foreign investments and the prohibition to adopt unjustified or discriminatory measures, and the prohibition of any illegal and discriminatory expropriation of foreign investment.'[227]

Argentina argued that 'the difficulties the Concession was faced with were in large part ground the AGBA's and its shareholders' deficient management' and that the claimants failed to 'provide the necessary investment into the Concession, thus violating their commitments and obligations under international law based on the human right to water.'[228]

The Tribunal decided that Argentina had breached some provisions of the BIT and rejected the argument of Argentina pertaining to 'the human rights to access to drinking water and

[222] *Urbaser S A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* ICSID Case No ARB/07/26 Award of 8 December 2016.
[223] Ibid para 1.
[224] Ibid para 34.
[225] Ibid.
[226] Ibid.
[227] Ibid 35.
[228] Ibid para 36.

sanitation,'[229] while it acknowledged that Argentina 'rightly recalled that the Province had to guarantee the continuation of the basic water supply to millions of Argentinians' and 'the protection of this universal basic human right constituted the framework within which claimants should have framed their expectations.'[230]

The *Urbaser* case is a landmark case in the interaction of international investment law with international human rights law. The Tribunal made a historic decision on the relationship between the obligations of host states to protect foreign investor's rights and their obligation to protect the human rights of citizens. According to the Tribunal, the obligations resulting from human rights cannot exempt host states from fulfilling their obligations to foreign investors.[231] By inductive interpretation, the obligations of host states to foreign investors do not operate as an obstacle to the realisation of the obligations arising from human rights.

Furthermore, although the claimants argued that 'any claim brought before the Tribunal through the Counterclaim on the basis of an alleged violation of international human rights was outside the Tribunal's competence,' the Tribunal maintained that such argument could not simply exclude any such claim 'on a simple *prima facie* basis as if it could not imply a dispute relating to an investment.'[232] In this respect, the Tribunal, by acknowledging international human rights instruments and principles in international investment arbitration, decided that IIA 'has to be construed in harmony with other rules of international law of which it forms' part, including those relating to human rights.'[233]

It is also noteworthy that human rights obligations can be imposed directly on MNCs.[234] The Tribunal stated that 'it could no longer be admitted that companies operating internationally are immune from becoming subjects of international law.'[235] In this respect, the *Urbaser* case

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229 Ibid para 1234.
230 Ibid para 624.
231 Ibid para 720. See section 5.4 of this thesis for more details.
232 Ibid para 1154.
233 Ibid para 1200.
234 Schacherer Stefanie *International Investment Law and Sustainable Development - Key cases from the 2010s* (e-book) 26, available at *https://www.iisd.org/library/international-investment-law-and-sustainable-development-key-cases-2010s*, accessed on 29 March 2019.
235 *Urbaser* supra note 222 para1195.

reflects that IIAs are incrementally incorporating provisions pertaining to the human rights obligations of foreign investors.[236]

Finally, this case made great strides in recognising international human rights before international investment arbitration. Unlike the then trend of international investment arbitration to disregard or to be reluctant to accept human rights claims, the Tribunal, for the first time, ruled that human rights claims, if they relate to the investment, may fall under its jurisdiction and developed a criterion to examine human rights claims in international investment arbitration.

(b) *Biwater Gauff v Tanzania*[237]

In August 2005, Biwater Gauff (Tanzania) Limited (BGT), a locally incorporated Anglo-German business entity, requested ICSID to institute arbitration proceedings under the ICSID Convention against Tanzania on the grounds that its assets had been expropriated and its contract illegally terminated.[238]

BGT based its case on the BIT between the UK and Tanzania. It argued that a series of measures taken by the Tanzanian government constituted the expropriation of its investment[239] and that the Tanzanian government was in breach of the BIT by 'failing to act for a public purpose related to the Republic's internal needs,' failing to 'act on a non-discriminatory basis,' and failing to 'provide prompt, adequate and effective compensation.'[240] In contrast, the *amici* submitted on behalf of Tanzania that 'the issue of investor responsibility in this case must be

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236 Eric De Brabandere 'Human Rights Counterclaims in Investment Treaty Arbitration' (2018), available at *https://oxia.ouplaw.com/page/human-rights-counterclaims/human-rights-counterclaims-in-investment-treaty-arbitratio*n, accessed on 17 July 2019.

237 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No ARB/05/22 Award of 24 July 2008.

238 Ibid paras 4 and 18. 'Biwater International Limited (Biwater), a company incorporated under the laws of England and Wales, and HP Gauff Ingenieure GmbH and Co. KG-JBG (Gauff), a German corporation, submitted a joint tender for the Project and were awarded preferred bidder status by the Republic in December 2002. Biwater and Gauff incorporated BGT for the purpose of their investment. Biwater holds 80% of BGT's shares and Gauff holds the remaining 20%.'

239 Ibid para 16.

240 Ibid para 354.

assessed in the context of sustainable development and human rights' in light of the MDGs and the nature of access to clean water as a basic human right.[241] The Tribunal held that Tanzania had violated the BIT but the violations had not caused any loss for which BGT claimed compensation at the time of expropriation.[242]

This award is understood to be a *de facto* victory for Tanzania. After the award, the UK-based World Development Movement, which campaigns against water privatisation deals in poor countries, described the verdict as 'a good day for the people of Tanzania' while Biwater said in a statement that 'the rationale is hard to fathom.'[243]

Adopting the position of the Tribunal in *Methanex*,[244] the Tribunal held the permission of some participation of interested non-disputing parties appropriate because the arbitration involved various issues of 'concern to the wider community in Tanzania.'[245] More importantly, the argument of the *amici* is worth mentioning. According to the *amici,* MNCs have 'the highest level of responsibility' to carry out their obligations as foreign investors once they engage in development projects closely 'related to human rights and the capacity to achieve sustainable development.'[246]

Finally, this case illustrates the contrasting sectoral perspectives in international investment law. While international investment lawyers perceived the case as simply an investment arbitration, international human rights lawyers viewed it as being closely connected with sustainable development imperatives and the fulfilment of basic human rights obligations.[247]

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241 Ibid para 379.
242 Ibid para 807.
243 Xan Rice 'Water: Campaigners cheer defeat of Biwater's £10m Tanzanian claim' *Guardian* [UK] 29 Jul 2008.
244 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No ARB/05/22 Procedural Order No 5 of 2 February 2007 paras 51-55.
245 Ibid para 358.
246 Ibid.
247 Frances Aldson 'Biwater v Tanzania: do corporations have human rights and sustainable development obligations stemming from private sector involvement in natural resource provision?' (2010) *Envi Liability* at 58.

(c) *World Duty Free v Kenya*[248]

In 2000, World Duty Free Company Limited (WDFC), a UK company, initiated ICSID proceedings against the Republic of Kenya. At the heart of this case was a 1989 contract between WDFC and Kenya, which allowed the company to construct, maintain and operate duty-free complexes at two airports in Kenya.[249] In 2002, Kenya sought to dismiss the 1989 contract on the grounds that, because the contract had been concluded through a bribe, it was void and unenforceable as a matter of public policy.[250] In response, WDFC alleged that Kenya had unlawfully 'expropriated its property and destroyed its rights' when Kenyan officials ordered in 1989 that a court-appointed official take over management and control of WDFC.[251] As a remedy, the claimant sought restitution and damages, including lost profits and exemplary damages. The Tribunal held that WDFC had in fact procured the 1989 agreement through a bribe to the former Kenyan president and that, consequently, it was 'not legally entitled to maintain any of its pleaded claims,' all of which arose from that 1989 agreement.[252]

This case is significant in addressing how international investment tribunals can make reference to general principles of international law, and MNCs' obligations. It signals that foreign investors not only have rights in the host state where their investment is made, but also obligations.[253] This case supports the argument that foreign investors have obligations to comply with domestic and international law in the host states in which they invest, and shows how a foreign investor's misconduct in certain circumstances can affect the foreign investor's legal rights *vis-à-vis* host states.[254] Most significantly, it also articulated the nature of the obligation on foreign investors, which may be directly imposed under international law. The Tribunal indicates that foreign investors' obligation to comply with the relevant 'international law principles remain in force even when corruption is a widespread and common practice' in the host state.[255] The award suggests that foreign investors cannot deviate from their

[248] *World Duty Free Co Ltd v Republic of Kenya* ICSID Case No ARB/00/7 Award of 4 October 2006.
[249] Ibid paras 62-3.
[250] Ibid para 128.
[251] Ibid para 74.
[252] Ibid para 179.
[253] Lise Johnson 'World Duty Free v Kenya' (2018) *Investment Treaty News* 18 October 2018.
[254] Ibid.
[255] Ibid.

international obligations even if the host state breaches international law obligations and cannot comply with or enforce them.[256]

This case further highlights the importance of anti-corruption measures to achieve sustainable development in the context of human rights, given that Goal 16 of the SDGs is rooted in human rights and highlights the importance of strengthening institutions and governance in the pledge of the international community to leave no one behind. The award supports the argument that the 2030 Agenda clearly recognises that anti-corruption measures and sustainable development are significantly interrelated and mutually reinforcing and has established anti-corruption action as a global imperative.[257]

Unlike the cases mentioned in this thesis, the *World Duty Free* case further concerns a contract-based investment arbitration. This case is exceptional in that the dispute arose under a contract between the host state and the foreign investor, not a BIT between two states.[258] It is indeed reasonable that once foreign investors' obligation under international law is accepted in a contract-based arbitration, it is more likely to be accepted in a BIT-based arbitration, since the latter has a stronger international law nature than the former.

4.7 Harmonising International Investment Law under International Law

It is evident that the international law of investment protection underwent a thorough structural change through the evolution of development. States have heeded the human rights factor of development, thereby moving the international investment law regime from solely focusing on investor protection to considering human rights in the process of investing for the purpose of development.

In this respect, it is notable that major international organisations in charge of international investment law have recently come up with an initiative to create new-generation IIAs. For

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[256] Ibid.

[257] UNDP Administrator Achim Steiner's remarks, available at *https://www.unssc.org/courses/anti-corruption-context-2030-agenda-sustainable-development*, accessed on 4 January 2020.

[258] Johnson op cit note 253.

instance, since 'UNCTAD's advocacy of a systemic and sustainable-development-oriented approach to reforming the international investment regime started in 2010,' it has been imperative to 'reflect broader policy considerations in IIAs, with a view to formulating a "new generation" of investment policies.'[259] The initiative of UNCTAD has been articulated in its UNCTAD Road Map and UNCTAD Investment Policy Framework for sustainable development.

Three factors of the initiative are in line with the ideas presented in this thesis: first, safeguard the right to regulate while providing protection; secondly, ensure responsible investment; and third, enhance systemic consistency.[260] The first is related to the balancing of the right of host states to regulate foreign investments and the right of property of foreign investors. The second concerns the obligations of foreign investors in exercising their property rights. The third may refer to the harmonisation of the three clusters of international development law, international investment law and international human rights law.

In this respect, it is appropriate for the international community to be moving towards dealing with harsh criticism that the current pro-foreign investor arbitral system fails to operate in isolation from other systems of international law by reflecting sustainable development in the international investment policy and regime. It further stresses the need to balance and decide on priorities between potential or existing conflicting obligations that host states assume when dealing with both foreign investors and their nationals. These could arise both from IIAs and from non-commercial agreements that may apply in international investment treaty cases. Functioning as the key institutions testing the legitimacy of hosts states' measures, international investment arbitral tribunals can sustain a legitimate and reasonable balance between these competing obligations by applying international law rules for the interpretation of IIAs and relevant international agreements, particularly on the basis of a balance of the different interests, values and rights explicitly or implicitly contained in those IIAs and international agreements.[261]

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[259] James X Zhan 'Introductory Remarks, Taking Stock of International Investment Agreement Reform' (2016) *UNCTAD's Expert Meeting on Taking Stock of IIA Reform*.
[260] UNCTAD 'Recent Development In the International Investment Regime' (2018) 1 *IIA Issues* at 3.
[261] Panayotis Protopsaltis 'Book Review: Ahmad Ali Ghouri, Interaction and Conflict of Treaties in Investment

In this vein, this section is focused on the paradigm shifts in the relationship of international investment law with international human rights law and international development law. The paradigm shifts may be explained from the change of reality of the international business environment. For instance, it can be a reflection of global shifts in economic power, which have turned traditionally capital-exporting home states into capital-importing host states. Accordingly, where the governments of capital-exporting home states have mainly had an eye on the interests of their investors investing abroad, they are considering that they are simultaneously host states for foreign investors, and may be the subject of claims from foreign investors. This trend has led traditional capital-exporting home states to adopt a more equally balanced approach to incoming and outgoing investments,[262] by incorporating more provisions in favour of host states in their IIAs.

However, the focus here is on the paradigm shifts from the perspective of the legal regime. The international community has demonstrated its intention to harmonise the international investment law regime under the general international law regime (including the international human rights regime and the international development law regime) in three instances: the interconnection between foreign investment and sustainable development, the recognition of other international law regimes in the international investment regime, and reconsideration of foreign investors' obligations to international human rights.

4.7.1 The First Instance of a Paradigm Shift: Comprehensive Understanding of Sustainable Development

There has been a definite paradigm shift in terms of the relationship between foreign investment and sustainable development in the last decade. Some conceive of foreign investment as a barrier to sustainable development, while others regard foreign investment as a key to foster sustainable development. According to the former, IIAs are regarded as a tool

Arbitration' (2016) 33 (2) *Journal of International Arbitration* 234-43 at 235.

[262] Albert Marsman 'New model treaty to replace 79 existing Dutch bilateral investment treaties' (2018) *De Brauw Blackstone Westbroek Legal Articles* at 3, available at *https://www.debrauw.com/newsletter/new-model-treaty-to-replace-79-existing-dutch-bilateral-investment-treaties*, accessed on 7 July 2019.

to prevent host states from using their sovereign power to regulate essential fields to achieve sustainable development such as human rights, the environment and public health, resulting in a so-called 'chill effect' on governments' ability to regulate.[263] This perspective is based on the notion that investment and sustainable development are mutually exclusive. According to the proponents of this argument, sustainable development is often used as a justification to restrict the protection of foreign investments, and thus may even be conceived as hostile towards foreign investment.

However, although there are different views on whether foreign investors make a contribution to the economic development of host states or whether they exploit the resources of host states, there is general consensus that foreign investment plays a key role in any development agenda and is important to achieve sustainable development. The international investment regime moved far beyond its original objective of realising development in host states until in recent years sustainable development started being reflected in the realm of international investment law. This is demonstrated in the current trend of the increase of intra-African FDI. Intra-African greenfield FDI accounted for only 8 per cent of the total of its kind in 2007, but remarkably increased to 22 per cent in 2013. In particular, the share of African countries in South Africa's outward FDI doubled between 2004 and 2012 to 21 per cent. The share of South African companies in all intra-African greenfield investment between 2003 and 2014 accounted for 30 per cent.[264]

The UNCTAD World Investment Report 2019 stated that 'since 2012 over 150 states have taken steps to formulate a new generation of sustainable development-oriented IIAs', which demonstrated that the international community had been accepting the notion that foreign investment and sustainable development are mutually supportive. Agenda 21 expressed such a relationship between foreign investment and sustainable development.[265] Significant guidance

263 Andrea Saldarriaga & Kendra Magraw 'UNCTAD's effort to foster the relationship between international investment law and sustainable development' in Stephan W Schill (eds) *International investment Law and Development* (2015) 125 at 126.
264 Ralf Krüger & Ilan Strauss 'Africa rising out of itself: The growth of intra-African FDI' (2015) 139 *Columbia FDI Perspective* at 1.
265 Agenda 21 para2.23. 'Investment is critical to the ability of development countries to achieve needed economic growth to improve the welfare of their population and to meet their basic needs in a sustainable manner, all without deterioration or depleting the resource base that underpins development. Sustainable

on investment has recently requested states to link sustainable development and international investment agreements. For instance, the Commonwealth Secretariat Guide suggests that 'investors would be required to conduct a sustainability assessment of investments that takes their environment, social and human rights impact into account.'[266] According to a study by the OECD, a survey of treaty-based investment arbitration cases shows that arbitration panels refer fairly frequently to sustainable development and responsible business conduct issues and to related international agreements.[267]

As articulated in the UNCTAD Investment Policy Framework for Sustainable Development, it is an undeniable trend in the international community that marshalling foreign investment and ensuring its critical role in achieving sustainable development is a priority of all states[268] and 'new generation investment policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment.'[269]

4.7.2 The Second Instance of a Paradigm Shift: Systemic Consistency[270]

One can see an increasing recognition of other international regimes in the international investment regime, either in jurisprudence of international tribunals or through interpretation of relevant international investment agreements.

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development requires investment, for which domestic and external financial resources are needed. Foreign private investment and the return of flight capital, which depend on a healthy investment climate, are an important source of financial resources.'

266 Commonwealth Secretariat Guide at 33.

267 Gordon K J Pohl & M Bouchard 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' (2014) *OECD Working Papers on International Investment*, available at *http://dx.doi.org/10.1787/5jz0xvgx1zlt-en*, accessed on 29 March 2019.

268 UNCTAD *Investment Policy Framework for Sustainable Development (2015)* 10.

269 Ibid.

270 The international community has also been concerned about the lack of consistency of ISDS tribunals, which has been on the lists of the Working Group III of the United Nations Commission on International Trade Law (UNCITRA). This Working Group has been addressing the matters pertaining to divergent interpretations and inconsistency of ISDS tribunals. See UN General Assembly 'Possible reform of investor-State dispute settlement' (A/CN9WG III/WP149) at 3. It is noteworthy to acknowledge the discussion in UNCITRAL in terms of harmonising investment law. However, much of this discussion concentrates on structural reforms such as the establishment of appellate mechanism and selection of tribunal members within the current ISDS system, while this thesis centres on ensuring systemic consistency of international investment tribunals in relation to other international law regimes with emphasis of substantial elements such as sustainable development to this effect.

