A Critical Assessment of Foreign Direct Investment and Inclusive Development in the Context of Sino-African Relations

Submitted by

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[1] A Chinese proverb which translates as: filial piety (or respect for your parents) is an integral virtue.

CONTENTS

ABSTRACT

All States want to achieve a higher state of 'being' and this is particularly true of developing States. Development is often seen as the end-goal for States, which is considered to be synonymous with progress and positive change. In pursuit of this target, foreign direct investment (FDI) is used by States as a catalyst for development. However, in search for development through FDI, not all States benefit. Some States, such as China, are an attractive destination for FDI inflows and are able to use this capital to rapidly evolve. Other States, however, are unable to achieve the change that they want. The fact that not all States benefit from FDI is a conundrum and also alludes to a dissonance between FDI and development.

Despite this incongruence, FDI remains an important source of capital for developing States when domestic resources are limited or lacking. The motivation to attract FDI serves as a mantra for developing States to conclude international investment agreements (IIAs) and join the international investment law (IIL) regime. IIAs and IIL are viewed as the respective tools or framework for development. To that end, developing States conclude IIAs and compete for FDI without truly questioning the nexus between FDI, IIL and development.

Developing States should question the intersectionality between these concepts and their underlying roots. The very pursuit of development is a challenge in itself. Development is a subjective and complex concept but it is traditionally and erroneously linked to economic growth. Within this particular framing of development, it is said that economic benefits will 'trickle down' to society through enhanced wages, modernisation and productivity without intervention from the State. However, this is not true. The ability of developing States to achieve change is dependent on an

inclusive conceptualisation of development. To that end, inclusive development requires these States to adopt a proactive stance and use of law to harness FDI, so that the connection between FDI and development is secured in a manner which works to their advantage.

CHAPTER 1: INTRODUCTION

1. FRAMING THE ISSUE

In 2019, foreign direct investment (FDI) flows were estimated to be worth US$1.3 trillion, which is a significant amount of available capital within the global economy.[1] As an available source of capital, FDI represents a lot of potential for future change, so much so, all States (developed and developing) want to access FDI and have re-orientated their national policies in order prioritise and attract FDI.[2] In relation to these policies, some States have been more successful that others in attracting FDI.[3]

Whilst all States compete for FDI, developing States are disadvantaged due to the lack of resources (economic, institutional and knowledge) at their disposal, which means that, it is not a level playing field among States.[4] At the same time, although developing States pursue FDI, these States are and remain net capital-importers – this refers to States that receive more FDI than they export.[5] Other States have fared better, as they have managed to not only attract large amounts of FDI but also transitioned to a point where they are also able to export capital.[6] China is an excellent example of such a State, since it has successfully evolved from developing State to a newly industrialised country (NIC). Moreover, it has successfully

[1] UNCTAD, 'World Investment Report 2019' (*UNCTAD*, 12 June 2019) 2 <https://unctad.org/en/PublicationsLibrary/wir2019_overview_en.pdf> accessed 15 December 2019.
[2] UNCTAD (n 1) 2.
[3] Karl Sauvant, 'New Sources of FDI: The BRICS – Outward FDI from Brazil, Russia, India and China' (2005) 6 Journal of World Investment & Trade 639, 672-673.
[4] Lauge Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP 2015) 67.
[5] Eric Neumayer, Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries' in Karl Sauvant, Lisa Sachs (eds), *The Effect of Treaties on Foreign Direct Investment* (OUP 2009) 227.
[6] Gallagher and Shan even go as far to emphasise that China's ability to attract FDI is 'undisputed and unprecedented'.
Norah Gallagher, Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (OUP 2009) 1.

transformed from a capital-importing economy to a major capital-exporter, but also continues to be a major destination for FDI. [7] Economically, China not only outpaces developing States in terms of its generation of capital to export but also developed economies such as the United States of America (USA).[8]

China's economic rise is exceptional because it has achieved this transformation within a short period of time (within the last fifty years).[9] During this period, China has used FDI to fuel its domestic change, for example, it has improved access to food and managed to halve the number of people suffering from hunger in 2015.[10] These aforementioned reasons make China a useful point of reference as an illustration of how a State has positively used FDI to its advantage.[11] In particular, further study of how China has created conditions suitable for FDI is warranted in order to better understand to what extent FDI can enable positive change in other developing States.

[7] Gallagher, Shan (n 6) 1.

[8] In 2020, China's FDI outflows were estimated to be worth US$133 billion whereas outflows from the USA were estimated at US$93 billion.
UNCTAD, 'World Investment Report 2021' (*United Nations Publications*, 21 June 2021) 7 <https://unctad.org/system/files/official-document/wir2021_en.pdf> accessed 22 September 2021.

[9] Hui Yao Wang, Lu Miao, 'China's Outward Investment: Trends and Challenges in the Globalization of Chinese Enterprises' in Julian Chaisse (ed), *China's International Investment Strategy: Bilateral, Regional and Global Law and Policy* (OUP 2019) 40; UNCTAD, 'Global Foreign Direct Investment Slides for Third Consecutive Year' (*UNCTAD*, 12 June 2019) <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2118> accessed 19 December 2019.