First, there has been a trend that international investment arbitrations have referred to the jurisprudence of other international legal systems, as shown in the *Philip Morris v Uruguay* case examined above. Secondly, in interpreting the provisions of IIAs, account has to be taken of any relevant rules of international law, including general customary international law, applicable in relations between parties.[271] The Tribunal in *Sempra* pointed out that 'international law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle.'[272] The trend is in line with the jurisprudence articulated by other international tribunals. For instance, as addressed in chapter 2, the WTO Appellate Body in the *Shrimp and Turtles* case stated that 'WTO agreements should not be read 'in clinical isolation from public international law.' Since then, the Appellate Body has frequently sought 'additional interpretative guidance, as appropriate, from the general principles of international law.'[273]

Thus, it is observed that international investment tribunals have considered a broader range of applicable law, including international human rights law, in order to justify regulatory measures as not being in violation of host states' obligations under IIAs.[274] In particular, sustainable development-related considerations play a role in leading international investment arbitral jurisprudence to consider the object and purpose of IIAs in the context of international human rights. Although it seems to limit the notion of development to an economic one, the Tribunal in *Lemire v Ukraine*, having recourse to the preamble of the applicable IIA, stated that the purpose of the treaty was not the protection of foreign investment *per se.*[275] Instead, it articulated that the treaty should pursue a farther-reaching objective, namely to contribute to the development of the host state. Accordingly, the development of the host state required that the host state's favourable treatment of foreign investors be balanced against the legitimate right of the host state to adopt measures for the protection of what as a sovereignty it perceived to be its public interest.[276] This is also demonstrated in various international instruments. For

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[271] *Saluka Investments BV (The Netherlands) v The Czech Republic* UNCITRAL Partial Award of 17 March 2006 para 254.
[272] *Sempra* supra note 137 para 378.
[273] *Korea-Measures Affecting Government Procurement* WT/DS163/R of 19 January 2000 para 7.96.
[274] See Haugen op cit note 34 at 257.
[275] See Schill, Tams & Hofmann op cit note 10 at 27.
[276] *Joseph Charles Lemire v Ukraine* ICSID Case No ARB/06/18 Decision on Jurisdiction and Liability of 14 January 2010 para 273.

instance, the WTO Doha Declaration mandated member states to consider that investment solutions should reflect balanced interests of home and host states and take due consideration of the development policies and objectives of host states, as well as their right to regulate in the public interest.[277] The international investment law regime seems to have begun to come out of its isolation from other international law regimes, and to be more integrated into international law.

4.7.3 The Third Instance of a Paradigm Shift: Reconsideration of Foreign Investors' Obligations to International Human Rights: Responsible Investment

Traditionally, host states have welcomed investment of foreign companies to achieve their economic or social development and conclude bilateral investment agreements with home states of foreign investors even if some investment may undermine the human rights of their citizens. For instance, access to natural resources is a key interest both for foreign investors and sometimes their home states, and for host states that pursue the use of such resources and investment to promote their development. At this stage, the interests of foreign investors and host states are matched. However, the activities of foreign investors to extract such resources promoted by such an alignment of interests may come at the expense of marginalised groups who live in the area covered by the investment project.[278] Sustainable development will lead international investment tribunals to give communities in a host state in international investment arbitration a more formal voice.[279] The inclusiveness of sustainable development may be grounded in the argument that rights holders, particularly vulnerable or marginalised people in a community, must be central to the legal proceedings in international investment arbitration, since they are the ones who are directly affected and suffer harm from foreign investment-related human rights abuses of MNCs. It is promising to see third-party interests being taken into consideration more seriously in the investment protection regime, not only by way of a reference to foreign investors voluntarily acting in a socially responsible manner, but

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[277] 'Doha WTO Ministerial 2001: Ministerial' (2001) *WT/MIN (01)/DEC/1* para 22.

[278] Viñuales Jorge E 'International Investment Law and Natural Resource Governance' *E15Initiative Geneva*: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 2015, available at *www.e15initiative.org*, accessed on 2 May 2019.

[279] This topic will be examined in more detail in the section on *amicus curiae* in chapter 6.

actually recognising that foreign investors should uphold human rights and that they can be held responsible in their home states if they cause damage by failing to do so.

It is clear that human rights arguments in international investment arbitrations are incrementally being elaborated to be conducive to articulating the precise nature of investment treaty obligations of host states and foreign investors alike to international human rights in a complex modern political, economic, social and legal environment. A remarkable change in the position of the international community, including foreign investors and their home states and host states, towards international human rights has recently been demonstrated in IIAs and jurisprudence of international investment arbitrations, as explored above. As examined previously, IIAs have established a range of protection for foreign investors, mostly MNCs, which entails obligations for host states, while not imposing any direct international human rights obligations upon foreign investors. Host states' obligations under these agreements can, in most cases, be enforced by means of investor-state arbitration, which provides MNCs with lop-sided access to remedy at the international level. MNCs have enjoyed the privilege of relying upon this mechanism to challenge host states' policy decisions and measures taken in pursuit of public purposes, such as sustainable development.

In my view, the importance of foreign investors' obligations in international investment arbitrations derived from the following four factors: the increased role of MNCs, growing awareness of international human rights, the general acceptance of sustainable development in international law, and the modification of an asymmetrical legal relationship between MCNs and host states.

First, as UNCTAD has estimated that about 80 per cent of global trade has become linked to international production networks of MNCs,[280] one cannot ignore the role of MNCs in realising the right to development and eventually upholding the human rights of (particularly marginalised) people of the host state. Secondly, the discourse on obligations of MNCs has

[280] UN Conference on Trade and Development 'World Investment Report 2013 – Global Value Chains: Investment and Trade for Development' (2013) at 135, available at *http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf*, accessed on 7 May 2019.

emerged in the context of their interaction with human rights law. Since growing awareness of human rights developed in the international community in the 1990s, international human rights concerns have led states, international organisations, NGOs and experts on international law to consider the control of MNCs. The human rights obligations of MNCs have been a much-discussed issue[281] in international law and the focus of obligations of MNCs in the process of expropriation has gained global attention from both international investment lawyers and international human rights lawyers. Thirdly, and more importantly, the acceptance of sustainable development in international law has enhanced the role and responsibility of MNCs. With the inclusion of sustainable development objectives, the role of IIAs in terms of the rights and obligations of host states and foreign investors has been changing.[282] There has been a shift towards recognising the obligations of MNCs, which is observable in a number of recent IIAs and in several awards by international investment arbitrations. For instance, the investment cooperation and facilitation agreement between Brazil and the Republic of Malawi introduced a provision in which investors will 'strive to achieve the highest possible level of contribution to the sustainable development of the host party.'[283] Corporate responsibility has also been heeded in terms of sustainable development.[284] By another illustration, the plan of implementation of the World Summit on Sustainable Development also underlined corporate responsibility and accountability as an important method of attaining the status of sustainable development.[285] Finally, in addition to the international community's awakening to international human rights, including sustainable development, there have been some concerns that traditional IIAs only impose asymmetrical substantive obligations on host states in relation to expropriation,[286] without matching foreign investors' rights with their obligations. It has been criticised that many IIAs still have very vague provisions as to the requirements under which host states have rights to limit foreign investors' rights, as included in many human rights

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[281] In 2014 the Human Rights Council decided to establish a working group to examine an international legally binding instrument to regulate the activities of MNCs in the context of international human rights law.

[282] Yulia Levashova 'The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law' 14(2) *Utrecht Law Review* 40–55 at 54.

[283] Article 9 of Investment Cooperation and Facilitation Agreement Between the Federal Republic of Brazil and the Republic of Malawi, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4715/download, accessed on 5 February 2021.

[284] Ibid.

[285] UN 'Report of the World Summit on Sustainable Development' (2002) *UN Doc A/CONF* 199/20, 49.

[286] This topic will be examined in more detail in the following chapter on expropriation.

agreements.[287]

4.8 Conclusion

This chapter looked into underlying questions in relation to international investment law and international human rights law, taking into account the key elements of the human right to sustainable development in the course of foreign investors' ventures. Once one adopts the vantage point of the human right to sustainable development, one is better able to perceive, discuss, and address the fundamental source of the controversy involving the three clusters of international law: the evolution of development and the incorporation of the notion of human rights in international development law and international investment arbitration.

From the foregoing, one can come to the following conclusions: First, home states of foreign investors have increasingly agreed with host states on IIAs containing international human rights provisions, including sustainable development and corporate social responsibilities. According to an OECD survey of treaty provisions in over 200 IIAs (1959-2013) referring to sustainable development and responsible business conduct, 12 per cent of the surveyed IIAs referred to these issues by 2013 and the frequency of inclusion has rapidly increased relative to the 6 per cent registered in 2001.[288] Secondly, more host states have gradually become aware that they are obliged to take measures to protect international human rights, beyond simply reserving the right to regulate foreign investment to achieve sustainable development. As a result of this, host states are moving forward to enjoin foreign investors to comply with international human rights obligations, including the right to development or sustainable development. Finally, foreign investors have begun to invoke human rights in international investment arbitration. Recent international investment arbitral tribunals have considered the purpose and application of a challenged measure in the context of determining a host state's compliance with the substantive obligations under international law in a broad sense, not only within relevant IIAs. Furthermore, international investment arbitration counts on the

[287] Kingsbury & Schill op cit note 5 at 76.
[288] OECD 'Key Issues on International Investment Agreements' (2017) at 3, available at https://www.oecd.org/investment/globalforum/2017-GFI-Background-Note-Freedom-of-Investment.pdf., accessed on 13 May 2019.

jurisprudence of international human rights tribunals in articulating host states' violation of the rights of foreign investors and international arbitrators have referred to other legal systems.[289]

[289] Yadira Castillo 'the Appeal to Human Rights in Arbitration and International Investment Agreements' (2012) VII *en Anuario Mexicano de Derecho Internacional* 47-84 at 67-68.

CHAPTER 5 A CASE STUDY: EXPROPRIATION

When one thinks of unlawful interference with the interests of a foreign investor, it is natural to think first of expropriation.[1]

5.1 Introduction

For better understanding of the relationship between international investment law, international human rights law and international development law, I have chosen expropriation as a case study in this chapter. The reason for selecting expropriation as a case study is clear and simple. Most IIAs representing international investment law include provisions in relation to expropriation and most conflicts between host states and foreign investors before international arbitration tribunals have occurred in the process of expropriation. Thus, it is of significance to examine provisions of IIAs and jurisprudence of international arbitration tribunals in light of the way in which the international community has addressed expropriation, taking due consideration of human rights issues, including sustainable development. Through expropriation one can articulate the interplay of the three clusters of international investment law, international development law, and international human rights law, taking place in the reality of international law beyond theoretical discussions.

The chapter will be dedicated to exploring how the components of the human right to sustainable development play a crucial role in balancing the right of foreign investors and the right of host states in the course of international investment arbitration proceedings. Furthermore, since most international investment tribunals are focused on whether and to what extent host states must pay compensation for damages in the process of expropriation, the significance of compensation in expropriation in international investment arbitration will be briefly addressed and instances where host states' obligations to make compensation will be discharged or reduced will also be explored.

This chapter will be structured to describe the notion of expropriation first (section 2) and the

[1] Vaughan Lowe 'Changing Dimensions of International Investment Law' (2007) *University of Oxford Faculty of Law Legal Studies Research Paper Series 4* 53.

rest of the chapter will be focused on reviewing the right and obligation of host states to ensure human rights or the right to development of vulnerable or marginalised peoples in the process of expropriation based on jurisprudence, mainly from the cases of international investment arbitrations mentioned in the previous chapter (section 3). Section 4 will examine the obligations of foreign investors, mainly MNCs, in the same process.

5.2. Significance of Expropriation in International Investment Law

5.2.1 Concept of Expropriation

In essence, an expropriation is the taking of private property by a government acting in its sovereign capacity. International law recognises that host states have the right to expropriate tangible rights or intangible rights[2] of foreign investors in their jurisdictions. Land is most commonly the relevant tangible property right when it comes to expropriation but, as international investment tribunals have found, it is well established that expropriation is not limited to tangible property rights.[3] It could include intangible rights such as contract rights, export licenses, owner's management, and monopoly or free zone permits.[4] The right to expropriate is subject to certain conditions under customary international law and IIAs. These conditions have led to a distinction between lawful and unlawful expropriations.

Originally, expropriation means outright taking of private property by the state, usually involving transfer of ownership rights to the state or a third person. The term 'nationalisation' is used in the same context. While nationalisation refers to large-scale takings for the purpose of transferring property ownership into the public domain, expropriation involves individual measures taken by states for a public purpose.[5] Although there is strictly a difference between

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[2] *Wena Hotels Ltd v Arab Republic of Egypt* ICSID Case No ARB/98/4 Award of 8 December 2000 para 98. Also, the Tribunal in the *S D Myers* case expressly mentioned that 'the Tribunal accepts that, in legal theory, rights other than property rights may be expropriated.' para 281.
[3] Christoph Schreuer 'The Concept of Expropriation under the ETC and other Investment Protection Treaties' (2005) at 51, available at *http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf*, accessed on 22 June 2017.
[4] Ibid at 19-27.
[5] Catherine Yannaca-Small 'Indirect Expropriation and the Right to Regulate in International Investment Law in OECD *OECD International Investment Law: A Changing Landscape* (2005) at 45.

expropriation and nationalisation, the terms are often used interchangeably or on par in various contexts. 'Expropriation' is the more frequently used term in international investment arbitrations.

In terms of the level of protection standards granted to investors, expropriation has more complexity and accordingly requires more clarification in international law than in domestic property law. From an international point of view, foreign investors may enjoy more protection than host states' nationals when expropriation takes place through additional standards of protection in accordance with international norms, which makes international scholars' analysis more complicated. In other words, foreign investors are entitled both to equality of treatment and to a minimum international standard[6], while a national of a host state can enjoy only equality of treatment relative to others in the host state, but cannot enjoy a minimum international standard. Thus, foreign investors might be entitled to a minimum international standard if this standard is more favourable than equal treatment applicable to all investors, including local investors, but at the same time they would qualify to enjoy equality of treatment with the nationals of the host state, if such treatment should be more favourable than the minimum international standard.[7]

The complexity lies in the fact that there is no clear agreement on a minimum international standard. In addition, the expropriation measures of a host state are usually complicated by the fact that the host state is unable to compensate the expropriated foreign investor[8] in accordance with international minimum standards. From a procedural perspective, foreign investors are also better placed than domestic investors. Foreign investors may bring claims before local courts of host states, or rely on diplomatic protection of their home states, or appeal directly to international investment arbitral tribunals, which tend to be favourably disposed to foreign investment. In essence, with the introduction of the protection mechanism of foreign investments through international agreement, foreign investors generally acquire additional

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[6] Leo T Kissam & Edmond K Leach 'Sovereign Expropriation of Property and Abrogation of Concession Contracts' (1595) 28 *FordhamL Review* 177-214 at 183.
[7] Ibid.
[8] Francis J Nicholson SJ 'The Protection of Foreign Property Under Customary International Law' (1965) 6 *Boston College Law Review* 391-415 at 392.

legal rights and protections beyond those they would have within the domestic legal system of the host state.[9] Furthermore, the international protection of foreign investors needs more engagement of international tribunals and the evolving interpretation of relevant international instruments in order to apply the minimum standard of protection in a clearer way.

Theoretically, expropriation may occur against foreign investors as well as domestic entities. However, foreign investors appear to be more often subjected to expropriation than domestic entities. Most significant cases involving expropriation take place in developing states. Those states have difficulty in financing a wide range of development projects out of their own national resources because they lack sufficient capital and need a great volume of foreign investment from MNCs, the individual economic resources of which far exceed those of some sovereign states. In return, the developing states offer favourable treatment to MNCs. Such treatment is usually based on an international minimum standard accorded to aliens in the host states and is much more favourable than any standard rendered to the nationals of the host state.

In this situation, developing states could be more inclined to expropriate foreign investment than domestic investment because they can ensure a huge amount of foreign investment (relatively larger than domestic investment) from an economic point of view and deny any criticism of granting privileged treatment to foreign investment from the perspective of domestic politics. As expropriation is at the heart of the discussion of the international minimum standard and any challenges to the international minimum standard have not been faced outside the context of expropriation,[10] expropriation in relation to foreign investment has drawn more attention than in relation to domestic investment.

Expropriation can be either direct or indirect. Direct expropriation typically occurs when the state directly transfers legal title over the asset to the state, such as through nationalisation. However, direct expropriations have become rare.[11] Although direct expropriations have been

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9 Jorge Daniel Taillant & Jonathan Bonnitcha 'International Investment Law and Human Rights' in Marie-Claire Cordonier Segger & Markus W Gehring & Andrew Newcombe (eds) *Sustainable Development in World Investment Law* (2011) at 58.

10 Muthucumaraswamy Sornarajah *The International Law on Foreign Investment* 2ed (2004) 149.

11 Schreuer op cit note 3 at 3.

regulated under international law for a long time, in practice outright direct expropriations no longer occur often.[12] One can find few cases in international arbitrations. A rare recent example that seems to point to the relevance of direct expropriation in international arbitration is found in *George Garrilovi v Republic of Croatia*[13], where the Tribunal accepted the claimant's argument[14] of a direct taking of its real property by Croatia in response to the argument that 'the Respondent (Republic of Croatia) directly expropriated the Claimant's real property by registering State ownership over the land plots comprising that property without providing compensation.'[15]

As such, expropriation claims before international investment arbitral tribunals more frequently involve indirect expropriation, through measures tantamount to (direct) expropriation. Indirect expropriation is based on the notion that 'measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.'[16] The 1961 Draft Convention on State Responsibility tried to define indirect expropriation by stating that 'taking of the use of property includes not only outright taking of property, but also any unreasonable interference with the use or enjoyment of property for a limited period of time.'[17] International investment arbitration tribunals defined indirect expropriation in a similar way as in *Metalclad*, in which the tribunal characterised indirect expropriation as follows:

> 'Thus, expropriation includes not only open, deliberate, and acknowledged taking of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the

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[12] Courtenay Barklem and Enrique Alberto Prieto-Ríos 'The Concept of "Indirect Expropriation", its appearance in the international system and its effects in the regulatory activity of governments' (2011) 11 *Civilizar Ciencias Sociales y Humanas* 21 at 78.
[13] *Georg Gavrilovic and Gavrilovic d o o v Republic of Croatia* ICSID Case No ARB/12/39 Award of 25 July 2018.
[14] Ibid para 933.
[15] Ibid para 897.
[16] *Starrett Housing v Iran*, Interlocutory Award No ITL 32-24-1 of 19 December 1983 at 154.
[17] International Law Commission *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November (2001) Supplement No 10 (A/56/10) chpIVE1 Article 10(3), available at *http://www.refworld.org/docid/3ddb8f804.html*, accessed on 8 February 2018.

> effect of depriving the owner, in which or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State.'[18]

Considering the importance of indirect expropriation, most IIAs explicitly address indirect expropriation as well as direct expropriation. For example, the 2008 China-New Zealand Free Trade Agreement provides that 'expropriation may be either or indirect,' and articulates that 'direct expropriation occurs when a state takes an investor's property outright'[19] while 'indirect expropriation occurs when a state takes an investor's property in a manner equivalent to direct expropriation, in that it deprives the investor in substance of the use of the investor's property.'[20]

Indirect expropriation differs from direct expropriation in that there is no deliberate intent of host states to formally transfer title over the property of the foreign investor.[21] In determining indirect expropriation, the primary question is whether the foreign investor has been substantially deprived of the value of the investment.[22] For instance, in *Philip Morris*, the Tribunal unanimously confirmed that Uruguay's measure did not have the effect of substantially depriving Philip Morris of the investment, since Philip Morris was able to continue its business of selling tobacco products in Uruguay.[23] 'The adoption of a broad definition of indirect expropriation' may lead all measures of host states with a negative impact on foreign investors to 'be considered indirect expropriations, regardless of the reasons that underlie any such measures.'[24]

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[18] *Metalclad Corp v United Mexican States* ICSID Case No ARB(AF)/97/1 Award of 30 August 2000 para103.
[19] The 2008 China-New Zealand Free Trade Agreement 1.2 (a) in Annex 13: Expropriation.
[20] Ibid 1.2 (b) in Annex.
[21] UNCTAD 'Expropriation' *UNCTAD Series on Issues in International Investment Agreement* II (2012) at 7.
[22] Some recent international agreements provide criteria to determine when substantial deprivation of the value of the investment does not constitutes indirect expropriation. For instance, the EU-Vietnam Investment Protection Agreement signed on 30 June 2019 provides that 'non-discriminatory measures or series of measures by a Party that are designed to protect legitimate public policy objectives do not constitute indirect expropriation, except in the rare circumstances where the impact of such measure or series of measures is so severe in light of its purpose that it appears manifestly excessive.' See the Annex 4 of the EU-Vietnam Investment Protection Agreement.
[23] *Philip Morris Brands Sàrl, Philip Morris Products S A and Abal Hermanos S A v Oriental Republic of Uruguay* ICSID Case No ARB/10/7 para 287.
[24] See Suzy H Nikièma 'Indirect Expropriation' (2012) *Best Practices Series IISD* at 3.

Expropriation has been regarded as an area where host states threaten the basic rights of foreign investors, either individuals or multinational corporations. A sovereign state is always entitled to ask foreign investors to leave or to expropriate the assets of foreign companies, once expropriation meets some requirements, such as compensation in a manner prescribed by international law and according to BIT provisions.[25] Foreign investors have been concerned about their property being dispossessed through expropriation by host states and argued that any deprivation without compensation constitutes a serious breach of an individual's right to property, which is a fundamental human right recognised by core international human rights instruments.

Therefore, many Western scholars have tried to limit the exercise of expropriation by host states for the purpose of protecting fundamental human rights (property rights) granted to foreign investors. According to this view, expropriation is only allowed in rare circumstances. Principally, the property rights of foreign investors take precedence over host states' policy implementation in areas such as environmental protection and natural resource management. This view regards actions of host states not as a right of host states but as measures limiting the exercise of foreign investors' rights, and recognises such actions of host states as taking place in exceptional circumstances. According to this view, international law allows host states to expropriate foreign investment only where expropriation occurs for a public purpose, in a non-discriminatory manner, and with compensation. Some argue that a host state as a sovereign state is entitled to request foreign investors to leave or to expropriate the assets of foreign investors by paying compensation in accordance with international customary law and BIT provisions.[26]

This view has, however, not been permitted to go unchallenged. Under customary international law host states have a recognised right to regulate in order to protect or promote the public interest, understood broadly to include interests associated with public order, public health,

[25] See generally Suzy H Nikièma 'Compensation for Expropriation' (2013) *Best Practices Series IISD*; Schreuer op cit note 3 at 3.
[26] See Surya P Subedi *International Investment Law Reconciling Policy and Principle* 2 ed (2012) 119.

national security and environmental protection.[27] Expropriation without compensation is not *per se* illegitimate. In 1933, Jessup recognised the legitimacy of uncompensated mistreatment of the right to property of investors when it was a reasonable measure taken by the state in the interest of public welfare.[28] In this regard, Vattel already wrote that 'individuals have not such liberty in the management and control of their property as not to be subject to the police laws and regulations enacted by the sovereign.'[29]

A number of recent IIAs contain provisions recognising host states' right to regulate. This is the case with the 2016 Morocco-Nigeria BIT. This BIT articulates host states' right to exercise discretion by stating that 'nothing in the treaty prevents them from adopting, maintaining, or enforcing, in a non-discriminatory manner, any measure otherwise consistent with the treaty that they consider appropriate to ensure that investment activity in their territory is undertaken in a manner sensitive to environmental and social concerns.'[30]

From the foregoing, it is widely accepted that the right of host states to expropriate any property under their jurisdiction is not challenged. The most difficult question for an international arbitration faced with an allegation of expropriation is how to address the question of the international minimum standard in relation to compensation when host states exercise the right to regulate foreign investment by way of expropriation. In this respect, one should note that almost all disputes referred to international arbitration under IIAs involve an allegation of host-state responsibility for some form of expropriation without compensation.[31] To examine the argument that the right of a host state to regulate or expropriate foreign investment can be exercised in pursuance of human rights or the right to development, one needs to explore how the international investment law regime addresses the compensation issue pertaining to expropriation and in which circumstances the requirement of compensation can be waived.

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[27] See Nikièma op cit note 24.
[28] Philip C Jessup 'Confiscation' (1913) 21 *American Society of International Law Proceedings* 38 at 40.
[29] Martins Paparinskis 'Regulatory Expropriation and Sustainable Development' in Marie-Claire Cordonier Segger, Makus W Gehring & Andrew Newcombe (eds) *Sustainable Development in World Investment Law* (2011) at 313.
[30] Tarcisio Gazzini 'The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties' (2017) 8(3) *Investment Treaty News* 8 September 2017 3-4 at 3.
[31] Subedi op cit note 26 118.

5.2.2 Compensable Expropriation and Non-compensable Expropriation

The line between the notion of indirect expropriation requiring compensation and measures taken by host states not requiring compensation has not been clearly drawn in most IIAs and has largely rested with state practice and jurisprudence in particular. Some scholars argue that if a claim arising from expropriation were referred to an international tribunal, a foreign investor would have a reasonable prospect of success if there had either been discrimination or no compensation was paid to the foreign investor.[32] Others argue that there is no general principle of international law prohibiting expropriation without compensation.[33] By way of illustration, the *Sempra v Argentina* case concerns the legitimacy of regulatory measures against the gas industry promulgated by the Argentine government following the Argentine economic crisis.[34] In this case, the Tribunal did not accept the indirect expropriation claims because 'a finding of indirect expropriation would require that the investor no longer be in control of its business operation, or that the value of the business had been virtually annihilated and the Government did not manage the day-to-day operations of the company; and the claimant retained full ownership and control of the investment.'[35]

This study will explore how individual states' practice and international investment arbitral tribunals have articulated the discrepancy between indirect expropriation requiring compensation and instances where host states' measures affect foreign investment but do not require compensation. The former, indirect expropriation requiring compensation, is generally regarded as a host state's measure that has a serious impact on foreign investment without legal title to the foreign investment being affected. Thus, the foreign investors retain legal title over their investment in the host state, but the investment no longer has any economic value or effectively no longer exists.[36] In contrast, a host state's measure affecting an investment of foreign investors but not requiring compensation entails a non-discriminatory measure taken by the host state designed to protect a legitimate public welfare objective, which does not

[32] Leo T Kissam & Edmond K Leach 'Sovereign Expropriation of Property and Abrogation of Concession Contracts' (1595) 28 *FordhamL Review* 177-214 at 178.
[33] Ibid at 180.
[34] *Sempra v Argentina* ICSID Case No ARB/02/16 Award of 25 September 2007.
[35] Ibid para 284.
[36] Nikièma op cit note 24 at 4

necessarily constitute regulatory expropriation requiring compensation.[37]

For instance, the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens recognised non-compensable takings that result 'from the execution of tax law; from a general change in the value of currency; the action of competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights.'[38] Measures affecting foreign investment but not requiring compensation seem to be akin to diminishing use and enjoyment of property in the common-law property sense. It may be inferred from the awards of two international investment tribunals. The Tribunal in *Suez* hinted that diminishing use and enjoyment of property by a measure of a host state does not *per se* constitute indirect expropriation requiring compensation.[39] The Tribunal in *LG&E* indirectly demonstrated the same view by articulating when indirect expropriation requiring compensation takes place. The Tribunal stated that 'a measure tantamount to expropriation occurs when governmental measures effectively neutralise the benefit of the property of the foreign owner and ownership or enjoyment can be said to be neutralised where a party is no longer in control of the investment or where it cannot direct the day-to-day operations of the investment.'[40] In essence, in many international arbitration decisions, compensation was not allowed where host states' measures did not affect all or most of the foreign investment's economic value, and where host states' interference with the foreign investor's ability to carry on its business still allowed the foreign investor to continue to operate, even if profits were diminished.[41]

It is further noteworthy that several states have recently attempted to introduce a new formula of expropriation without compensation. For instance, in December 2018, the South African

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[37] Subedi op cit note 26 76.
[38] Article 10 of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961)
[39] *Suez, Sociedad General de Aguas de Barcelona, S A and Vivendi Universal, S A v Argentine Republic* ICSID Case No ARB/03/19 Decision on Liability of 30 July 2010 para 137. 'The fact that the effect of such measures may have diminished the value of an investment does not in and of itself constitute an indirect expropriation.'
[40] *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentine Republic* ICSID Case No ARB/02/1 Decision on Liability of 3 October 2006 para 188.
[41] Ibid para 191.

government released a new ‘Expropriation Bill (Expropriation Bill 2019)’[42], which lists five types of properties that can be expropriated without compensation, namely ‘Land occupied by a labour tenant as under the Restitution of Land Rights Act; Land that has been purchased for speculative purposes; Land owned by a state-owned enterprise; Land which has been abandoned by a landowner; When the market value of the land is equal or less than the present value of direct state investment or subsidisation for the purchase of beneficial capital improvement of the land.’[43] This may have a negative impact on foreign investment. For instance, suppose that a foreign investor in the area of mining in cooperation with a state-owned entity is given the right to use some land, but afterwards the South African government *de facto* expropriates the foreign investment by depriving the foreign investor of its right to use the land, without compensation. In such a situation, foreign investors would be reluctant to invest in the area of mining in South Africa.[44]

The commentary on the American Law Institute’s Restatement (Third) of Foreign Relations Law of the USA distinguished these two notions: ‘A State is responsible for an expropriation of property when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably, interferes with, or unduly delays, effective enjoyment of an alien’s property or its removal from the state’s territory, while a state is not responsible for loss of property or for other economic disadvantage resulting from *bona fide* general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory.’[45]

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[42] The Bill has not been translated into an Act. Once the bill has undergone the required departmental public comment and consultations, it will go to Cabinet for approval, and then on to Parliament. According to the media, it is unlikely to reach the national legislature before the second half of 2020. Marianne Merten ‘ANC’s executive proposal on expropriation without compensation obscures already vast ministerial powers’ *Daily Maverick* 28 January 2020, available at *https://www.dailymaverick.co.za/article/2020-01-28-ancs-executive-proposal-on-expropriation-without-compensation-obscures-already-vast-ministerial-powers*, accessed on 25 April 2020.

[43] 12 (3) in the draft Expropriation Bill 2019 in GN 1409 in GG 42127 of 21 December 2018.

[44] It is noteworthy to examine the tension between international law and national law in addressing the issue of expropriation without compensation, although it is indeed beyond the scope of this thesis to address whether South Africa can be responsible for exercising expropriation without compensation or without justifications since her domestic regime of compensation might be against international customary law or international investment agreements that she is party to.

[45] Restatement (Third) of the Foreign Relations Law of the United States (1987).

5.3 Expropriation and a Host State's Obligation under International Law

Can a host state justify its breach of obligations contained in IIAs in the process of expropriation and be exempted from compensation? To this effect, there are various difficulties in terms of legal relationships concerning expropriation. These mainly arise in two areas. First, the relationship between the right of a host state to take regulatory measures for the purpose of public interest and the property right of foreign investors may be in conflict. Secondly, a host state may have to take measures that have a negative impact on foreign investors in accordance with its international obligations, in particular pertaining to international human rights, including the human right of sustainable development.

The right of a host state to regulate is reconciled with its obligation to respect and protect the property right of foreign investors. Likewise, a host state's obligations in terms of property rights are reconciled with its obligations to comply with international human rights norms and to fulfil its international commitments by establishing a set of regulations under which it cannot be held liable for compensation.

The analysis in this section is conducted by referring to four potential ways in which a host state may attempt to justify a breach of its obligations under the international investment law regime. These are, first, through the invocation of the public interest in order to invalidate a foreign investor's claim; secondly, by precluding responsibility for breach of its obligations under the principle of necessity; thirdly, by invoking an obligation to comply with international human rights norms; and finally, by initiating a claim against a foreign investor's investments before expropriating the property of the foreign investor. The first three defences do operate as a host state's defence for justifying its actions to expropriate the property of a foreign investor in response to the foreign investor's claiming compensation, while the last is a pre-emptive means used by a host state to justify its subsequent expropriation measure in response to a breach of foreign investors' obligations to international human rights norms.

5.3.1 The First Instance of Non-compensable Expropriation: Public Interest

The right of a host state to regulate individual property for a public purpose or in the public interest is recognised in jurisprudence and international instruments as undeniably forming part of a state's sovereign power.[46] The host state's right to regulate individual property is understood as being an exercise of the police power of the state, or regulatory measures for a public purpose, or in the public interest.[47] However, as private sectors or individuals prevail over the public sector, property right protections become increasingly predominant in many states in order to prevent property owners from being subject to abusive use of state power. As a result, various protection measures against unlawful or excessive regulatory interference by a host state have been included in IIAs and various other forms of international legal instruments. Nevertheless, given that property rights themselves are not absolute, those protected rights of foreign investors are also subject to a host state's lawful regulations and reasonable limitations.

In general, measures taken by a host state in the exercise of its right to regulate for a public purpose or in the public interest do not give rise to expropriation entailing compensation, even though they may have the same effects as a compensable expropriation. This happened in the *Methanex* case where the Tribunal found that no expropriation had taken place because a Californian environmental regulation was a lawful regulation, which was for a public purpose and non-discriminatory and was accomplished with due process.[48] Interestingly, the Tribunal did not mention compensation in deciding whether the environmental regulation was lawful or not, but concentrated on the two requirements of serving public purpose and being non-discriminatory.

The public interest justification in IIAs allows host states to lawfully take measures directed at a particular regulatory objective that would otherwise be inconsistent with its substantive IIA obligations. There is broad agreement that the exercise of the right of host states to expropriate should not be discriminatory and should have a basis in public purpose.[49] This kind of

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[46] See Ali Ghassemi *Expropriation of Foreign Property in International Law* PhD Thesis the University of Hull (1999) at 82, available at https://core.ac.uk/download/pdf/2731706.pdf, accessed on 5 February 2021.
[47] UNCTAD op cit note 21 at 79-85.
[48] *Methanex Corp v United States* Final Award of the Tribunal on Jurisdiction and Merits of 9 August 2005 Part IV Chapter Page 4 para 7.
[49] Sornarajah op cit note 10 240.

justification has become an increasingly popular mechanism in IIAs, appearing in 43 per cent of IIAs concluded between 2011 and 2016, compared to 7 per cent of agreements signed between 1959 (when the first investment treaty was signed) and 2010.[50] Most defences to claims made by foreign investors in international investment arbitration were understood to be related to host states justifying expropriation measures premised on public interest considerations.[51]

International arbitration tribunals have made many awards to this effect. Of the nine cases discussed in chapter 4, the *Philip Morris* tribunal makes it clear that Uruguay's measure was part of the host state's right to regulate; protecting public health has long been recognised as an essential manifestation of the host state's right to regulate.[52] Other significant cases are involved in this discussion. The ICSID tribunal in *Parkerings-Companiet AS v Lithuania* ruled that it is each state's undeniable right and privilege to exercise its sovereign legislative power and there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.[53] In its *Amoco Award*,[54] the Chamber of the Iran-US Claims Tribunal recognised nationalisation (expropriation) as a 'right fundamentally attributed to State sovereignty'[55] and 'commonly used as an important tool of economic policy by many countries, both developed and developing,'[56] and as a right that 'cannot easily be considered as surrendered.'[57]

A number of recent IIAs also contain explicit provisions, some of which are inspired by Article

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50 Caroline Henckels 'Should Investment Treaties Contain Public Policy Exceptions?' (2018) 59 *Boston College Law Review* 2825-44 at 2826.

51 See Edward John Guntrip *The 'De-fragmentation' of International Investment Law and International Human Rights Law: A Procedural Basis for a Host State Human Rights Defence in ICSID Arbitration* Doctoral Thesis , Brunel University (2016), available at *https://bura.brunel.ac.uk/bitstream/2438/13855/1/FulltextThesis.pdf*, accessed on 20 June 2019.

52 *Philip Morris Brands Sàrl, Philip Morris Products S A and Abal Hermanos S A v Oriental Republic of Uruguay* ICSID Case No ARB/10/7 para 287.

53 *Parkerings-Companiet AS v Lithuania* ICSID Case No ARB/05/08 Award of 11 September 2007 para 332.

54 *Amoco International Finance Group v The Government of the Islamic Republic of Iran, the National Iranian Oil Company et al (Amoco v Iran)* Award No 310-56-3 of 14 July 1987.