[10] United Nations World Food Programme, 'China' (*UN WFP*, 2021) <https://www.wfp.org/countries/china> accessed 20 September 2021.

[11] The World Bank, 'China' (*The World Bank,* 2020) <https://data.worldbank.org/country/china> accessed 2 February 2021.

2. BACKGROUND CONTEXT

2.1 The Pursuit of FDI as an Enabler for Development

For most developing States, domestic capital and financial resources are lacking or limited, and so FDI is welcome in order to fill this economic gap.[12] This economic gap means that these States are disadvantaged in their starting-point and is particularly apparent when comparing the gross national income (GNI) per capita between a developed and developing economy. The GNI per capita in many developing States is valued at less than US$995.[13] In contrast, the GNI per capita of developed countries is substantially more. It is valued at US$12,056.[14] This difference is significant as an example of the disparity in terms of economic wealth between developing and developed States. It also alludes to the fact that developed States will have the necessary resources to export capital whereas developing States do not have additional capital to export.[15]

Capital is a main component of FDI; however, FDI also refers to the transfer of assets from one country to another.[16] These assets can be either tangible or intangible, ranging from equipment or buildings to shares of a given company.[17] Due to the fact that FDI also involves the transfer of assets, it is often viewed by developing States as a multifaceted solution to compensate for their lack of economic resources.[18] In that regard, FDI is viewed in terms of its potential to generate further economic benefits for the recipient State if it leads to the

[12] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 1995) 24.
[13] UN, 'World Economic Situation and Prospects' (*Department of Economic and Social Affairs of the United Nations Secretariat*, 2019) 168 <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2019_BOOK-ANNEX-en.pdf> accessed 1 February 2020.
[14] UN (n 13) 168.
[15] Eric Neumayer, Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33(10) World Development 1567, 1580.
[16] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2018) 11.
[17] Sornarajah (n 16) 11.
[18] Priscilla Schwartz, 'Capitalism, International Investment Law and the Development Conundrum' (2013) 6(2) Law and Development Review 217, 227.

creation of physical property, such as factories or infrastructure. These large-scale projects will require labour for construction and so present further opportunities for job creation within the local economy. With additional employment, the local labour markets will also benefit from the transfer of modern technology, managerial knowledge and skills from foreign investors.[19] These benefits that are associated with FDI are often referred within the economic literature as the 'spillover' or 'spillover effect'.[20] Developing States assume that these spillovers will be generated. Consequently, these States have high expectations in hope that FDI will infuse domestic industries with foreign capital, knowledge, best practices, technology and lead to positive change within their societies.[21]

FDI has great transformational potential, particularly for developing economies due to the positive impact on local employment.[22] Theoretically, the presence of foreign investors will lead to improved skills among the local labour force and increased wages.[23] In turn, with these additional wages, household incomes will rise and, as a result, so will the overall standard of living.[24] The backbone of development is through the improvement of the standard of living.[25]

[19] Lisa Sachs, Karl Sauvant, 'BITs, DTTs, and FDI Flows: An Overview' in Karl Sauvant, Lisa Sachs (eds), *The Effect of Treaties on Foreign Direct Investment* (OUP 2009) xxvii. For a more detailed discussion, see: Escobar (n 12) 32-39.
[20] Nuno Crespo, Maria Paula Fontoura, 'Determinant Factors of FDI Spillovers – What Do We Really Know?' (2007) 35(3) World Development 410, 411; Banri Ito, Maomitsu Yashiro, Zhaoyuan Xu, XiaoHong Chen, Ryuhei Wakasugi, 'How Do Chinese Industries Benefit from FDI Spillovers?' (2012) 23(2) China Economic Review 342, 343-344; Oliver Morrissey, 'FDI in Sub-Saharan Africa: Few Linkages, Fewer Spillovers' (2012) 24 European Journal of Development Research 26, 27.
[21] Rajneesh Narula, Nigel Driffield, 'Does FDI Cause Development? The Ambiguity of the Evidence and Why It Matters' (2012) 24 European Journal of Development Research 1.
[22] Eric Neumayer, Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries' in Karl Sauvant, Lisa Sachs (eds), *The Effect of Treaties on Foreign Direct Investment* (OUP 2009) 227.
[23] Schwartz (n 18) 225.
[24] Schwartz (n 18) 225.
[25] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (ICESCR) art 11(2); UNCHR, 'CESCR General Comment No. 12: The Right to Adequate Food (Art.11)' (12 May 1999) UN Doc E/C.12/1999/5 para 1.

This is because households should have more income to spend on food, healthcare, education and other socio-economic factors that contribute to an adequate standard of living.[26]

Development is concerned with positive change within society, where everyone has the ability to enjoy life (as a concept, development is further examined in Chapter 2, section 5.1). As a baseline, an adequate standard of living is needed as an aspect of development and also, in order be able to enjoy life.