55 Ibid para 179. See Elena Blanco & Jona Razzaque *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (2011) 70.

56 Ibid.

57 Ibid.

XX of the GATT of 1994,[58] reaffirming a host state's right to regulate. For instance, this is the case with Article 12 of the BIT between Mauritius and Comoros in 2001, which states: 'Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting any measure whatsoever to protect its essential security interests or in the interest of public health or the prevention of diseases affecting animals and plants.' Similarly, some investment treaty models presented to replace old models by European and Western states contain clauses relating to protection of the environment, health and labour rights.[59]

Above all, it is argued that the objectives of sustainable development are essential elements of the public purpose or interest of host states. Accordingly, public purpose or interest 'can be regarded as the conceptual cornerstone of Sustainable Development.'[60] As the SDGs have

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[58] 'Article XX General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(c) relating to the importations or exportations of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.'

[59] This can be seen in the model BITs drafted by the United States (2004, Articles 12 and 13), Canada (2004, Article 11), Belgium (2002, Articles 5 and 6), Finland (2004, Article 14), Austria (2008, Article 4(5)) and Netherlands (2018, Article 2).

[60] Yannick Radi 'International investment law and development: A history of two concepts' in Stephan W Schill(eds) *International Investment Law and Development* (2015) at 71.

been guiding all policy-makers at the national and global levels, sustainable development lies at the heart of the public purpose justification based on the right to regulate of a host state in international investment arbitration. Further, since the definition of expropriation still falls within the area of interpretation in international law, some scholars have suggested incorporating sustainable development as an interstitial norm in drawing a line between the protection of property rights of foreign investors and a host state's right to regulate in appropriate cases.[61] Given the jurisprudence of international investment arbitration and individual states' practices examined previously, chapters 2 and 3 confirmed that international tribunals must balance two competing legal interests, the power of a host state to regulate and the degree of the measure's interference with the right of ownership of foreign investors,[62] to realise the human right to sustainable development.

5.3.2 The Second Instance of Non-compensable Expropriation: Necessity

The second instance of non-compensable expropriation may take place in the necessity justification of a host state. Necessity has traditionally been invoked in various international disputes and it has, as stated in Draft Article 25 of the ILC's Draft Articles on State Responsibilities,[63] been understood to be a part of customary international law. Thus, a host state can invoke necessity as an excuse for not complying with its international obligation under IIAs.

In international investment arbitration, necessity has been invoked to justify a breach of a host state's obligations under IIAs in the process of expropriation, on its own or alongside other justifications such as public purpose justification and human rights justification. Necessity is

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[61] Martins Paparinskis 'Regulatory Expropriation and Sustainable Development' (2011) in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe (eds) *Sustainable Development in World Investment Law* 295-327 at 304.
[62] *LG* supra note 40 para 189.
[63] Article 25 states: '1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity.'

the most frequently invoked general international public law defence in international investment arbitration tribunals.

This section will examine three leading cases where necessity was addressed in international investment arbitration: the *Sempra* case, the *Biwater Gauff* case and the *Bernhard von Pezold and others v Zimbabwe* case.

In *Sepmra,*[64] Argentina maintained that 'the concept of state of necessity has consolidated itself under international law so as to foreclose any wrongfulness on the part of measures adopted in its context and to exempt the State from international responsibility.'[65] As Argentina concluded that 'in view of the existence of a state of necessity, any damage caused is not attributable to the State as it originates in social and economic forces beyond the power of the state to control through the exercise of due diligence and Compensation is thus not due'[66], one can find two important factors in terms of pre-condition to invoke a state of necessity and of the effect of invoking it. These are, respectively, that a state of necessity should not find its origins in endogenous factors and that the obligation of compensation is exempted when a state of necessity is accepted. In spite of strong arguments by Argentina, the Tribunal indicated that 'there are questions as regards relationship between bilateral investment agreement, necessity situation or emergency and the human rights of citizens and property owners.'[67] It ruled that the requirements for a state of necessity under customary international law had not been fully met in this case (2007 Award).[68] However, the *ad hoc* committee, in deciding to annul the 2007 Award, is understood to have accepted the necessity argument by recognising the measure adopted by Argentina as necessary to maintain public order and protect its essential security interests.[69]

In *Biwater Gauff* examined in chapter 4, Biwater Gauff argued that Tanzania expropriated its

[64] *Sempra* supra note 34.
[65] Ibid para 333.
[66] Ibid para 337.
[67] Ibid para 332.
[68] Ibid para 355.
[69] See *Sempra Energy International v The Argentina Republic* ICSID No ARB/01/16 Decision on the Argentine Republic's Application for Annulment of the Award of 29 June 2010.

investment in breach of the relevant BIT provisions. According to Biwater Gauff, the Tanzanian government failed to prove that its measures had been taken for a public purpose, and acted on a non-discriminatory basis without prompt, adequate and effective compensation.[70] In response, Tanzania argued that it had 'the discretion to take such actions as it deemed necessary to regain possession and control of the assets and operations concerned.'[71] In spite of these arguments, the Tribunal ruled that 'there was no necessity or impending public purpose to justify the Tanzanian government's intervention in the way it took place.'[72]

In *Bernhard von Pezold and others v Zimbabwe,* Zimbabwe invoked both the public purpose justification and the necessity justification. Zimbabwe argued that there was 'a state of emergency in effect in Zimbabwe' from February 2000 until March 2013, 'which posed a real threat' to the continuation of the state, and that the only way to safeguard the continuation of the state was to implement the Fast Track Land Reform Programme (FTLRP),[73] framing its case for necessity under Article 25 of the ILC Articles on State Responsibility.[74] In response, the claimant argued that, 'even if the elements of the necessity defence were established, Article 26 of the ILC Articles prevented the existence of a state of necessity from precluding the wrongfulness of an act that breaches an obligation arising under a peremptory norm,' namely 'the prohibition against discrimination on the basis of race.'[75] The Tribunal accepted the claimant's argument in recognising that the necessity justification cannot impair peremptory norms.

From the jurisprudence above, it is obvious that the tribunals in international investment arbitration refrained from accepting the necessity defence, although necessity is widely

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[70] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No ARB/05/22 Award of 24 July 2008 para 354.
[71] Ibid paras 429 and 434.
[72] Ibid para 515.
[73] See *Bernhard von Pezold and others v Zimbabwe* ICSID Case No ARB/10/15 Award of 28 July 2015 para 610.
[74] Ibid para 613. 'Necessity is invoked by the State of Zimbabwe as a ground for precluding any wrongfulness of acts not in conformity with an international obligation of that State because the act of land reform: a) is the only way for the State of Zimbabwe to safeguard an essential interest against a grave and imminent peril; and b) land reform in Zimbabwe does not seriously impair an essential interest of Germany and/or Switzerland, or of the international community as a whole.'
[75] Ibid paras 621-622.

recognised under general international law and there are several cases of international arbitrations that clearly accepted the necessity arguments, such as *CMS* and *LG& E*. According to the *CMS* Tribunal, 'any state could invoke necessity to elude its international obligations.'[76] In *LG&E Energy Corp v Argentina*, for instance, the Tribunal rejected the assertion of the foreign investor that the necessity defence of Argentina should not be applied,[77] and determined that Argentina's measure was necessary.[78]

As a result of inconsistency of international investment arbitration in relation to the necessity justification, one finds that host states frequently invoke the necessity justification together with other arguments, namely the public interest argument or the human rights argument. In the *Sempra* case, Argentina brought human rights issues based on the conditions under which necessity can be invoked in general customary international law. In *Bernhard von Pezold* and in *Biwater Gauff,* the respondent states both relied on necessity alongside public purpose. In *Biwater Gauff* Tanzania argued that its actions were justified under the relevant provision allowing the authority to take any measures necessary to ensure continuity of water supply and sewage services (necessity justification)[79] and also that lack of funds prevented it from performing properly and created a real threat to public health and welfare (public interest justification).[80] In *Continental Casualty*,[81] the Tribunal considered that the host state struck an appropriate balance between the protection of the foreign investor's rights and the obligation of the host state towards its people[82] by ruling that 'it is self-evident that not every sacrifice can properly be imposed on a country's people in order to safeguard a certain policy that would ensure full respect towards international obligations in the financial sphere, before a breach of those obligations can be considered justified as being necessary under this BIT.'[83] The award in *Continental Casualty* is understood to have reached proactive conclusions on both the

[76] *CMS Gas Transmission Co v Republic of Argentina* ICSID Case No ARB/01/8 Award of 12 May 2005 para 317.
[77] *LG* supra note 40 para 239.
[78] Ibid para 240.
[79] *Biwater* supra note 70 para 428.
[80] Ibid para 436.
[81] *Continental Casualty v Argentine Republic* ICSID Award Case No ARB/03/09 of 5 September 2008.
[82] Valentina Vadi 'Jus Cogens In International Investment Law and Arbitration' (2016) in M den Heijer and H van der Wilt (eds) *Netherlands Yearbook of International Law 2015* 357-388 at 377.
[83] Ibid para 227.

effectiveness of Argentina's emergency defence or necessity defence and the pre-eminence of its human rights obligations.[84]

Moreover, in terms of the level of discretion of a host state to exercise its right to regulate, necessity is limited in nature. Compared to the public interest argument, necessity is more inclined towards a host state' obligations, rather than towards its rights. In the case of necessity, a host state is under more pressure to take some measures to address the situation of necessity rather than assuming that it has absolute discretion to take measures for the purpose of public interest. In this sense, the necessity justification lies between the public interest justification and the human rights justification.

5.3.3 The Third Instance of Non-compensable Expropriation: International Human Rights Obligation

The public purpose justification and the necessity justification are mainly based on the discretion of a host state. Whether or not a host state takes the measure of expropriation in achieving public purpose or in overcoming a situation of necessity may depend on the host state's discretion. In response to such discretionary measures of a host state, foreign investors or their home states have employed a variety of counter-measures through IIAs to limit the exercise of host states' discretion, mainly expropriation. For instance, in the event of a dispute, most IIAs give the foreign investor the opportunity to claim its rights directly in an international arbitration process, instead of relying on diplomatic protection or leaving the case to the decision of the host state's national courts. In *Maffezini v Spain*,[85] by rejecting Spain's contention that 'the Claimant should have submitted the case to Spanish courts before referring it to international arbitration,' the Tribunal held that Maffezini had the right to resort to arbitration without first accessing the Spanish courts.[86]

Another example is where foreign investors specify the international minimum standard

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[84] Laurence Boisson de Chazournes & Brian McGarry 'What Roles Can Constitutional Law Play in Investment Arbitration?' (2014) 15(5-6) *The Journal of World Investment & Trade* 862-888 at 877.
[85] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7 Award of 13 November 2000.
[86] Ibid para 21.

beyond the national treatment standard in their BITs. The notion of the national treatment standard would enable a foreign investor to enjoy the same rights as those granted by the nationals of a host state, but it would not provide adequate protection to the foreign investor if the nationals of the host state and the foreign investors were treated equally badly.[87] Accordingly, the right of host states to regulate foreign investment in the exercise of their sovereign rights had to be limited or balanced with the principles of international human rights law.[88] Ironically, the reasoning of this argument was originally adopted for foreign investors but is very similar to the argument this thesis is developing in order to limit unbalanced protection of foreign investors in the current international investment regime. In this sense, the strongest counter-measure taken by foreign investors against the exercise of host states' power to expropriate can equally be used by the host state. Thus, it is argued that the *Urbaser* award is the first ever to provide a detailed discussion of a host state's human rights counterclaim against the claim of illegal expropriation made by the foreign investor.[89]

To justify its expropriation measure, a host state may base the human rights argument on the following three defences: obligation to comply with international human rights norms, obligation to abide by peremptory norms (*jus cogens* - Latin for 'compelling law'), and obligation to ensure that all activities including business activities of MNCs in its jurisdiction are lawful. On the one hand, these three are closely interrelated. The first argument may be reinforced by the second defence. Since some international human right norms are categorised as *jus cogens*, the obligation of a host state to comply with international human rights norms with the nature of *jus cogens* is much higher than to comply with other international human rights norms. On the other hand, there is a sophisticated difference between the first two arguments and the last. The first and second ones impose direct obligations on a host state, while the third puts indirect obligations on a host state, meaning that the third involves the responsibility of a host state resulting from activities of individuals, including foreign investors in the territory of the host state. For instance, once a foreign investor violates human rights, the

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[87] See Subedi op cit note 26 9.

[88] Ibid 11.

[89] Edward Guntrip 'Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?' (2017) *EJIL:Talk!,* available at https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/, accessed on 3 July 2020.

instant reaction may be against the regulatory failure of a host state within which the breach of human rights obligations has taken place. In this case, the host state itself would be responsible for the violation of the foreign investor in its jurisdiction if it fails to protect international human rights against such acts of the foreign investor. This characterises the responsibility as indirect, as the host state is not the immediate agent of harm caused by the acts of the foreign investor.[90] This is well demonstrated in the *Advisory Opinion in Legality of the Threat or Use of Nuclear Weapons.* The ICJ expressed the view that 'the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.'[91]

First, in a situation of becoming a potential violator of international obligations, a host state may no longer be in a discretionary position to make a decision on whether it will take appropriate measures, including expropriation. Instead, the host state should take appropriate measures to meet its obligations under international human rights law. This view is reflected in the compelling argument put forward by an *amicus curiae*[92] brief in *Methanex*. According to the *amicus curiae*, international agreements both constrain and compel the use of the right of the host state to regulate,[93] and the host state is obligated under international law to protect human rights. Furthermore, the *amicus curiae* stressed that the Tribunal had to give substantial deference to measures implemented to achieve these goals. Expropriation may play out in achieving international human rights or the right to development, including sustainable development. In particular, once one accepts the right to sustainable development as a human right, host states are required to take measures such as expropriation to protect and fulfil the right to development, even by limiting the exercise of property rights of foreign investors, individuals or MNCs.[94] The right to development entails a legal obligation imposed upon a

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[90] Viljam Engstrom 'Who is responsible for Corporate Human Rights Violation?' (2002) *Abo Akademi University Institute for Human Rights* at 18.
[91] *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion of 8 July 1996 para 29.
[92] The meaning and significance of *amicus curiae* will be examined in chapter 6.
[93] Amicus Curiae Submissions by International Institute for Sustainable Development (2004) para 10.
[94] According to Alan Boyle, 'one possible explanation for the reluctance of UN human rights institutions to engage more directly with human rights and the environment is their long-standing project on corporate responsibility for human rights abused. while the primary responsibility for promoting and protecting human rights lies with the state, it has long been recognised that businesses and transnational corporations have

host state whereby the responsibilities of a host state corresponding to the right to development are not only domestic in nature or in accordance with its constitution but have an international element.[95] As such, the right to development can be implemented in the form of expropriation in many developing states, because most developing states are willing to resort to expropriation to protect the environment in the narrow meaning of sustainable development it had in the past and to ensure inclusive growth in its broad sense today.

The second case that a host state can make to justify expropriation falls to the *jus cogens* argument. The source of international law as a higher-order norm of customary law is referred to either as a peremptory norm or as *jus cogens*.[96] A host state can or should invoke the potential violation of peremptory norms of international law imposed on the state to justify its breach of obligations contained in IIAs,[97] since *jus cogens* has a character of universality that cannot be ignored or contracted out of by any international subject through a treaty; a treaty that is against *jus cogens* is accordingly void.[98] In this respect, it would be problematic that a host state is forced to compensate an investor involved in a breach of peremptory obligations for losses resulting from said violations. This has been a bone of contention in various international investment arbitrations in relation to expropriation. In *Methanex*, the Tribunal held that 'as a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or *jus cogens* and not give effect to parties' choice of law that are inconsistent with such principles.'[99] The *Bernhard von Pezold v Zimbabwe* Tribunal found that Zimbabwe had violated its international legal obligations 'by engaging in racial discrimination through the implementation of the FTLRP.'[100] Interestingly, the Tribunal went further to address the obligation of the international community in an international investment dispute. The international community, including donor countries that had been financially

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contributed to or been complicit in the violation of human rights in various way.' Alan Boyle 'Human Rights and the Environment: where Next?' (2012) 23(3) *EJIL* 613-642 at 619.

[95] D Shelton 'A Response to Donnelly and Alston' (1985) 15(3) *California Western International Law Journal* 524–27 at 527.

[96] Marie Amann(ed) *Benchbook on International Law* (2014) I B-9.

[97] Peremptory is defined as imperative, final, decisive, absolute, conclusive, positive, not admitting of question, not requiring any cause to be shown. See *Black's Law Dictionary* 6ed (1990) 1136.

[98] Adam Mcbeth *International Economic Actors and Human Rights* (2010) 21.

[99] *Methanex* supra note 48 para 24.

[100] *Bernhard von Pezold* supra note 73 para 659.

assisting Zimbabwe, was not obliged to assist Zimbabwe by granting aid or preferential treatment to Zimbabwean exporters as long as the government of Zimbabwe had carried out 'a policy that discriminated against persons based on their race and seized their foreign currency to bolster the state's dwindling reserves.'[101]

The third source of claiming a host state' obligations under international law comes from its indirect obligations in relation to foreign investors' illicit investment. It is accepted in international law that a state has an obligation to protect human rights against abuses by non-state parties within its jurisdiction.[102] An increasing awareness of the relationship between MNCs' business activities and international human rights is emerging internationally, as demonstrated by recent international instruments adopted by the UN and other relevant international organisations and by recent jurisprudence of international investment arbitration. In 2011, the UN Human Rights Council adopted the Guiding Principles on Business and Human Rights, consisting of three so-called pillars, namely states' duty to protect people against human rights violations committed by companies, corporate responsibility to respect human rights, and states' responsibility to guarantee effective remedy for the victims of human rights violations. The UN Guiding Principles on Business and Human Rights expressly acknowledge that 'bilateral investment treaties affect the domestic policy space of governments and recommend that states encourage multilateral institutions, 'within their respective mandates and capacities, to promote business respect for human rights and to help states meet their duty to protect against human rights abuse by business enterprises.'[103] For example, the general comment of the UN CESCR concerning the right to health obliges states to prevent third parties, mostly foreign investors, from violating the right in other states.[104]

This soft rule on requiring a host state to ensure that foreign investors comply with international human rights is indeed implemented in international arbitration. As pointed out by the African

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[101] Ibid para 665.
[102] John Ruggie 'Business and Human Rights, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises section 1' (2007) *UN Doc A/HRC/4/35*.
[103] Principle 10 of the UN Guiding Principles on Business and Human Rights.
[104] UN Committee on Economic, Social and Cultural Rights, General Comment 12: The Right to the Highest Attainable Standard of Heath (Article 12 of ICESCR), *UN Doc E/C 12/2000/4(2000) [39]*.