To that end, development can only be realised if the aforementioned socio-economic factors as part of the adequate standard of living are addressed.[27] This includes the right to food, which is used as a lens to illustrate how development can be progressively actualised.[28] Consequently, one way to improve the standard of living is to tackle long-term hunger,[29] which is particularly problematic in developing countries because of high poverty levels.[30] Poverty is a barrier to access to adequate access to food.[31] Arguably, these States need to ensure that their population has adequate access to food as a starting-point towards ensuring an adequate standard of living and as part of the development process.[32] Accordingly, FDI needs to play a part in this development process.

In relation to the development process, there seems to be an implicit assumption within the wider literature that a causal link between FDI and development exists. Before an examination of this causal link can take place, it is argued that the very conception of development needs to be unravelled first. This is because development is often viewed by

[26] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 25(1).
[27] UNCHR (n 25) paras 4, 13.
[28] UNCHR (n 25) para 1.
[29] UNCHR (n 25) para 1.
[30] UNCHR (n 25) para 5.
[31] This refers to both economic procurement and also physical procurement. For further details, see: UNCHR (n 25) para 13.
[32] Olivier de Schutter, Johan Swinnen, Jan Wouters, 'Introduction: Foreign Direct Investment and Human Development' in Olivier de Schutter, Johan Swinnen, Jan Wouters (eds), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge 2013) 1.

developing States as an overall outcome or end-goal, which is concerned with the modernisation and economic advancement of a given State.[33] However, Chapter 2 argues that development is not a static end-point; it is a continuous process where the goalpost also shifts.[34] As will be further argued in the next chapter, development is about positive change, which is concerned with the progressive achievement of the higher state of 'being'.[35] Yet, this positive change for developing States has been and remains elusive.[36] To the knowledge of this researcher, part of the reason for this is because the existing scholarship on development neglects to examine the role of international investment law (IIL) and FDI, which is a necessary step.

2.2 The Legal Framework for FDI: International Investment Law

IIL is a legal framework which establishes the respective rules on FDI and so it needs to be taken into account as part of the inquiry within this thesis.[37] IIL is particularly difficult to navigate for developing States owing to its intricate patchwork of international investment agreements (IIAs) that form an aspect of the relevant sources of law for this regime.[38] Arguably, careful navigation of IIL is necessary if developing States are to secure FDI for the positive change that they seek.

IIL is complex because it is not organised around a central authority or international organisation, or even around any particular treaty.[39] Unlike many other areas of international

[33] Escobar (n 12) 43.
[34] Amartya Sen, *Development as Freedom* (OUP 1999) 17.
[35] Sen (n 34) 18.
[36] Krista Nadakavukaren Schefer, 'Poverty, Obligations, and the International Legal System: What Are Our Duties to the Global Poor?' in Krista Nadakavukaren Schefer (ed), *Poverty and the International Economic Legal System: Duties to the World's Poor* (CUP 2013) 5.
[37] Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Zachary Douglas, Joost Pauwelyn, Jorge Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 14.
[38] Pauwelyn (n 37) 14.
[39] Pauwelyn (n 37) 14.

law, IIL is fragmented.[40] On an international level, IIL is made up of both international investment agreements (IIAs), customary international law, general principles of international law and even sometimes unilateral statements.[41] Pauwelyn astutely argues that IIL even overlaps with wider aspects of public international law, such as diplomatic protection, trade law and also human rights, which further adds to IIL's complexity.[42]

IIAs are instruments of public international law since these agreements are concluded between States. However, these instruments have been critiqued by scholars as being asymmetric because they reflect the private interests of home States and foreign investors.[43] IIAs, for example, codify the standard of treatment that a foreign investor (a private actor) can expect within a recipient State even though the investor is not party to the relevant IIA.[44] Additionally, foreign investors have substantive rights provided within IIAs, which they can and do invoke.[45] Foreign investors invoke these rights when they believe that the value of their assets has been adversely affected.[46] It is unusual that investors have procedural ability to invoke these substantive rights. This ability refers to the fact that investors can bring legal

[40] Sol Picciotto, 'Fragmented States and International Rules of Law' (1997) 6(2) Social and Legal Studies 259, 260; Steven Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 3 American Journal of International Law 475, 484.
[41] Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 18.
[42] Pauwelyn (n 37) 15.
[43] Howard Mann, 'Reconceptualizing International Investment Law: Its Role in Sustainable Development' (2013) 17(2) Lewis & Clark Law Review 521, 528.
[44] Ursula Kriebaum, 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade 454, 466-467.
Like any other treaty, IIAs are concluded between States, not between the host State and the foreign investor.
[45] Kaj Hobér, *Investment Treaty Arbitration: Problems and Exercises* (Edward Elgar 2018) 10-11.
[46] Daniel Aguirre, *The Human Right to Development in a Globalized World* (Ashgate 2008) 141.
It should be noted that the notion of investment is broad, which means that the corresponding rights that investors have are also wide. For further details, see: Julian Mortenson, 'The Meaning of Investment: ICSID's Travaux and the Domain of International Investment Law' (2010) 51 Harvard International Law Journal 257, 259; Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113 American Journal of Internatrional Law 1, 2.

proceedings before an arbitral panel if their legitimate expectations have not been met.[47] This is an unusual quirk of IIL and an additional layer of complexity to navigate, because it allows foreign investors to initiate dispute proceedings against the host State even though foreign investors are not party to IIAs.[48] Paulsson terms this peculiarity as 'arbitration without privity'.[49]

This peculiarity means that foreign investors can file claims against the host State, where the host State has adopted such measures for the public interest but where this measure adversely affects the property of the investor.[50] The tobacco company Philip Morris, for example, challenged host States regarding plain packaging legislation,[51] while a mining company was able to challenge host State legislation for protecting cultural property of indigenous peoples.[52] Additionally, when a host State faced financial crisis and adopted emergency fiscal measures, for example, the devaluation of its national currency in order to make exports more attractive, this host State faced claims in relation to a violation of the substantive rights within relevant IIAs.[53] Foreign investors have even challenged host States when the host State has attempted to adopt legislation that encourages equitable economic participation amongst marginalised ethnic groups.[54]

At the same time, the host State who *is* party to the IIA does not have the same rights when it comes to foreign investors.[55] A host State cannot sue a foreign investor for failing to live up to its expectations.[56] For example, by failing to provide specific amounts of FDI, or

[47] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2008) 60; Chin Leng Lim, Jean Ho, Martins Paparinskis, *International Investment Law and Arbitration: Commentary, Awards and Other Materials* (CUP 2018) 87.
[48] Lim, Ho, Paparinskis (n 47) 87.
[49] Jan Paulsson, 'Arbitration Without Privity' (1995) 10(2) ICSID Review 232.
[50] Aguirre (n 46) 141.
[51] *Philip Morris Asia Ltd. v The Commonwealth of Australia*, UNCITRAL PCA Case No. 2012-12, para 93.
[52] *Glamis Gold Ltd. v The United States of America*, NAFTA/UNCITRAL, Award, para 10.
[53] For example: *CMS Gas Transmission Company v The Republic of Argentina* (12 May 2005) ICSID Case No. Arb/01/8, Award, para 329.
[54] *Piero Foresti, Laura de Carli & Others v The Republic of South Africa* (4 August 2010) ICSID Case No. ARB(AF)/07/01, Award, para 64.
[55] Paullson (n 49) 232.
[56] Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate* (Routledge 2016) 14.

failing to construct new infrastructure or create employment opportunities. A host State does not even have any legal guarantees that positive spillovers will be gained through FDI, such as the transfer of knowledge or technology.[57] Furthermore, a host State might be constrained by the IIA in attempting to foster positive spillovers, for example, when enacting performance requirements.[58] This is problematic especially in relation to developing countries for two main reasons. First, there is an assumption by developing host States that IIAs will lead to increased FDI. Secondly, developing States expect that the increased FDI will generate positive spillovers via the transfer of skills and technology, which will lead to increased employment and wages. Thirdly, this increase in employment and wages is necessary for the (economic) development of the host State because it will have a positive impact on the standard of living for local communities.

The asymmetries between the host State and the foreign investor do not just stop at the legal obligations contained within IIAs. In reality, there are also further imbalances. For example, the economic wealth of a foreign investor versus that of a developing host State. Given the low GNI per capita of many developing States and lack of domestic capital, it is not surprising that they are outmatched (in terms of economic influence) when compared to the wealth of foreign investors, especially when foreign investors are often multinational corporations (MNCs). For example, in 2010, Uruguay's gross domestic product (GDP) was worth half of the annual sales of tobacco company Philip Morris.[59] Incidentally, in 2010, Philip

[57] Mouyal (n 56) 14.
[58] Host States are generally not permitted to enact performance requirements due to their obligations under IIAs and the adoption of performance requirements is contentious. For further details, see: Rudolf Dolzer, Ursula Kriebaum, Christoph Schereuer, *Principles of International Investment Law* (OUP 2022) 140-141; Wenhua Shan, 'From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law' (2006) Northwestern Journal of International Law and Business 631, 654; Ole Kristian Fauchald, 'International Investment Law in Support of the Right to Development?' (2021) 34 Leiden Journal of International Law 181, 184.
[59] Duff Wilson, 'Cigarette Giants in Global Fight on Tighter Rules' (*The New York Times*, 13 November 2010) <https://www.nytimes.com/2010/11/14/business/global/14smoke.html> accessed 7 February 2020.

Morris initiated a claim against Uruguay.[60] The claim has further practical implications for the relationship between the foreign investor and the host State, particularly in the event of investment disputes or arbitration.

Investment arbitration involves exorbitant costs and lengthy proceedings.[61] Those costs are difficult enough for many developing host States with struggling economies, external debt owed to IFIs, in addition to the cost of employing legal experts for arbitration.[62] But these States will have to pay high levels of compensation if an award is decided by a tribunal in favour of the foreign investor.[63] For example, following the 2001 financial crisis, Argentina faced numerous investment claims. It is said that the total worth of these claims exceeded US$17 billion.[64] This is a significant amount for any host State to compensate, let alone a developing economy or even one that is experiencing economic difficulties.[65] In light of the legal costs and high awards of compensation, academics have argued that host States are increasingly reluctant to adopt measures that may pose a threat to investors and their property, even if those measures are for the benefit of their local communities or in the name of the public interest. This is referred to as the 'regulatory chill'.[66]

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[60] For further details, see: *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (19 February 2010) ICSID Case No. ARB/10/7, Request for Arbitration.