Commission on Human and Peoples' Rights in the *SERAC* case, a host state has an obligation to protect its citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging activities that may be perpetrated by private entities, including MNCs. This obligation requires ‘positive action on host states in fulfilling their obligation under human rights instruments.’ [105] According to the decision of the Inter-American Court on Human Rights in the *Sarayaku* case, states are obliged to guarantee the creation of the conditions required to prevent violation of the right to life and the general obligation under Article 1 of the Inter-American Convention on Human Rights ‘applies not only with respect to the power of the state, but also with respect to actions by third parties.’[106]

On balance, once violations of human rights committed by MNCs are confirmed, the host state has the obligation to interfere with the foreign investment of MNCs to protect the international human rights of the nationals of the host state. The measures of the host state may indeed include expropriation.

5.3.4 Preliminary Conclusion

The CESCR divides states’ obligations pertaining to the protection of international human rights into three categories: first, ‘the obligation to respect’, which requires states to refrain from interfering with the enjoyment of rights; secondly, the obligation to protect, compelling states to protect the enjoyment of these rights from violations by third parties; and thirdly, ‘the obligation to fulfil’, which requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of rights.[107] These human rights obligations imposed upon a host state should always be taken into account when international tribunals interpret international investment obligations. In this vein, a host state must demonstrate whether every attempt has been made on its part to comply with minimum core obligations, for instance, obligations of providing essential primary healthcare in case of

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[105] *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, ACHPR Communication No 155/96 Decision of 27 May 2002 para 57.

[106] *Matter of Pueblo Indigena Sarayaku* (Provisional Measures) Order of 6 July 2004 para 10.

[107] The Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights ‘Human rights, trade and investment Report of the High Commissioner for Human Right’ (2003) *UN Doc E/CN 4/Sub 2*/2003/9 at 18.

the right to health, in order to be able to attribute its failure to meet such obligations[108] to foreign investors.

The investment arbitration system provides arbitrators with various interconnected ways whereby a host state' prerogatives to protect human rights can be accommodated: by interpreting the provisions and principles of IIAs such as the fair and equitable treatment standard, by taking account of parallel international obligations, and by mitigating the amount of compensation awarded.[109] More importantly, given that international investment law is mainly based on treaty law, its interpretation must be taken into account and be consistent with the hierarchy of norms in international law, reflecting, for instance, the status of some international human rights as peremptory norms (*jus cogens*).[110] Many international law experts have been supportive of the superiority of the peremptory norms. For instance, Surya P Subedi notes that 'international public policy may include strong candidates for *jus cogens* such as the principles of economic sovereignty of states, the principle of permanent sovereignty of states over their natural resources, the right of self-determination and the principle of sustainable development.'[111] Also, the ILA Committee on International Commercial Arbitration defined international public policy as being principles of 'universal application and as comprising fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as civilised nations.'[112] In doing so, in the event of a conflict between human rights obligation entailing *jus cogens* of a host state and a commitment of a host state under international investment law, the former prevails and the latter must be interpreted to be consistent with the former.

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[108] Martin Scheinin 'Core Rights and Obligations' in Dinah Shelton (eds) *The Oxford Handbook of International Human Rights Law (2013)* 527.

[109] Jasper Krommendijk & John Morijn 'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni (eds) *Human Rights in International Investment Law and Arbitration* (2009) at 423.

[110] See Mutua Makau & Howse Robert 'Protecting Human Rights in a Global Economy: Challenges for the World Trade Organisation' (2001) in Hugo Stokke & Anne Tostensen (eds) *Human Rights in Development Yearbook 1999/2000: The Millennium Edition 51-82.*

[111] Subedi op cit note 26 184.

[112] International Law Association (ILA) 'Report of London Conference (2000)' at 6-7.

Attracting foreign investment in a host state is not an end in itself, but a policy tool to achieve the human right to sustainable development. Considering the eventual and intrinsic role of foreign investment in contributing to realising sustainable development, conceived of as part of human rights, foreign investment activities preoccupied with economic development at the expense of human rights may be considered to be deviated from or even to undermine their purpose.

One may therefore conclude that a host state may be free from its obligation to pay compensation in spite of the exercise of expropriation in the international investment arbitration on various grounds in the context of sustainable development. First, as an international human rights norm, sustainable development or the right to development can justify that expropriation measures aimed at ensuring the right to development for subjects such as vulnerable or marginalised people should be non-compensable. Secondly, if recognised as a matter of *jus cogens*, the obligation of a host state to ensure sustainable development can prevail over the obligations imposed on a host state in favour of foreign investors in IIAs. Thirdly, a host state may take expropriation measures in order to preclude foreign investors from doing business against sustainable development.

5.4 Obligations of MNCs to International Human Rights in International Investment Arbitration

The three justifications mentioned above can play an important role in protecting human rights in the process of expropriation by allowing host states to make an argument 'on the defensive' against claims that they have failed to protect the rights of foreign investors. In such a situation, however, since the right of MNCs in accordance with IIAs should also be protected, international investment tribunals would be more inclined to make decisions in favour of MNCs. In the absence of strong arguments on obligations of MNCs to international human rights, it would be difficult for host states 'on the offensive' to actively prevent MNCs from misusing their investment projects that may impair human rights.

It has been criticised that any appeal to international human rights tribunals by victims will at all times concentrate on the state's failure to preclude human rights violations committed by MNCs but not against MNCs themselves.[113] In other words, since host states are obliged to ensure that non-state entities abide by regulations to protect human rights,[114] foreign investors' obligations would logically be characterised as indirect, and those of a host state as direct. But only recognising indirect obligations of foreign investors does not suffice to explain that human rights are more likely to be breached by non-state entities than by states in a globalisation age. Thus, as explored in the previous chapter, many IIAs have increasingly tried to insert provisions that impose obligations upon MNCs. Given that this factor would be a very important argument in protecting international human rights in the process of expropriation, this section will examine the significance of recognising direct obligations of MNCs to international human rights in relation to expropriation.

Before examining how the issue of foreign investors' obligations in international investment arbitration have been addressed in the process of expropriation, it is necessary briefly to recap the issues of the subjectivity of MNCs examined in section 3.4 of chapter 3. The subjectivity issue of MNCs with a long history in the discussion among international lawyers, albeit beneath the surface, has recently come to the surface thanks to an increased sense of urgency to protect individuals' international human rights, in particular economic and social rights, from MNCs' abuse of those human rights, and to control MNCs' increasingly superior roles as a subject in international law, in particular international investment law.

This study will look into examples that reflect this recent trend. The UN General Assembly adopted the Charter of Economic Rights and Duties of States, which allows host states to control activities of MNCs. According to Article 2 of this charter, 'the state has the right to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its law, rules and regulations and with its economic and social policies.' It is rather noteworthy that the Open-ended Intergovernmental Working Group mandated by the UN Human Rights Council has been

[113] Taillant & Bonnitcha op cit note 9 at 57.
[114] Asbjorn Eide 'Realization of Social and Economic Rights and the Minimum Thresholds Approach '(1989) *10 Human Rights Law Journal* 35-51 at 37.

working on proposing a legally binding instrument[115] at the global level to address the activities of MNCs in international human rights law. The revised draft of this instrument (informally called a Treaty on Business and Human Rights[116]) prepared by this working group explicitly mentions the Declaration on the Right to Development[117] and the necessity of all business enterprises to 'have responsibility to respect all human rights'[118] as well as underlines the purpose of the instrument to 'strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities.'[119]

Furthermore, when it comes to controlling MNCs' superior roles in international investment law, one can see a modest type and an extreme type. While some IIAs recognise foreign investors' human rights obligations through provisions in which MNCs voluntarily comply with CSR standards in the context of human rights,[120] other IIAs have provisions containing obligations for host states to direct foreign investors' operation in their jurisdictions.

The increased role of MNCs in promoting sustainable development in the host state in the context of international human rights has lent considerable impetus to a CSR movement.[121] The regulations on CSR issues are related to a series of soft norm initiatives that have been drafted on the international and national levels to induce businesses, including foreign investors, to take voluntary action above legal requirements for societal good. Unlike typical international investment law rules, which restrain the host state's intervention, including expropriation, in the business activities of foreign investors, the CSR initiative promotes the regulation of the private sector to protect social and economic interests such as sustainable development. Soft or

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[115] Open-ended Intergovernmental Working Group Chairmanship Revised Draft 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises,' available at https://www.ohchr.ogr/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf., accessed on 2 February 2021.
[116] Carlos Lopez 'The Revised Draft of a Treaty on Business and Human Rights: Ground-breaking improvements and brighter prospects' *Investment Treaty News* 2 October 2019.
[117] Preamble of the revised draft.
[118] Ibid.
[119] Article 2 of the revised draft.
[120] Eric De Brabandere '(Re)Calibration, Standard-Setting and the Shaping of Investment Law and Arbitration' (2018*),* 59 *Boston College Law Review* 2607-34 at 2627.
[121] Ying Zhu 'Corporate Social Responsibility and International Investment Law: Tension and Reconciliation' (2017) *NJCL 2017/1* 91-119 at 93.

modest CSR initiatives have in recent years been incorporated into investment treaties to reconcile potential tension with host states' international investment obligations as a result of their adverse impact on foreign investments caused by hard rules enforcing social and environmental responsibilities of MNCs.

There are, however, more examples of IIAs with provisions that make clear and direct references to obligations of foreign investors, such as the COMESA Investment Agreement of 2007 (COMESA Agreement). The COMESA Agreement states under the title of Investor Obligation that 'COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made.'[122] According to this provision, a foreign investor may be under a legal obligation to follow an expropriation measure taken by a host state, even if the expropriation measure allows no compensation under certain circumstances as demonstrated above in the instance of South Africa's Expropriation Bill 2019.

Attempts to apply such a foreign investor obligation defence have also been made in international investment arbitration. The *Amici* in *Biwater Gauff*, for instance, suggested that 'human rights and sustainable development issues are factors that condition the nature and extent of the investor's responsibilities, and the balance of rights and obligations between the investor and the host state.'[123] In *Urbaser*, the Tribunal declined the principle that MNCs do not qualify as subjects of international law and cannot be duty bearers 'as if they would be participants in the State-to-State relations governed by international law.'[124] As a result, host states can initiate a case before a tribunal against foreign investors based on a breach of obligations by foreign investors or can make counterclaims. Furthermore, as a matter of conflicting obligations in international arbitration, the *Urbaser* Tribunal decided that Argentina had two competing obligations, namely 'obligations regarding the population's right to water,' and 'obligations toward international investors.'[125] According to the Tribunal, a host state

[122] Article 13 of Investment Agreement for the COMESA Common Investment Area.
[123] *Biwater* supra note 70 para 380.
[124] *Urbaser S A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* ICSID Case No ARB/07/26 Award of 8 December 2016 para1194. Thus, the Tribunal pointed out that this principle had 'lost its impact and relevance.'
[125] Ibid para 694.

‘could and should fulfil both kinds of obligations simultaneously.’[126] In so doing, the obligations imposed upon the host state resulting from the human right to water, did ‘not operate as an obstacle to the fulfilment of its obligations’ to the foreign investor.[127] In essence, the Tribunal acknowledged the existence of the conflict between the obligation of host states to ensure foreign investors’ rights under contracts and the obligation of host states to ensure the right of the marginalised or vulnerable population to water.[128] Despite its contribution to the development of the relationship between international human rights law and international investment law, in my view, the Tribunal missed an opportunity to deal with this issue when it mentioned that ‘there is no need to open at this juncture the debate on whether foreign investors have, under international law, an obligation to contribute on their part to the provision of drinking water to the extent this is required by the human right to water.’[129]

It can accordingly no longer be admitted that MNCs ‘operating internationally are immune from becoming subjects of international law’ and cannot be held liable for their violation of international legal obligations.[130] It is more relevant that MNCs have acquired the status of legal personality, both active and passive, which finds expression in the fact that they may, on the one hand, invoke the responsibility of other subjects, for instance, host states in respect of international law in certain specific circumstances, essentially in the realms of human rights and international investment, and on the other, be held accountable for their own internationally wrongful acts.

5.5 Conclusion

The issues concerning cases in relation to expropriation have illuminated various and complicated aspects of the interplay between three clusters of international law.

Human rights arguments are increasingly being considered in international investment

[126] Ibid.
[127] Ibid.
[128] Ibid para 720.
[129] Ibid para 721.
[130] Ibid para 1195.

arbitration. Foreign investors may make claims based on their human right to property, while host states may invoke their obligations to ensure full protection of human rights as a defence against foreign investors' claims. In this respect, the international community is becoming increasingly aware that international investment law and international human rights law are no longer separate areas of international law. Given the recent development of jurisprudence of international investment arbitration, the contents of recent IIAs, and the discussion of the international law community on reform of the current IIA regime, one must examine whether arguments of foreign investors should be construed in conformity with the international human rights obligations of the host state concerned and foreign investors themselves. A host state's human rights defence contributes to providing the necessary link to unify international investment law and international human rights law in international arbitrations concerning expropriation.[131]

Moreover, the peremptory norms or *jus cogens* in international law should be considered in the proceedings in international investment arbitration. As shown above, if this argument is made by either foreign investors or host states, international arbitrators may or should apply the peremptory norms, as the status of the peremptory norms prevails in relation to other international norms. Further, the subjectivity of MNCs has been strengthened through the international investment law regime rather than through the international human rights regime. As the role of MNCs in international investment law is growing, the legal status of MNCs under international law has been upgraded to the level of subjectivity. As the UN Special Representative noted, MNCs are increasingly recognised as participants at the international level, with the capacity to bear rights and obligations under international law.[132] The legal status of MNCs as obligation-bearers under international law has been more obvious and it is no longer the case that MNCs are immune from becoming subject to international law, as demonstrated in the recent award in the *Urbaser* case.[133] This is more strongly articulated in specific areas of international law, as shown in the UN CESCR's explicit recognition of the

[131] Guntrip op cit note 89 at 39.
[132] J Ruggie 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2006) at 60.
[133] Yulia Levashova 'The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law' (2018) 14(2) *Utrecht law review* 40-55 at 41.

‘responsibility’ of ‘the private business sector’ in ‘realising the right to adequate food.’[134]

In light of the above, a potential means of introducing the human rights defence of a host state would include an express provision in IIAs permitting the host state to rely on international human rights law to justify its expropriation measure that may be in breach of the IIA.[135] This would allow international investment arbitral tribunals to review the extent to which human rights considerations may influence the evaluation of the international legality of the host state’s interference with foreign investors’ property.

[134] UN Committee on Economic, Social and Cultural Rights, General Comment 12: The Right to the Right to Adequate Food (Article 11 of ICESCR), UN Doc E/C 12/1999/5(1999) [20].
[135] See Guntrip op cit note 89 at 39.

CHAPTER 6 BALANCING INTERNATIONAL INVESTMENT LAW, INTERNATIONAL DEVELOPMENT LAW AND INTERNATIONAL HUMAN RIGHTS LAW

6.1 Conclusions

This study has demonstrated that sustainable development may serve as a bridge between international development law and international human rights law through the medium of the notion of the human right to sustainable development, as well as play a constructive role as a portal through which human rights concerns may engage international investment law. It began by arguing that international investment law has developed as *sui generis* for the purpose of foreign investor protection, which was supposed to contribute to the development of the host state. International investment arbitration, which was used to resolve purely private commercial disputes between two private parties, has recently been understood to be inappropriate when it comes to resolving disputes related to international public law. It is argued that the existing international investment law regime has biased the playing field against some of the best paths to fostering foreign investments' contributions to development and to ensuring international human rights. While IIAs can boost development in host states, they could affect the realisation of international human rights adversely, for instance by limiting the legal tools available to the host state to regulate the conduct of foreign investors, decoupling rights of foreign investors from their human rights obligations in relation to sustainable development, and ignoring adversely affected groups' right to participate in the process of development.

Thus, traditional IIAs were predominantly protective in nature. However, over time, the emergence of sustainable development has largely changed and expanded the notion of development and application areas in which it should play out, mainly because of the comprehensive and inclusive nature of sustainable development. Hence, one can see the tendency that the underlying purpose of IIAs has evolved from economic prosperity to sustainable development, while investment protection has always been the central focus of

IIAs.[1] Because of sustainable development, once deemed to be irrelevant, the relationship between international development law, international investment law and international human rights law is now moving towards being reconciled and becoming a dominant discussion in international law.

There might still be controversies over the legal status of sustainable development and the critical role of sustainable development in reconciling the three clusters of international law. However, from its examination of states' practice, various IIAs and jurisprudence of international tribunals, this thesis concludes that there is currently growing consensus in the international community that international law, international development law, international investment law and international human rights law are closely inter-connected and play a critical role in addressing and solving substantial and complicated issues taking place in the reality of international law. This was illustrated particularly in relation to the process of expropriation, which is closely related to international human rights issues and key to the international investment regime.

Given that international investment has a universal impact and that more investment is necessary for public policy and human rights, it is desirable to incorporate new foreign investor rights and obligations into a new investment regime that pursues other core legitimate international policy goals, such as promoting human rights and sustainable development.[2]

Recent state practice, as demonstrated in IIAs and other international instruments, tends to reflect a more balanced approach to the protection of foreign investment than was previously the case, by including preambles, exceptions and carve-outs that re-emphasise the significance of non-economic concerns, such as international human rights and sustainable development, in international investment law and arbitration.[3] Furthermore, recent IIAs reflect a degree of homogeneity in regard to the inclusion of essential elements of striking a balance between

[1] Federico Ortino 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing' (2015) *King's College London Law School Research Paper* No 2105-30 TLI Think! Paper 14/2016 at 6.
[2] Ibid at 71.
[3] Valentina Vadi *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (2018) 9.

foreign investment protection, the right of host states to regulate foreign investment and the rights of the marginalised people in host states. While recent IIAs differ in detail, their scope and content have become standardised. They now tend to include provisions that reconcile international development law and international human rights law, including provisions affirming commitment to sustainable development, obligations of host states to comply with international human rights norms and obligations on foreign investors to act in ways conducive to achieving sustainable development of the host state and not to act against international human rights.