[61] Tai-Heng Cheng, 'Power, Authority and International Investment Law' (2005) 20(3) American University International Law Review 465, 498; Jason Webb Yackee, 'Political Risk and International Investment Law' (2013) Duke Journal of Comparative & International Law 477, 496.

[62] Emily Alexander, 'Taking Account of Reality: Adopting Contextual Standards for Developing Countries in International Investment Law' (2007) 48 Virginia Journal of International Law 817, 824.

[63] Luke Eric Peterson, 'Bilateral Investment Treaties and Development Policy-Marking' (IISD, November 2004) 18-19 <http://www.iisd.org/sites/default/files/publications/trade_bits.pdf> accessed 7 February 2020.

[64] For further details, see: Van Harten (n 47) 1-2.

[65] Van Harten (n 47) 3; Muthucumarswamy Sornarajah, 'The Clash of Globalizations and the International Law on Foreign Investment' (2003) 10(2) Canadian Foreign Policy Journal 1, 15.

[66] Jona Razzaque, 'Sustainable Investment and Natural Resources' (The Impact of Armed Conflict on the Environment and Natural Resources: A Sustainable Development Goal (SDG) 16 Perspective Interactive Seminar, Bristol, 17 March 2017); Van Harten (n 47) 166; Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints From Alternative Evidence' (2011) 51 Virginia Journal of International Law 397, 405; Konrad von Moltke, Howard Mann, 'Towards a Southern Agenda on International Investment:

From the aforementioned discussion, developing States are stuck between a rock and a hard place. Host States are either leaving themselves at risk of investment claims from foreign investors or try to avoid these claims through inaction. This means eschewing any regulation or measures that may adversely affect investments. Neither of these choices are practical. On one hand, developing host States do not have ample economic resources needed to defend their actions in investment claims. Equally, developing host States do not have the additional finances needed to keep paying compensation in investment disputes. It also means that vital funds are diverted away from the national economy, which could be put toward development and improving the local standard of living. On the other hand, these States cannot and should not simply avoid enacting measures in fear of investment claims. Accordingly, it is important that developing States have appropriate legal mechanisms in place that enable them to use FDI to aid their development. With these mechanisms in mind, the aim of this thesis is to analyse how developing States can use FDI without compromising themselves in the process. The aims and rationale behind this thesis are further discussed in the next section.

Discussion Paper on the Role of International Investment Agreements' (*IISD*, May 2004) 29 <http://www.iisd.org/sites/default/files/publications/investment_sai.pdf> accessed 1 February 2020.

3. RESEARCH AIMS AND RATIONALE

The ability of developing States to attract and use FDI without compromising their own needs is an important and underlying theme within this thesis. In that regard, whether developing States are able to adequately employ FDI to meet these needs is dependent on an understanding of the intersectionality of FDI, IIL and development in order to assess whether and to what extent these concepts interconnect. However, the nexus between these concepts is not clear. As a result, this intersectionality requires further academic inquiry.

From an economic perspective, FDI equates to development when the aforementioned spillovers (see section 2.1) are generated within the local economy.[67] Owing to the focus on spillovers, economic studies do not analyse the role of law nor IIL within this equation. From a law and development perspective, academics that adopt a law development approach have critiqued the role of law and have argued that law has not always been an instrument for positive change.[68] Instead, these academics argue that law has been used as an instrument to secure the interests of Western States.[69] The law and development literature, however, does not scrutinise FDI or IIAs which can enable development and why IIL needs to be considered. Chapter 2 reviews the law and development literature by examining the concept

[67] For example, see: Binyam Demena, Peter van Bergeijk, 'A Meta-Analysis of FDI and Productivity Spillovers in Developing Countries' (2017) 31(2) Journal of Economic Surveys 546; Klaus Meyer, Evis Sinani, 'When and Where does Foreign Direct Investment Generate Positive Spillover: A Meta-Analyis' (2009) 30 Journal of International Business Studies 1075, 1076-1077; Abdoulaye Seck, 'International Technology Diffusion and Economic Growth: Explaining the Spillover Benefits to Developing Countries' (2012) 23 Structural Change and Economic Dynamics 437, 439-440.

[68] For example, see: David Trubek, Marc Galanter, 'Scholars in Self-Estrangement: Some Reflection on the Crisis in the Law and Development Studies in the United States' (1974) Wisconsin Law Review 1062, 1067; Stéphanie de Moerloose, 'Law and Development as a Field of Study: Connecting Law with Development' (2017) 10(2) Law & Development Review 179, 185; Mariana Mota Prado, Diogo Coutinho, Mario Schapiro, 'Law and Development: An Evolving Research Agenda' (2016) 9(2) Law & Development Review 223, 226; Ada Ordor, 'Tracking the Law and Development Continuum Through Multiple Intersections' (2015) 8(2) Law & Development Review 333, 335.

[69] Trubek, Galanter (n 68) 1067; de Moerloose (n 68) 185; Ordor (n 68) 335.

of development in order to assess what it means within the context of the positive change desired by developing States and why that change has not been achieved.

Within the IIL literature, there are three relevant themes in relation to this thesis. The first theme is focused on whether IIAs lead to increased FDI flows to developing countries, which is a useful point of reference.[70] Nonetheless, these studies do not take the extra step in evaluating whether the FDI positively affected the developing host State. The second theme assesses the ability of host States to retain their autonomy to regulate in the public interest in light of IIAs, which alludes to the interests of developing States within the context of development.[71] Despite scholars highlighting that the public interest needs to be more clearly reflected in IIAs and the IIL, how the public interest is relevant to development has not been clearly articulated. The third theme concentrates on whether IIL is incongruent with public international law such as IHRL.[72] These studies have focused on examples from investment arbitration to emphasise how tribunals have addressed IHRL issues. Chapter 3 reviews these

[70] For example, see: Neumayer, Spess (n 5) 227; Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit – And They Could Bite' (2003) World Bank Research Working Paper WPS3121, 19 <http://documents.worldbank.org/curated/en/113541468761706209/pdf/multi0page.pdf> accessed 3 February 2021; Jeswald Salacuse, Nicholas Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 Harvard International Law Journal 67; Webb Yackee (n 66) 411.

[71] See: Stephanie Bijlmakers, 'Effects of Foreign Direct Investment Arbitration on a State's Regulatory Autonomy Involving the Public Interest' (2012) 23(2) The American Review of International Arbitration 245; Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law' (2014) 36 University of Pennsylvania Journal of International Law 1; Dominic Dagbanja, 'The Limitation on Sovereign Regulatory Autonomy and Internationalization of Investment Protection by Treaty: An African Perspective' (2015) Journal of African Law 56.

[72] For example, see: James Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 Duke Journal of Comparative & International Law 77; Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights' (2011) 60 International & Comparative Law Quarterly 573; Yannick Radi, 'Realizing Human Rights in Investment Treaty Arbitration: A Perspective from Within the International Investment Law Toolbox' (2012) 37(4) North Carolina Journal of International Law & Commercial Regulation 1107; Silvia Steininger, 'What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration' (2018) 31 Leiden Journal of International Law 33.

themes within the IIL literature to provide a better understanding of the complex relationship between FDI, IIL and development.

These areas of study provide useful reference points for this thesis, but the steps in which developing States can use and create conditions to attract FDI to aid development is missing. This is the rationale of why this study is needed. This thesis 'connects the dots' between these areas of literature but also specifies that law has an instrumental role to play for development, which is argued in Chapter 4 – the analytical framework. In doing so, the aim of this thesis is to identify the areas of intersectionality between these concepts, so that it can provide guidance as to how developing States can create the right conditions for FDI and development.

As identified in section 1 of this introductory chapter, China has managed to use FDI to its advantage and to the benefit of its society. This has also allowed Chinese industries to flourish and for China to continue to attract large amounts of FDI.[73] As such, China has managed to create the right conditions for FDI and so, whether China's approach to FDI can and should be imitated by developing States requires further research. As an NIC, China is potentially more attuned to the economic interests of developing States in receipt of FDI since China's economic transformation has occurred within the last fifty years, meaning that its experiences are more recent than the experiences of developed States.[74] China's consideration for developing States can be deduced from the way it frames its economic relationships, since it refers to comradeship, equality, sovereignty and flexibility.[75] In terms of rhetoric, this suggests that the FDI relationship between China and developing States (or the South-South context) may be more beneficial for the latter. Whether this is true or not requires further examination using concrete examples. For that reason, since Ethiopia and Tanzania are the main recipients

[73] Karl Sauvant, 'China: Inward and Outward Foreign Direct Investment' (2011) 3 Transnational Corporations Review 1.
[74] Congyan Cai, 'Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice' (2006) 7(5) Journal of World Investment and Trade 621, 622-623.
[75] Shan, Gallagher (n 6) 37.

of Chinese FDI,[76] these States provide relevant South-South context for investigation as case studies.

Ethiopia and Tanzania are comparable as case studies because they are net-capital importers of FDI within East Africa.[77] Similar to other developing States, both Ethiopia and Tanzania view FDI as a mechanism to pave the way for development as a method to improve the standard of living and so being able to use FDI successfully is important in both contexts.[78] It is particularly vital for Ethiopia to improve the standard of living because it is one of the fastest-growing economies in Africa but also has one of the largest populations.[79] Therefore, ensuring that there is adequate access to food should be a particular priority for Ethiopia given its history of famine and food shortages (this is further examined in Chapter 5, section 4.1).[80]

Tanzania is also a developing country located in East Africa, which provides an alternative example to Ethiopia since it has not suffered famines on the same scale as Ethiopia, but more than a quarter of its population is unable to access enough food to meet basic needs.[81] This highlights that adequate access to food has not yet been attained within Tanzania. Tanzania is a useful comparative country because it is more politically-stable than Ethiopia, which has