It cannot be denied that the notion of sustainable development has played a pivotal role in creating a systemic, integrated international approach that reconciles policies and norms of different areas in international law. Sustainable development is a backbone of resolving complex issues involving the three clusters of international law. It is to be hoped that the identity and legitimacy of the international investment regime will be forged in large part by taking sustainable development into consideration. Future case law and state practice should follow the established framework more accurately and articulate the importance of sustainable development.

Through the existing and continuing efforts of the international community to harmonise the three clusters of international law, the international investment law regime can be legitimised better, which requires the international community to take full consideration of the international human rights regime containing sustainable development. Considering the challenges the international investment regime may face as a result of a potentially increasing level of the crisis of isolation from international law relative to an increase in global FDI, and given the overwhelming status that sustainable development has come to enjoy among the goals of the current international community, it appears imperative for the international investment regime to go beyond its overarching goal of protecting foreign investment only[4] and move towards achieving sustainable development.

[4] Andrea Saldarriaga & Kendra Magraw 'UNCTAD's effort to foster the relationship between international investment law and sustainable development' in in Stephan W Schill, Christian J Tams & Rainer Hofmann(eds) *International Investment Law and Development Bridging the Gap* (2015) at 129.

6.2 Way Forward

There appear to be three possible ways to align the notion of sustainable development in international investment law: through the reform of existing IIAs (as is discussed in the context of the UN Commission on International Trade Law); through the active role of international tribunals; and through the increased participation of marginalised people.

The first way aims to provide a framework for governing the international investment law regime, and is somewhat radical because it explicitly replaces traditional IIAs in favour of foreign investors with new IIAs focused on ensuring international human rights and sustainable development. The second way is to change the existing international investment regime gradually by jurisprudence, in particular dedicated to providing international investment arbitration with practical tools to solve the conflicting interests of foreign investors, host states and marginalised people. The third is a modest way aimed at allowing the participation of vulnerable or marginalised people in proceedings to reflect the importance of sustainable development in international investment arbitration and the defragmented regime.

As shown earlier, the trend in the 1980s and 1990s, supported by jurisprudence of international investment arbitration and IIAs, was to accord maximum protection to foreign investors even if this was at the cost of other societal values, including environmental protection and international human rights.[5] However, when the new millennium dawned with the introduction of the MDGs and recently the SDGs, there was increased awareness of the need for a balanced international investment regime that reflects sustainable development.

Taken together, the following subsections aim to roll out a practical governance mechanism to serve human rights protection without jeopardising foreign investors' rights in the context of sustainable development. Some of the suggestions are *de lege ferenda* (what the law ought to be) rather than *lex lata* (what the law is). However, they can contribute to consolidating a balanced structure in handling the systemic relationships between inseparable and equally

[5] Surya P Subedi *International Investment Law* 2ed (2012) 46.

legitimate interests in the three clusters of international law.

6.2.1 Reform of the Current International Investment Regime

At present, there is scepticism about any clear political will among states to reform the current international investment regime radically. The possibility of a new generation of IIAs reconciling international human rights and sustainable development, and balancing the rights and obligations of corporations, is uncertain. This has been reflected in the move of some states, such as South Africa, towards domesticating the governance of foreign investments. However, the international community, including developed states and MNCs, have shown great interest in pursuing changes in the current international investment regime.

As examined in chapter 4, IIAs have progressed towards incorporating international human rights norms in the international investment regime. It is argued that reform of the current investment regime has been advocated by a range of stakeholders, owing to the restrictions placed by the current investment regime on the right and duty of host states to act in the public interest.[6]

There have been many initiatives to this effect. In particular, according to the assessment of UNCTAD, most of today's new IIAs have been moving towards accepting sustainable development-oriented reform.[7] In the same context, UNCTAD's 2014 World Investment Report laid out the path of the reform by pointing out that 'systemic reform means making international commitment on fostering Sustainable Development in line with the investment and development paradigm shift entailing a new IIA model that effectively increases the development dimensions, rebalances rights and obligations, manages the systemic complexity of the IIA regime and focuses on proactive foreign investment for sustainable development.'[8]

Many proponents of the reform believe that the current IIA regime has shortcomings beyond

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[6] Roundtable Outcome Document 'Impact of the International Investment Regime on Access to Justice' (2018) *Columbia Centre on Sustainable Development* at 6.

[7] UNCTAD *IIA Issues Note* (2018) 1.

[8] UNCTAD *World Investment Report: Investing in the SDGs - an action plan* (2014) 130.

repair, and argue for the complete reform of the regime and its replacement with a regime specifically focused on the achievement of sustainable development and the obligations of foreign investors.[9] For instance, in a statement by a group of scholars versed in international investment norms and practice, it was recommended that states should review their existing IIAs and that 'the international business community should refrain from promoting the international investment regime and from resorting to' international investment arbitration.[10]

Considering such a move of the international community towards IIA reform and based on the paradigm shifts traced in chapter 4, namely the relationship between foreign investment and sustainable development, recognition of other international law regimes in the international investment regime, and reconsideration of foreign investors' obligations to international human rights, this thesis suggests three points in order to facilitate the reform of the current international investment law regime.

First, future IIAs could be required to articulate the relationship between foreign investments and sustainable development in their texts. In spite of the original focus of IIAs on purely economic development, the ongoing various initiatives in the international law community reflect that foreign investments and sustainable development have increasingly been recognised as closely inter-connected issues and more recent initiatives have articulated the relationship between investment-related means and ends, such as the promotion of sustainable development and the transition into inclusive economy paths.[11]

For this purpose, the gap between international investment and development notwithstanding, continued efforts are made to make international investment law more receptive to sustainable development in ensuring economic and social rights and achieving development. Given the tendency to demand that foreign investment should support the pursuit of sustainable development, the new generation of IIAs are assessed on whether they have a sustainable

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[9] See Howard Mann, Konrad von Moltke & Luke Eric Peterson et al *IISD Model International Agreement on Investment for Sustainable Development Negotiators' Handbook* 2ed (2006) x.
[10] See Erlend M Leonhardsen 'Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration' (2011) 3(1) *Journal of International Dispute Settlement.*
[11] PAGE (Partnership for Action on Green Economy) *International Investment Agreements& Sustainable Development* (2018) 1.

development orientation and recent IIAs include provisions explicitly referring to sustainable development. Foreign investments can put in place elements that promote their positive impact on sustainable development, by articulating the importance of sustainable development in future IIAs and by clearly enabling host states to harness measures that deliver such outcomes. To this end, the international community requires IIAs to have more meaningful provisions, which can contribute to establishing 'the sustainable development paradigm.' [12] Simultaneously, international arbitrators and individual states are required to rethink the 'interpretive role of the preamble' or provisions with objectives in IIAs into 'a more balanced' and holistic approach, giving 'greater recognition to state rights and responsibilities, even in the presence of investor rights.'[13] For instance, future IIAs can provide specific provisions that identify sustainable development or they expressly endorse 'sustainable development as the broader goal of the investment agreements, rather than the protection of investor rights.'[14]

Secondly, in order to meet the demand for recognition of other international law regimes, in particular the international human rights law regime, in the international investment regime, the current IIA system should be reformed. As previously examined, one of the most urgent challenges in the international legal domain is how the relatively autonomous sub-fields and norms of international law may interact to coexist in the event of conflict. The main challenge is to reconcile investment and non-investment values, or economic and human rights objectives, on the international plane. It is argued that although it is flourishing, the international investment regime is facing a legitimacy crisis because it remains a self-contained regime, which excessively privileges the interests of foreign investors while structurally and intentionally ignoring those of more weakly organised and less powerful groups and vulnerable individuals.[15] The UN special procedures mandate holders and human rights experts have repeatedly underscored the threat that current IIAs pose to the regulatory space required by host states to abide by their international human rights obligations as well as to achieve the SDGs.[16] In this context, greater attention should be paid to ensuring consistency and coherence

[12] Mann H 'Reconceptualizing international investment law: its role in sustainable development' (2013) 17(2) *Lewis & Clark Law Rev* 521-544 at 536.
[13] Ibid at 537.
[14] Ibid.
[15] Vadi op cit note 3 2.
[16] UN Experts' letter to the UNCITRAL Working Group III (2019), available at

of IIAs and their compliance with international human rights law and sustainable development norms by making express reference to international human rights law and sustainable development in their preamble, as well as specific provisions. For instance, an IIA may provide that the tribunal can or should apply and refer to international human rights law as an integral part of international law and as a source of law in applicable international investment arbitral cases.

Thirdly, reconsideration of investors' obligations to international human rights can be realised by articulating such obligations in future IIAs. The simplest way for the international community to respond to concerns expressed by international civil society about the negative impact that MNCs' activities may have on local populations with respect to human rights and related issues would be to incorporate articulated provisions imposing human rights obligations upon corporations in IIAs. This should include both the home states of foreign investors and the host states. As examined in chapter 4, some states or international organisations have recently tried to impose positive obligations on foreign investors to respect human rights. However, such efforts are still insufficient to ensure that MNCs fulfil their obligations at the international level. For instance, the Morocco-Nigeria BIT states that investors shall uphold human rights and requires foreign investors' home states to allow the investors to be sued for actions causing personal injury or loss of life in the host state. Nevertheless, it is not clear that the obligations of foreign investors originate in the domestic human rights regime or contain international human rights obligations as well and whether violations by foreign investors may be claimed in international investment arbitration, or only in domestic tribunals of home states. Another frequently offered example is the International Institute for Sustainable Development (IIDS) Model International Agreement on Investment for Sustainable Development. Article 14 of this model states that 'Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties.' Although the IISD model is formulated to 'promote foreign investment in pursuit of sustainable development, in particular in

https://www.ohchr.org/Documents/Issues/.../OL_ARM_07.03.19_1.2019.p...Cached, accessed on 15 August 2019.

developing and least-developed countries,'[17] and refers to international human rights obligations, this provision still fails to ensure foreign investors' obligations, because the obligations rely on only written international agreements to which the host state and the home state are parties, rather than on international customary law or the general principle of law. Moreover, the obligations seem to be imposed in a negative way.

In this respect, future IIAs should articulate that MNCs' obligations are based on international law (treaties, customary law and the general principle of law); in particular, international human rights law and MNCs may be brought before international investment arbitral tribunals in case they violate international human rights obligations in their investments. The inclusion of international human rights obligations in IIAs may be opposed by arguing that the aim of IIAs is to protect foreign investment rather than to create international human rights obligations for foreign investors.[18] However, one of the aims of IIAs is initially to protect the human rights of foreign investors, property rights and, in modern terms, to make a contribution to attaining the purpose of sustainable development of host states, which recent IIAs have explicitly stipulated.

Without considering sustainable development, international investment tribunals are easily isolated from the international human rights regime and accordingly lack legitimacy in their awards. Thus, it is often argued that a future international investment regime should not only remove obstacles to achieving more sustainable development from the current IIAs, but must also proactively make a pivotal contribution to achieving sustainable development. Thus, one scholar stressed that 'this goal can only be achieved if the incipient investment regime respects and incorporates the internationally agreed upon principles of sustainable development.'[19]

6.2.2 Active Role of International Investment Tribunals

International investment arbitration can be more actively engaged with harmonising the international investment law regime, the international development law regime and

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[17] Article 1 of the Model International Agreement on Investment for Sustainable Development.
[18] Edward Guntrip 'A Host State Human Rights Counterclaim in Investment Arbitration' (2018) *Session at the UN Forum on Business and Human Rights* at 2.
[19] Konrad von Moltke *An International Investment Regime? Issues of Sustainability* (2000) 53.

international human rights law regime, by way of creative adjudication.

Even in the case that an IIA does not expressly state human rights obligations in its text, human right obligations can enter into international arbitrations' consideration as applicable law.[20] International investment tribunals are required to understand IIAs as instruments for attracting foreign investment for sustainable development and to situate investors' rights within a wider normative context to interpret IIAs in a systematically balanced and integrated way.[21] In particular, from the perspective of sustainable development, requiring the active engagement of international investment tribunals is related to efforts to balance the conflicting interest of international investment law and international human rights law. An investor-friendly IIA should be development-friendly and human rights-friendly as well. Enhancing human rights, including sustainable development and inclusive development, through foreign investment requires a balance of promotion and regulation from the perspective of policy, as well as a balance of protection of the property rights of investors and protection of public interest and the human rights of vulnerable or marginalised people.

In what follows, I consider the adjudication of two principles, the principle of proportionality and the principle of clean hands, which may contribute to reconciling the three clusters of international law in the course of international investment arbitration. Both of these may be pursued under the existing system without any radical consequences based on balanced interpretation and application of relevant IIA provisions.

(a) The Principle of Proportionality

In general, proportionality is understood to be a principle that guides the balancing of human rights and states' interference for the purpose of public interest and justifies interference of states with human rights by providing reasons that maintain a reasonable relation with the

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[20] Benjamin Miller, Jennifer Liu & Ramin Wright et al 'Guide for Potential Amici in International Investment Arbitration' (2014*) the International Human Rights Program (IHRP) at the University of Toronto* at 10.

[21] Markus W Gehring & Marie-Claire Segger 'Overcoming Obstacles with Opportunities: Trade and Investment Agreements for Sustainable Development' in Stephan W Schill (eds) *International Investment Law and Development - Bridging the Gap* (2015) at 93.

intensity of the interference. By extension, proportionality is also used as a tool to balance conflicting human rights against each other. Proportionality usually applies to any balancing of competing interests, values and principles.[22] Proportionality serves as a way to inform the exercise of interpreting an IIA with a view to resolving conflicts between competing rights and interests when an IIA does not have explicit provisions to indicate the priority of one right or interest over the other.[23]

Under international law, proportionality has frequently featured in discussions on armed conflict, where it plays a role in prohibiting attacks against military objectives expected to cause incidental loss of civilian life, which would be excessive in relation to the concrete and direct military advantage anticipated. However, over time, proportionality has expanded its scope to cover various areas of international law, including international human rights law and international investment law. In the *Gabcikovo-Nagymaros* case, the ICJ stated that 'the effect of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question,'[24] which is understood to apply proportionality in considering the legality of the use of force in the context of the right to self-defence. The protection of human rights, 'spearheaded by the European Court of Human Rights applying the European Convention on Human Rights, has ever since its establishment applied considerations of proportionality in assessing restrictions of fundamental rights.'[25] On the global level, the principle of proportionality is fully incorporated in international agreements, including the ICCPR.[26] In its General Comment No 29, the UNHRC expressly stated that 'a balancing test using the principle of proportionality is an important vehicle for constraining national authorities' discretion.'[27] In addition, the principle of proportionality is applied in human rights tribunals, domestically or internationally, not only in a situation where a legitimate public purpose or interest might

[22] Jan Sieckmann 'Proportionality as a Universal Human Rights Principe' in David Duarte & Jorge Silva Sampaio(eds*) Proportionality in Law-An Analytical Perspective* (2018) at 5.
[23] Benedict Kingsbury & Stephan W Schill 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – the Concept of Proportionality' (2010) in Stephan W Schill (eds) *International Investment Law and Comparative Public Law* (2010) at 78.
[24] *The Gabčikovo-Nagymaros Project (Hungary v Slovakia)* Judgment of 25 September 1997 para 85.
[25] Thomas Cottier, Roberto Echandi, & Rafael Leal-Arcas et al 'The Principle of Proportionality in International Law' (2012) NCCR Trade Working Papers at 3.
[26] Yutaka Arai-Takahashi 'Proportionality' in Dinah Shelton (eds) *The Oxford Handbook of International Human Rights Law* (2013) at 459.
[27] UNHRC 'General Comment No 29' para 4.

take precedence over individual human rights, but also in a situation where the human rights of one person might be equally considered alongside with those of another.[28]

In this respect, the usefulness of proportionality in international investment tribunals has gained ground by acceptance of the concept of proportionality developed in international human rights tribunals.

When it comes to proportionality in the area of international investment arbitration, one first thinks about what the tensions are that are being balanced. The essential idea underlying proportionality is that individual rights should only be limited to the extent that a state measure is necessary for the public interest, commensurate with its objective.[29] In the context of determining the existence of indirect expropriation, it has therefore been argued that there is no right to compensation for the legitimate exercise of sovereign powers of host states, subject to an analysis of reasonableness[30] based on proportionality. One author confirmed this tension by pointing out that in international expropriation law, the tension between protection of foreign investment and conflicting rights and interests crystallises.[31] 'It is in the context of this intrinsic tension generated at the core of the application of certain provisions of IIAs that the principle of proportionality acquires its relevance.'[32] A particular architecture of most IIAs was that they contained provisions for foreign investors' rights without addressing the relationship of the provisions for foreign investors to the powers of host states' regulation.[33] However, recent IIAs have tended to expressly contain provisions allowing for a balancing of interests, considering both the purpose of the host state measures, including expropriation, and their effect on the foreign investor.[34] For instance, the ASEAN Comprehensive Investment Agreement, the Colombia-United Kingdom BIT and the Colombia-India BIT refer to the

[28] Anne van Aaken 'Defragmentation of Public International Law Through Interpretation: A Methodological Proposal' (2009) 16(2) *Indiana Journal of Global Legal Studies* 483-512 at 503.
[29] Catharine Titi 'Refining the Expropriation Clause: What Role for Proportionality?' in Julien Chaisse (eds) *China-European Union Investment Relationships: Towards a New Leadership in Global Investment Governance?* (2018) at 112.
[30] Ortino op cit note 1 at 2.
[31] Kingsbury & W Schill op cit note 23 at 89.
[32] Cottier, Echandi & Leal-Arcas et al op cit note 25 at 23.
[33] Kingsbury & W Schill op cit note 23 at 88.
[34] Titi op cit note 29 at 120.

application of the principle of proportionality.[35]

Given that the principle of proportionality has been developed through international human rights tribunals as a notion that conflicting interests or rights should be addressed not in an 'all-or-nothing' fashion but in a 'more or less' way,[36] it might be useful to apply the principle of proportionality in the context of the international investment law regime, which requires host states to pursue the two goals of attracting more foreign investments and ensuring human rights at the same time. In the absence of the consideration of the international human rights regime (where proportionality mostly applies to assessing or determining the amount of compensation, not taking an all-or-nothing approach), international investment tribunals can apply proportionality as they decide on whether the expropriation measure of a host state was allowed and consequently non-compensable based on an all-or-nothing approach. As such, international investment tribunals could acknowledge that host states have the power to restrict the property rights of foreign investors without compensation in pursuance of a legitimate purpose, to the extent that the measure taken with this purpose is reasonable and balanced in relation to the regulation's effect on the foreign investment. This happened in the case of the award of the *Tecmed* Tribunal. According to the Tribunal, a host state has the power to limit property rights of foreign investors without compensation as long as the measure is reasonably balanced in relation to the effect of the host state's regulation on the foreign investment. However, by referring to international human rights tribunals, proportionality may serve as useful guidance for the evaluation of damages caused by expropriation to avoid a black-and-white solution.[37] For instance, in *Azurix*, the Tribunal, in exploring Azurix's expropriation claim, deemed useful an approach by the ECtHR,[38] which applied the proportionality of measures to the public interests being pursued.[39] Although the *Azurix* Tribunal did not make clear, by referring to the ECtHR, whether it still applied proportionality in an all-or-nothing way, it is significant that the Tribunal hinted that proportionality can be applied to determine the amount of

[35] UNCTAD 'Expropriation' *UNCTAD Series on Issues in International Investment Agreement* II (2012) at 97.
[36] Kingsbury & W Schill op cit note 23 at 79.
[37] Titi op cit note 29 at 130.
[38] According to Benedict Kingsbury and Stephan W Schill, 'proportionality analysis plays a crucial role in the jurisprudence of the ECtHR in its application of the European Convention on Human Rights and Fundamental Freedoms.' See Kingsbury & W Schill op cit note 23 at 84.
[39] UNCTAD *Selected Recent Developments in IIA Arbitration and Human Rights* (2009) 5.

compensation arising from expropriation.