[76] China-Africa Research Initiative, 'Chinese Investments in Africa' *(John Hopkins School of Advanced International Studies*, 1 January 2021) <http://www.sais-cari.org/chinese-investment-in-africa> accessed 9 September 2021; Claassen Carike, Loots Elsabe, Bezuidenhout Henri, 'Chinese Foreign Direct Investment in Africa: Making Sense of a New Economic Reality' (2012) 6(47) African Journal of Business Management 11583, 11588.
[77] UNCTAD (n 1) 213.
[78] Neumayer, Spess (n 22) 227.
[79] The World Bank, 'Ethiopia: Overview' (*World Bank*, 17 December 2019) <https://www.worldbank.org/en/country/ethiopia/overview> accessed 19 December 2019.
[80] Jason Mosley, 'Peace, Bread and Land: Agricultural Investments in Ethiopia and the Sudan' (2012) Chatham House Briefing Paper AFP BP 2012/01, 2 <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/bp0112_mosley.pdf> accessed 11 December 2019; Peter Koehn, 'Ethiopia: Famine: Food Production and Changes in Legal Order' (1979) 22(1) African Studies Review 51, 52; Berhanu Adenew, 'The Food Security Role of Agriculture in Ethiopia' (2004) 1(1) Journal of Agricultural & Development Economics 138, 141.
[81] Roselyne Alphonce, 'Addressing the Mismatch Between Food and Nutrition Policies and Needs in Tanzania' (2016) Brookings Institute Policy Briefing, 1 <https://www.brookings.edu/wp-content/uploads/2017/10/erh-tanzania-policy-brief.pdf> accessed 6 May 2021.

helped it attract inward-FDI.[82] To that end, it is useful to examine whether Tanzania's political stability has allowed it to better secure FDI to fuel its development than Ethiopia (this is further examined in Chapter 6).

As developing States, FDI is important to Ethiopia and Tanzania since they face further economic pressure to repay external debt.[83] To repay this debt, developing States have to use their already limited domestic capital, which depletes resources needed to improve the standard of living.[84] According to the World Bank, Ethiopia owes over US$27 million and Tanzania owes over US$16 million to international financial institutions (IFIs).[85] At the same time, State-to-State development aid levels have been declining.[86] This is due to reduced State budgets from developed economies from whence this form of financial aid originates.[87] As a result, development aid is not as accessible as it once was for developing States such as Ethiopia and Tanzania.[88] This has real implications for FDI. It means that these developing States increasingly rely upon inward investment flows as a source of external capital for development and need to compete for it.[89]

[82] UNCTAD, 'Investment Policy Review: The United Republic of Tanzania' (2002) UN Doc UNCTAD/ITE/IPC/Misc.9, 11.
[83] Sigrun Skogly, 'Structural Adjustment and Development: Human Rights – An Agenda for Change' (1993) 15 Human Rights Quarterly 751, 756.
[84] Skogly (n 83) 756.
[85] The World Bank, 'International Debt Statistics' (*The World Bank*, 2020) <https://datatopics.worldbank.org/debt/ids/country/TZA> accessed 3 February 2021.
[86] Neumayer, Spess (n 22) 227; Federico Carril-Caccia, Elena Pavlova, 'Foreign Direct Investment and Its Drivers: A Global and EU Perspective' (2018) European Central Bank: Economic Bulletin 4/2018 <https://www.ecb.europa.eu/pub/economic-bulletin/articles/2018/html/ecb.ebart201804_01.en.html> accessed 11 September 2021.
[87] Neumayer, Spess (n 22) 227; Ryan Woodgate, 'Multinational Corporations and Commercialised States: Can State Aid Serve as the Basis for an FDI-Driven Growth Strategy?' (2021) Institute for International Political Economy Berlin Working Paper No. 161/2021 <https://www.ipe-berlin.org/fileadmin/institut-ipe/Dokumente/Working_Papers/ipe_working_paper_161.pdf> accessed 10 September 2021.
[88] Neumayer, Spess (n 22) 227; Carril-Caccia, Pavlova (n 86).
[89] Pablo Selaya, Eva Rytter Sunesen, 'Does Foreign Aid Increase Foreign Direct Investment?' (2012) 40(11) World Development 2155.

The current competition for FDI is intense.[90] Developing States not only compete with developed States for FDI but also other developing States.[91] Even among developing States, it is not a level playing field considering that some developing countries are in the process of economic transition (often these countries are referred to as NICs) with more established industries as well as considerably higher GNI per capita.[92] These economic factors may not seem relevant to the FDI relationship. In practice, however, these factors can make a particular economy more competitive, in terms of attracting FDI, than others.[93] For example, NICs have more mature and diversified industries that have moved beyond a reliance on the primary sector of the economy – namely, natural resources and/or agriculture.[94] This means that from the outset, some States already have a stronger starting position when competing for FDI. With this competition in mind, it is even more imperative that developing States secure FDI, and also are able to use that FDI, to aid their development, which is the justification behind this thesis topic as well as the research question at the core of this thesis.