It is further acknowledged that the principle of proportionality is quintessential for law and seems to be ubiquitous in contemporary human rights adjudication, serving as an underpinning structural feature of a rights-based practice of justification.[40] Thus, proportionality is a tool to address conflicts between a human right and a competing human right, at the heart of which lies a balancing exercise.[41] In the context of international investment law, in addition to balancing the rights of foreign investors and measures of host states, proportionality can also play a role in resolving conflicts of interest that international investment tribunals have not seriously addressed to date, such as conflicts between foreign investors and vulnerable or marginalised people in the host state. By considering conflicting human rights and interests at the stage of reviewing the legitimacy of an expropriation measure taken by the host state, proportionality may serve to reconcile conflicting international human rights in a reasonable way. Notwithstanding this, the principle of proportionality has been criticised to the extent that it deals with all human rights equally. In other words, a balancing method of proportionality may focus only on the technical weight of conflicting rights or interests based on strict objectivity and neutrality and risk side-lining core values of international law. It is obvious that if measures taken by foreign investors or host states are in violation of a norm of *jus cogens*, an international investment tribunal should consider Article 53 of the Vienna Convention[42] articulating *jus cogens* as applicable law and invalidate the measure. In such circumstances, application of the principle of proportionality should give way to the supremacy of *jus cogens* norms to other international human rights norms, including the property right of foreign investors, given that the right to property of foreign investors is not an absolute human right and may be subject to such limitations and restrictions as are imposed by law in the public interest and in the interest of social progress. Furthermore, a host state may or should defend

[40] Mattias Kumm & Alec Walen 'Human Dignity and Proportionality: Deontic Pluralism in Balancing' (2013) *New York University Public Law and Legal Theory Working Papers* 383 at 1.
[41] Kai Möller 'Proportionality: Challenging the critics' (2012) 10(3) *International Journal of Constitutional Law* 709-731 at 710.
[42] Article 53 provides that 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (jus cogens). For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

itself by taking recourse to its duty to respect, protect, and fulfil its international human rights obligations in the context of *jus cogens* obligations. One such case concerns issues of international human rights law in the field of race discrimination before international investment arbitration. The *Piero Foresti v. Republic of South Africa* case is certainly related to principal issues of conflict of a BIT against a national law, the South African Constitution, but also under international human rights norms, such as those contained in the Convention on the Elimination of All Forms of Racial Discrimination and other provisions on discrimination in international human rights law. In my view, this exceptional situation will allow international investment arbitration to take an all-or-nothing approach by invalidating the foreign investments made against *jus cogens*.

The contribution of proportionality to resolving the balance of competing rights and interests in international investment arbitration is also related to the legitimacy crisis of the international investment regime. The legitimacy crisis finds its roots in the fragmentation of international law and the isolation of the international investment regime from other international law regimes. However, international investment tribunals rely on proportionality balancing as a ground for addressing cross-regime normative conflict in international law, in response to the fragmentation of international law.[43] This is the case with the award of the Tribunal in the *Suez, Sociedad General de Aguas de Barcelona* case. The Tribunal did not mention the term of proportionality but *de facto* recognised it by referring to more flexible means that Argentina could have used to assure the functioning of the water and sewage services while respecting its obligations under the BIT, by stressing that the human rights and BIT obligations were by no means mutually exclusive.[44] Thus, as legal scholars have encouraged the application of the principle of proportionality as a balancing tool for harmonising fragmented international law,[45] the principle of proportionality will help the current international investment regime overcome

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[43] Some scholars argue that proportionality has recently been used by international investment tribunals, which should be seen in light of the legitimacy crisis of the international investment regime. See Susan D Franck 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decision' (2005) 73(4) *FordhamL* Rev 1521-1625 at 1557.

[44] *Suez, Sociedad General de Aguas de Barcelona, S A and Vivendi Universal, SA v Argentine Republic* ICSID Case No ARB/03/19 Decision on Liability (2010) para 260.

[45] Sué González Hauck 'A Critique of Proportionality Balancing as a Harmonisation Technique in International Law' (2015) *Völkerrechtsblog,* available at *https://voelkerrechtsblog.org/a-critique-of-proportionality-balancing-as-a-harmonisation-technique-in-international-law*, accessed on 13 August 2019.

its isolation from international law and a legitimacy crisis by becoming more balanced and helping the system pay due regard to international human rights.[46]

Finally, much attention has recently been paid to the role of proportionality in reconciling competing rights and interests in the process of expropriation before international investment tribunals, at the core of which is increased awareness of the right to development and sustainable development in the international investment regime. In the course of applying the principle of proportionality in international investment arbitration, the human right to sustainable development may influence the balance of conflicting rights and interests, since the concept of the human right to sustainable development originated in a balanced approach of reconciling various values and goals.[47] One example of this is the Treaty on the European Union, which articulates, in its article 3, that it is one of the goals of the EU to achieve 'the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.'[48] Thus, sustainable development requires the EU and its member states to make policy decisions in a balanced way, premised on a proportionality-based approach of reconciling economic arguments and on other values or objectives such as environmental, social and public health arguments.[49] Furthermore, as one author argues, sustainable development necessitates an interpretation of reasonableness-based or proportionality-based standards that 'leaves the balancing of the various interests or values at issue to the public decision-maker.'[50]

In essence, in the national law context and the international human rights context, proportionality is understood to help resolve conflict between the rights of individuals and the

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[46] Jasper Krommendijk & John Morijn 'Proportional by what measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration' In Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni (eds) *Human Rights in International Investment Law and Arbitration* (2009) at 451.
[47] See Tatyana P Soubbotina *Beyond Economic Growth: An Introduction to Sustainable Development* 2ed (2004) 9-10.
[48] Sander R W van Hees 'Sustainable Development in the EU: Redefining and Operationalizing the Concept' (2014) 10(2) *Utrecht law review* 60-76 at 63.
[49] Ibid at 71.
[50] Ortino op cit note 1 at 6.

interest of the state on the one hand and between conflicting rights of individuals on the other hand.[51] Likewise, in international investment arbitration, the principle of proportionality may play a critical role in resolving conflicts between the rights of foreign investors and the right of the host state to regulate and between competing rights of foreign investors and vulnerable or marginalised people, in particular in the process of expropriation. The principle of proportionality can accordingly be considered for a practical solution to align the international investment regime with the international human rights regime and the international development regime.

(b) The Principle of Clean Hands

In arbitral proceedings, international investment tribunals are requested to consider that the protection of foreign investors under IIAs should be guaranteed on condition that they respect international human rights obligations.[52] It is principally based on the principle of clean hands which means that whenever there is evidence that an applicant party in a legal proceeding has not acted in good faith, it has come to court with unclean hands. Thus, according to the principle of clean hands, a foreign investor that is accountable for any illegal conduct involving its foreign investments may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities in relation to expropriation on the part of a host state.[53]

The most notable application of the principle of clean hands in international law is found in opinions rendered by the PCIJ in the *Meuse Water* case.[54] In modern international investment arbitration, the *Gustav F W Hamester* Tribunal also recognised the principle of clean hands by

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[51] Kingsbury & W Schill op cit note 23 at 79.
[52] Patrick Dumberry & Gabrielle Dumas Aubin 'How to Incorporate Human Rights Obligations in Bilateral Investment Treaties,' *Investment Treaty News* 22 March 2013.
[53] Marcin Kałduński 'Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration' (2015) 4(2) Polish Review of International and European Law 69-101 at 70.
[54] In an individual opinion in this case, Judge Hudson observed that: 'It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of Anglo-American law … a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper.'

stating that the principle that an investment will not be protected if it has been made in violation of the host state's law is a general principle that exists independently of specific language to this effect in the treaty.[55]

The principle of clean hands was initially invoked on the ground that foreign investment should be made in accordance with the laws and regulations of the host state based on the 'in accordance with the law' provision in IIAs, if any, or implicit even when not expressly stated in the relevant IIA.[56] Thus, recent international investment tribunals have held that they either lack jurisdiction or that a claim is inadmissible when faced with the illegal conduct of foreign investors.[57] In *Plama*, an arbitration arising under the Energy Charter Treaty (ECT), the tribunal noted that although 'the ECT does not include a provision calling for the investment's conformity with a given law, the lack of such a provision does not suggest that ECT's protections would apply to all kinds of investments, including those contrary to domestic or international law.'[58]

Some may argue that to date international investment tribunals had not explicitly addressed the principle of clean hands in the context of international human rights violations when they had to decide on whether an expropriation was acceptable or not. However, an international investment tribunal hinted that the principle of clean hands has already been applied in international investment arbitration. Although the Tribunal in *Phoenix Action* did not directly mention the principle of clean hands, it stressed that protection under ICSID should not be invoked by foreign investors in violation of the most fundamental rules of protection of human rights.[59]

In this vein, I argue that international investment tribunals are required to employ the principle of clean hands when faced with a situation in which a host state justifies its expropriation based

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[55] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24 Award of 18 June 2010 paras 123-24.
[56] *Phoenix Action, Ltd v The Czech Republic* ICSID Case No ARB/06/5 Award of 15 April 2009. para 101.
[57] Patrick Dumberry & Gabrielle Dumas-Aubin 'The Doctrine of Clean Hands and the Inadmissibility of Claims by Investors Breaching International Human Rights Law' (2013) 10(1) *Transnational Dispute Management* 1-10 at 5.
[58] *Plama Consortium Ltd v Republic of Bulgaria* ICSID Case No ARB/03/24 Award of 27 Aug 2008 para 138.
[59] *Phoenix* supra note 56 para 78.

on the violation of international human rights by a foreign investor. The application of the principle of clean hands may be useful to this effect for a number of reasons.

This thesis discussed in chapter 4 the instance where allegations of international human rights violations committed by MNCs in the process of foreign investment can be raised by the host state before an arbitral tribunal to justify an expropriation measure. In the same vein, to the extent that recent international investment tribunals have explicitly denied the admissibility of claims based on bribery or misrepresentations made by foreign investors, it is inferred that tribunals should do the same when a foreign investor found responsible for international human rights violations makes a claim against the host state's expropriation measures. Likewise, Rahim Moloo and Alex Khachaturian pointed out that the principle of clean hands can be applicable in denying protection under IIAs based on violations of international human rights.[60] In short, it can be strongly argued that 'the application of the principle of clean hands in bribery, should, *a fortiori*, find application when a tribunal finds human rights violation committed by a foreign investor because these are precisely the kind of investments not worthy of protection under an IIA.'[61]

The application of the principle of clean hands in international investment arbitration may also be encouraged by the acceptance of sustainable development or the right to development. The provision of 'in accordance with law' in many IIAs is often understood to refer to compliance with the host state's law. However, it is also obvious that the protection of foreign investors in international investment arbitration cannot be provided in a way contrary to the general principles of international law.'[62] To be more specific, the host state's domestic law becomes part of the applicable law to be accepted by the international investment tribunal, in addition to the governing law in investment treaty arbitration, which consists of the IIA itself and principles of international law.[63] As mentioned in chapter 3, international human rights, including the right to development, are undoubtedly part of such general principles of law.

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[60] Rahim Moloo and Alex Khachaturia 'The Compliance with the Law Requirement in International Investment Law' (2011) 34(6) *Fordham International Law Journal* 1473-1501 at 1487.
[61] Dumberry & Dumas-Aubin op cit note 57 at 4.
[62] *Phoenix* supra note 56 para 106.
[63] Dumberry & Dumas-Aubin op cit note 57 at 4.

Moreover, as this thesis found that recent IIAs have increasingly incorporated sustainable development in their purposes, international investment tribunals should consider whether any actions by a foreign investor have undermined the purpose of achieving sustainable development through its investment. Once the foreign investor is found responsible for violating its obligation to sustainable development stipulated in the IIA, the Tribunal may directly deny the claim of the foreign investor against expropriation by the host state. The underlying logic of this would be based on the principle of clean hands. In other words, the underpinning argument of the principle of clean hand is based on the understanding that 'a state that is guilty of illegal conduct may be deprived of the necessary *locus standi injudicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality - in short were provoked by it.'[64] Thus, if a tribunal comes to the conclusion that a foreign investor has committed violations contrary to its obligations under international human rights law and international development law, e.g. by ignoring the right to development or taking measures to undermine sustainable development, it should find the foreign investor's claim inadmissible based on the principle of clean hands.

Most importantly, applying the principle of clean hands in international investment arbitration will be conducive to ensuring foreign investors' compliance with international human rights norms and to achieving sustainable development. The principle of clean hands can be applied from the general principle of law. In other words, 'any wilful conduct that is iniquitous, unfair, dishonest, fraudulent, unconscionable, or performed in bad faith may constitute unclean hands' even if such conduct in violation of the principle of clean hands is not illegal.[65] Thus, regardless of whether the principle of clean hands is articulated in an IIA or not, it can have a compelling influence on foreign investors and force them to abide by international human rights norms to realise sustainable development. As result of this, any business activities conducted by a foreign investor in a host state resulting in the violation of the provisions related

[64] Gerald Fitzmaurice *92 Recueil des Cours (1957)* 119.
[65] Ori J Herstein 'Normative Theory of the Clean Hands Defence' (2011) 210 *Cornell Law Faculty Publications Paper* at 3.

to sustainable development and international human rights may potentially serve as a legal basis for dismissing the claim of the foreign investor against expropriation measures taken by the host state.

The application of the principle of clean hands in international investment arbitration will preclude a foreign investor from committing any violation of international human rights obligations by compelling it to take more precautions in terms of its business activities' impact on international human rights, e.g. by conducting environmental assessments or considering the interest of local peoples before any development projects are implemented. Thus, it can be suggested that international investment tribunals should in future apply the principle of clean hands to deal with inadmissible claims involving international human rights violations committed by a foreign investor against nationals of the host state, including vulnerable or marginalised people,[66] in foreign investment and in the process of expropriating foreign assets by the host state.

In essence, the task of international arbitral tribunals is becoming more demanding than merely resolving a dispute between two parties based on legal instruments such as BITs and international agreements and the record before them. They are required to take into consideration various viewpoints other than those of the litigants in the proceedings and a wide range of ways to reflect such viewpoints. They may have regard, in addition to the applicable IIA, to customary international law and emerging norms of conduct, and ultimately have to satisfy the international community, including vulnerable or marginalised people, that arbitration remains a fair, reliable and convincing means of maintaining the integrity and legitimacy of the international investment law regime.[67]

6.2.3 Strengthening of Participation of Marginalised Peoples: *amicus curiae*

In the global discussion on reforms of the current international investment law regime, the

[66] See Dumberry & Dumas-Aubin op cit note 57 at 3.
[67] Georgios Petrochilos 'Who are the appropriate guardians of the public interest (States, International organisations or NGOs)?' (2016) in August Reinisch, Mary E Footer & Christina Binder (eds) *International Law and … Select Proceedings of the European Society of International Law* at 159.

concept of *amicus curiae* has been on the agenda. This section will briefly look into the state of play of *amicus curiae* in international investment arbitration and how *amicus curiae* have interacted with the international human rights and sustainable development arguments.

The concept of *amicus curiae*, literally meaning 'friends of the court', has recently frequently been used in international investment arbitration. Usually, *amicus curiae* participation in legal proceedings is justified on the ground that the *amicus curiae* is in a position to provide the tribunal with special expertise in relation to the dispute. When eight NGOs submitted an amicus brief in the *Case of the Indigenous Communities Members of the Lhaka Honhat Association vs Argentina*[68] before the Inter-American Court of Human Rights in 2019, encouraging the Court to apply the autonomous rights to a healthy environment, cultural identity, food, and water, the case attracted the attention of the international community in the context of indigenous peoples' rights to sustainable development.

The acceptance of *amicus curiae* is found in many domestic courts and has also recently been recognised in international proceedings. At a national level, *amicus curiae* have been considered to be nearly ubiquitous in the US Supreme Court; during the Supreme Court's 2017-2018 term, 890 amicus briefs were filed, with an average of 14 per case,[69] and *amicus curiae* briefs have been filed in 85 per cent of cases pending before the Court,[70] in contrast with only 10 per cent during the initial decades of the 20th century. Other common law states also recognise the participation of *amicus curiae*. This is the case in Canada, South Africa and the United Kingdom.[71] At a global level, the ICJ allows, in its statute, the submission of *amicus curiae* briefs in proceedings.[72] The rules of the ECHR render the president of the tribunal broad

68 *Aboriginal Community of Lhaka Honhat v Argentina* Petition 12 094 InterAm CHR Report No 78/06 Decision of 21 October 2006.
69 Richard DeMaio 'You've Got A Friend in Me: The Increasing Role of Amicus Curiae Briefs in Appellate Practice', available at *https://cmmllp.com/youve-got-a-friend-in-me-the-increasing-role-of-amicus-curiae-briefs-in-appellate-practice/*, accessed on 2 August 2019.
70 Katia Fach Gómez 'Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest' (2012) 35 *Fordham Int'l LJ* 510-564 at 518.
71 Ibid at 545.
72 Article 34(2) of the ICJ Statute states that the Court, subject to and in conformity with its Rules, may request of public international organisations information relevant to cases before it, and shall receive such information presented by such organisations on their own initiative.

powers to specify the intervention of any person concerned with the case.[73] One of the most important cases in international tribunals in relation to *amicus curiae* is the latest WTO *Softwood Lumber* case[74] in which the WTO panel accepted the submission of an *amicus curiae* from a Canadian NGO, the Interior Alliance, on behalf of indigenous peoples.

International investment arbitration initially hesitated to 'allow *amicus curiae* participation on account of the inherent difference' between international arbitration proceedings and those before other international courts.[75] This happened in *Aguas del Tunari SA v the Republic of Bolivia*, where the tribunal denied 'environmental groups standing at the arbitration owing to the parties' unwillingness to consent to their participation.'[76] However, in recent years, there has been an undeniable move in international investment arbitration towards acceptance of *amicus curiae* participation, responding to continuing public pressure and criticism, accompanied by increasing public concerns about the existing international investment regime's legitimacy.[77] In particular, *amicus curiae* briefs have become prevalent in the law and practice of investor-state arbitration. Allowing non-disputing parties' participation in some international investment proceedings has been regarded as being ground-breaking, which subsequently led both international arbitral rules and IIAs to introduce relevant provisions.[78] For instance, the ICSID incorporates a provision pertaining to *amicus curiae*. ICSID Arbitration Rule 37(2) provides that 'after consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the non-disputing party) to file a written submission with the Tribunal regarding a matter within the scope of the dispute.' By way of illustration, international investment tribunals have accepted *amicus* briefs in recent

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[73] The Rule 44(3) provides that ' Once notice of an application has been given to the respondent Contracting Party under Rules 51 § 1 or 54 § 2 (b), the President of the Chamber may, in the interests of the proper administration of justice, as provided in Article 36 § 2 of the Convention, invite, or grant leave to, any Contracting Party which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing.'

[74] *United States-Anti-dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada* WT/DS534/6 of 6 August 2019.

[75] See Eugenia Levine 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29(1) *BerkeleyJ Int'lLaw* 200-224 at 208.

[76] Ibid.

[77] Ibid.

[78] See Fernando Dias Simões 'A Guardian and a Friend? The European Commission's Participation in Investment Arbitration' (2017) 25(2) *Michigan State International Law Review* 234-301 at 234.

cases such as the *Biwater Gauff* case, the *Piero Foresti* case, the *Methanex* case, the *UPS* case, and the *Glamis* case. Decisions of the international investment tribunals to allow *amicus curiae* were based on the procedure nature of the *amicus curiae*, or the presence of a public interest or the procedure's legitimising effect.[79] Two cases mentioned in chapter 4, namely the *Methanex* case and the *Biwater Gauff* case, are noteworthy in this respect. The Tribunal in the *Methanex* case accepted an *amicus curiae* submission on the base of the absence of explicit exclusion of the submission. The Tribunal made it clear that given that the relevant IIA in relation to the case (NAFTA) did not 'expressly confer upon the Tribunal the power to accept amicus submissions nor expressly provide that the Tribunal shall have no such power,' the power of the Tribunal to allow submissions from third parties other than states concerned was 'inferred from its more general procedural powers' and not excluded.[80] In particular, in addition to accepting *amicus curiae* in international investment tribunals, the Tribunal in *Biwater Gauff* went further to articulate two requirements to ensure *amicus curiae* participation, namely 'the filing of a written submission' and 'the attendance at hearings' based on the discretion of a tribunal in accordance with the ICSID Arbitration Rules.[81]

In line with the tendency of international investment arbitration of accepting *amicus curiae*, the international community has been working on articulating the role of *amicus curiae*. For instance, a working group of the United Nations Commission on International Trade Law has been addressing some issues at the heart of the legitimacy challenge confronting the international investment regime. Among the issues, the right to participation by affected groups, mainly vulnerable or marginalised peoples, has been a key issue.[82] At present one cannot predict the result of the working group, but it is significant that the international community has taken a necessary step towards establishing a global and detailed regulation of *amicus*

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[79] See Maxime Somda 'Protecting Social Rights Using the Amicus Curiae Procedure in Investment Arbitration: A smokescreen against third parties?' *Investment Treaty News* 23 April 2019.
[80] *Methanex Corporation v United States of America*, UNCITRAL Decision of the Tribunal on Petitions from Third Persons to Intervene as amici curiae 2001 paras 24-5.
[81] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22 Procedure Order No 5 of 2 February 2007 para 46.
[82] Jane Kelsey, David Schneiderman & Gus van Harten 'Phase 2 of the UNCITRAL ISDS Review: Why "other matters" really matter' *Investment Treaty News* 23 April 2019.

curiae in international investment arbitration.

In my view, the application of the *amicus curiae* argument would be significant in upholding the reasoning presented in this thesis in the following two ways:

First, as shown in chapter 4, the first instance of the paradigm shift of the international investment law regime is to understand foreign investment in the context of the SDGs that host states will achieve. Recognition of sustainable development as an international human right has widened the scope of subjects of international law. Particularly, inclusiveness, a key component of sustainable development, can be achieved by ensuring the participation of vulnerable or marginalised people in the process of development. As vulnerable or marginalised people are understood to enjoy numerous international human rights under various international human rights instruments and international tribunals, it is imperative for international investment arbitration to find a way to accept the participation of vulnerable or marginalised people in its proceedings. At present, the participation of *amicus curiae* is most fitting to ensure the participation of vulnerable or marginalised people in international investment arbitration. Vulnerable or marginalised people might have no knowledge of the issues, or mostly lack resources to develop a defence to protect their proper rights. Under these circumstances, *amicus curiae* may make a significant contribution to the legitimacy and quality of the award by offering useful additional perspectives, factual, legal, and technical, to the tribunal on behalf of vulnerable or marginalised people. Although it is well recognised that any person who is affected by any decisions of tribunals should have a right to standing in a legal proceeding, this basic right has been ignored outright in international investment arbitration, which led to the legitimacy crisis of international investment arbitration. Moreover, in the existing international investment regime, vulnerable or marginalised people are under-represented because of their lack of expertise and can be assisted by external organisations, e.g. human rights NGOs in the form of *amicus curiae*. In most cases previously mentioned, international NGOs played a crucial role in representing the rights of vulnerable or marginalised people. *Amicus curiae* have often relied on arguments related to the rights of vulnerable or marginalised people to realise sustainable development, e.g. the right to water in *Biwater Gauff*, the right to health in *Methanex* and labour rights in *UPS*. In this context, explicit inclusion of the concept of *amicus curiae* in IIAs and full acceptance of it in international investment arbitration will contribute to realising inclusion of vulnerable or marginalised people in the process of achieving the SDGs. *Amicus curiae* participation can also help minimise the fragmentation of international law by allowing experts of other international law regimes, including international human rights law or international development law, to participate in arbitral proceedings in order to inform the tribunal of the extent to which the laws of different international regimes are implicated and to avoid imposing conflicting obligations on host states.[83] In this respect, realising the importance of international human rights in international investment arbitration can lead a tribunal to consider the impact of its decision on an affected group in the form of *amicus curiae*. As shown in chapter 3, sustainable development is characterised by the participation of parties concerned, including vulnerable or marginalised people who are directly affected by foreign investments.

Secondly, the paradigm shifts in the international investment law regime are related to the systemic consistency of various international law regimes in terms of their application and defragmentation of international law. The acceptance of *amicus curiae* would consequently help to overcome international investment arbitration's isolation from other international law regimes, in particular the international human rights law regime. When foreign investors bring a case against host states before international investment arbitration, they often make allegations and raise issues that affect vulnerable or marginalised people who have no legal right to participate,[84] because most IIAs have no explicit provisions to allow vulnerable or marginalised people to take part in the process of deciding foreign investor claims. This deeply unfair situation in international investment proceedings has caused the legitimacy crisis of international investment arbitration. While international investment arbitration is based on the consent of the disputing parties and accordingly the participation of vulnerable or marginalised people in arbitrations has been constrained, international investment arbitration is requested to accept *amicus curiae* in response to a demand for ensuring the legitimacy of its awards. In other words, international investment tribunals are required to accept the participation of *amicus*

[83] See Levine op cit note 75 at 218.

[84] See Jane Kelsey, David Schneiderman & Gus Van Harten 'Phase 2 of the UNCITRAL ISDS Review: Why "other matters" really matter' *Investment Treaty News* 23 April 2019.

curiae to overcome the legitimacy crisis caused by their isolation from the international human rights regime and the international development regime. *Amicus curiae* can also provide international investment tribunals with specialised knowledge or expertise and a wide range of information in awarding cases based on better knowledge of the broader implications of cases beyond international investment arbitration. As is well known, arbitrators of international investment arbitration are mostly investment or trade experts who lack knowledge of international human rights law and international development law, which can widen the isolation of the international investment law regime from other international law regimes, including the international human rights law regime and the international development law regimes, leading to a legitimacy crisis relating to the awards of international investment arbitration. Although the various regulations governing international investment arbitration require qualified arbitrators, arbitrators are not deemed to know all the aspect of a case *per se* and to have expertise in international human rights law and international development law other than international investment law.[85] In this respect, it is also argued that the admission of *amicus curiae* would lend legitimacy to the investment arbitration process.[86] Furthermore, *amicus curiae* may contribute to consolidating the legitimacy of awards of international tribunals by enhancing the transparency of proceedings. For instance, the Tribunal in *Suez v Argentina* noted that the acceptance of the *amicus* briefs could also have the benefit of increased transparency in the arbitration proceedings between foreign investors and host states, given that several organisations of users and consumers and human rights organisations submitted a petition for transparency and public participation as *amicus curiae*.[87]

In essence, *amicus curiae* can play a valuable role precisely in ensuring consistency in international law, upholding international human rights and eventually achieving sustainable development, because they provide helpful guidance to international investment tribunals on the real-world impact of their awards on international human rights and international

[85] See Gómez op cit note 70 at 544.
[86] See Somda op cit note 79.
[87] This role of *amicus curiae* has been affirmed in the award of the tribunal in the above-mentioned *Suez* case, which mentioned that 'it is possible that appropriate non-parties may be able to afford the Tribunal perspectives, arguments, and expertise' that will be conducive to a correct decision of the Tribunal. See *Suez, Sociedad General de Aguas de Barcelona, S A and Vivendi Universal, S A v Argentine Republic*, ICSID Case No ARB/03/*19* Ordering in response to a Petition for Participation as Amicus Curiae of 19 May 2005 paras 21-2.

development.

6.3 Suggestions for Further Research

The human right to sustainable development referred to in this study has allowed me to show that by considering human rights, the legitimacy crisis of the current international investment regime will be overcome and that it is now well established and more evident that the human right to sustainable development is the nucleus of reconciling the three clusters of international law. It also highlights certain lacunae in the current theory and scholarship in relation to the evolution of sustainable development and legal relationships in solving conflicting rights and interests of all stakeholders, involving international investment arbitration that requires elaboration through further research.

First, this dissertation has demonstrated that conflicting rights or interests between foreign investors and host states in international investment arbitration can be balanced by considering the obligations of foreign investors to international human rights. Further legal relationships among all stakeholders are likely to strengthen the argument of the human right to sustainable development in international investment arbitration, at which this dissertation has only hinted. In other words, research on the application of the human right to sustainable development to the 'immediate relationship between foreign investors and the vulnerable involved' would yield increased clarity on the standards of scrutiny to which host states' justification for non-compliance with IIA obligations should be subjected. As a claimant-investor-driven system of adjudication, the increased popularity of IIA-based arbitration is probably attributable to investor satisfaction with the system.[88] Likewise, even a host state-driven system, regardless of claimant or respondent, based on the human right to sustainable development, is likely to meet the demands of the host state. In other words, dissatisfaction with both systems comes primarily from the vulnerable and the marginalised who will be most affected by the decisions of international tribunals. However, if vulnerable or marginalised groups had the same legal standing as foreign investors in international tribunals, foreign investors would be compelled

[88] Daniel Behn 'Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-art' (2015) 46 *Georgetown Journal of International Law* 364-415 at 364.

to comply with the human right to sustainable development in their direct relationship with the vulnerable group, not through the medium of host states. In essence, in the realm of international law in which states (whether host states or home states behind the MNCs) are understood to be the ultimate deciders of how the international community's complex set of values should be balanced, further research may focus on bringing the participation of vulnerable and marginalised people to the fore in solving the problem of conflicting rights related to the three clusters of international law. In the absence of adequate participation of vulnerable or marginalised people, they are likely to be left behind in the pursuit of the SDGs.

Secondly, this thesis mostly examined the jurisprudence of international investment tribunals concerning international human rights. As already hinted, the lack of enforcement mechanisms might have led to the prevalence of international investment tribunals in this respect. But when other international law regimes, in particular international human rights law tribunals, develop their enforcement mechanism, they are more likely to address international investment law.

Thirdly, this study presented three justifications advanced by host states on the defensive and one justification on the offensive, on the premise that foreign investors are most likely to ignore the human right to sustainable development. However, as the human right to sustainable development has gained more relevance in international law, more research on the reversed situation would be appropriate. To be more specific, as is convincingly argued, FDI may directly promote sustainable development by generating capital for renewable energy to help mitigate climate change, for instance.[89] This could be relevant when a foreign investor is more engaged with its business activities than with complying with an international norm to cope with climate change, while a host state takes alleged expropriation measures by withdrawing its incentives to the foreign investor for the purpose of fostering investment in renewable energy. This illustration demonstrates that the expropriation by the host state should be evaluated not only by the standards of traditional investment arbitration, but also by that of the human right to sustainable development.

[89] Markus W Gehring & Marie-Claire Segger 'Overcoming Obstacles with Opportunities: Trade and Investment Agreements for Sustainable Development' in Stephan W Schill (eds) *International Investment Law and Development - Bridging the Gap* (2015) at 95.

In essence, the foreign investor may argue that its investment, made in view of abiding by international obligations or standards to achieve the SDGs, is being expropriated by the host state. In this respect, there are two cases that require more research. The *Micula v Romania* case[90] and the *Eiser v Spain* case[91] relate to the withdrawal of each host state's incentives for renewable energy granted to foreign investors. However, the host states rescinded their incentives on the grounds of non-compliance with EU law (EU state aid) and lack of financial resources. In response to the withdrawal, the investors argued that the host states should be held liable for breaching the BIT by withdrawing economic incentives granted to foreign investors under its national law, in particular by expropriating without compensation the claimants' right to receive the incentives and substantially depriving their entire investment of value. Each ICSID tribunal ruled in favour of the foreign investors. However, the European Commission warned Romania and Spain not to pay investor-state awards in this and several other solar energy cases, on EU state aid grounds. In my view, the ostensible argument of these cases is related to conflicting obligations by which host states and foreign investors should abide by international law, specifically EU state aid law. However, if all stakeholders paid more attention to the incentives granted to investors and the investment, which are well established in the pursuit of SDGs, particularly environmental protection, the argument would have been focused on the more substantial issue of whether it was legitimate for the host state to expropriate the investment made to achieve the SDGs without compensation, rather than only technical issues, namely whether the withdrawal of incentives was in breach of state aid law.

Finally, considering that vulnerable or marginalised groups have gradually gained the same legal status of subjects under international law as foreign investors, further research on the topic of how to address the direct relationship between vulnerable or marginalised groups and foreign investors and to resolve potential conflicts of their rights is expected to be conducted.

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[90] *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20 Final Award of 11 December 2013.

[91] *Eiser Infrastructure Limited and Energía Solar Luxembourg Sàrl v Kingdom of Spain* ICSID Case No ARB/13/36 Final Award of 4 May 2017.

In such a situation, when any marginalised group in host states can claim its right to sustainable development by requesting the host state (or its own state) to take measures such as expropriation to limit the exercise of foreign investors' rights, the relationship between the protection of property rights of foreign investors and 'expropriation measures' to limit its exercise can turn to the relationship of competing rights of foreign investors and vulnerable or marginalised groups beyond the relationship of the right of the foreign investor and the sovereign right of host states to regulate investment through expropriation.

6.4 Final Conclusion

By way of reconciling notions of development, sustainable development and human rights, the human right to sustainable development has the potential to make a significant contribution to the achievement of human rights in international investment arbitration. Rather than looking at development, human rights and investment separately, this study approaches the relationship between the three clusters of international law in a constructively integrated way. It particularly highlights options for international investment law to take account of international human rights imperatives, as well as socio-economic and environmental priorities.

However, the success of the human right to sustainable development in this respect ultimately depends on its potential to enable the international community, particularly including international investment tribunals, to improve human rights, boost sustainable development and attract more foreign investments in a balanced way. The international community is no doubt required to situate the international investment regime within the wider normative context of the human right to sustainable development. It is thus expected that international investment tribunals will become more comfortable with applying and enforcing the human right to sustainable development and will ensure its relevance and legitimacy in a manner that is consistent with other sub-branches of international law, such as international human rights law, international development law and international law as a whole, given that consistency or coherence 'is attached to an idea that a system should make sense as a whole,'[92] which is

[92] Lone Wandahl Mouyal *International Investment Law and the Right to Regulate: A Human Rights Perspective* (2016) 2.

considered an essential characteristic of law. This would more readily generate tangible benefits for foreign investors, host states and vulnerable and marginalised groups most affected by development and investment.

Whereas useful steps have been taken towards producing a balanced approach in international investment arbitration that resonates with the spirit and objects of the SDGs, these should be consolidated by an explicit provision in future IIAs that acknowledges that the human right to sustainable development generates legally applicable and enforceable entitlements in the international investment law regime.

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