4. THE RESEARCH QUESTION

Developing States pursue FDI because it presents real opportunities for change when domestic capital is limited or lacking. FDI is important because it has the potential to contribute towards realising an adequate standard of living (as an aspect of development) in these States, such as Ethiopia and Tanzania. Yet, if developing States are in receipt of FDI, then

[90] UNCTAD (n 1) 2; Neumayer, Spess (n 22) 227.
[91] UNCTAD (n 1) 2.
[92] For example: the GNI per capita in Brazil is estimated at US$15,850; US$26,470 in Russia, US$7,680 in India, US$18,170 in China and US$13,250 in South Africa.
World Bank, 'GNI Per Capita, PPP (Current International $)' (*World Bank International Comparison Program Database*, 2018) <https://data.worldbank.org/indicator/NY.GNP.PCAP.PP.CD> accessed 5 February 2021. See also: Dominik Boddin, 'The Role of Newly Industrialized Economies in Global Value Chains' (2016) IMF Working Paper WP/16/207, 6 <https://www.imf.org/external/pubs/ft/wp/2016/wp16207.pdf> accessed 30 January 2020.
[93] Hallward-Driemeier (n 70) 19.
[94] Webb Yackee (n 70) 411.

why has the standard of living not progressed more within these contexts? Additionally, what are the conditions needed in order to harness FDI?

With these issues in mind, this thesis argues that when developing States pursue FDI, they compromise their own needs and so are unable to instil the positive change that they desire.[95] From a domestic law perspective, developing States need to tailor domestic frameworks so that their interests are adequately represented. From an international perspective, these States need to actively participate in the creation and development of IIAs so that their interests are reflected within the respective IIL framework. This requires developing States to be willing actors in order to use law to harness FDI.

The core research question is: How can developing States use FDI in order to ensure that it positively contributes to their development without compromising their own needs? To further narrow the central research question, it is complemented by the following sub-questions:

- What is meant by development and how can this be grounded in IHRL in order to positively contribute to change within the developing State context?

- What is the nexus between FDI and development? And given that FDI is secured within IIL, to what degree can the legal frameworks be changed in order to enable development?

- How should development be conceptualised in order for it to be more inclusive in relation to the interests of developing States?

[95] It is noted that structural conditions have impeded and continue to impede the ability of developing States to harness domestic and international laws in relation to FDI. This analysis is outside the scope of this thesis, but for further discussion on this, see: David Schneiderman, *Revisiting Economic Globalization: Critical Theory and International Investment Law* (Springer 2013) 39, 43.

- What gaps can be identified from the case studies in relation to the interests of developing States, FDI and inclusive development?

- What lessons can be learned from developing States in relation to inclusive development? What are the next steps to achieve positive change?

In order to address these questions, a socio-legal approach will be adopted. The next section of this chapter discusses the relevance of the socio-legal methodology.

5. THE METHODOGICAL APPROACH

In order to meet the research aims, it is important to adopt a socio-legal approach. A socio-legal approach is necessary because FDI is an interdisciplinary concept and cannot be examined purely through a black-letter legal approach. The purpose of this thesis is to explore FDI in relation to the legal frameworks. This methodology allows for a broader analysis of the law, which means that the impact or context of the law can be examined.[96] This contextual analysis would not be possible if a traditional doctrinal methodology were adopted because it would restrict the line of inquiry to one that is purely based on the law.[97]

Instead, a socio-legal methodology allows for interdisciplinary research, so that the analysis of the law can be examined in relation to non-legal concepts and literature, such as development, economics and even State policy. As extended literature reviews, Chapter 2, for

[96] Roger Cotterrell, 'Transnational Networks of Community and International Economic Law' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2013) 134.
[97] Amanda Perry-Kessaris, 'What Does it Mean to Take a Socio-Legal Approach to International Economic Law?' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2013) 3.

example, examines the concept of development and Chapter 3 analyses the FDI-IIL-development nexus. Chapter 4 builds on the analysis of these concepts by constructing the analytical framework using interdisciplinary concepts.

By adopting this methodology, this thesis analyses non-legal concepts, for example development, in order to understand how it is affected by the law and how it can affect the law. This approach is necessary within the context of FDI because as a form of economic activity, it has wider implications on the society of the host State – both positive and negative, which need to be considered.[98] To that end, this allows the researcher to question why developing States are unable to create the right conditions for FDI.

A socio-legal approach allows the researcher to ask what is the interrelationship between FDI and development but also giving due consideration to IIL. To that end, this thesis can examine development, which is not a strictly legal concept in order to construct an analytical framework (in Chapter 4) that blends non-legal and legal factors. The analytical framework is used to assess the gaps that prevent developing States from adequately using FDI to instil the type of change that they want. In that regard, the applicability of the analytical framework is tested within Chapters 5 and 6 using the respective case studies of Ethiopia and Tanzania.

As a method, case studies not only test the analytical framework. These case studies provide the relevant contextual and interdisciplinary examples to identify areas for improvement in relation to these developing States, which are expanded on within Chapter 7. In addition to the case study method, this thesis also employs doctrinal methods in order analyse the law, for example IIAs and the relevant national law of the case study countries. As previously identified, a solely doctrinal method but would not allow for the thesis to analyse the 'bigger picture' in relation to FDI and development. To gather this 'bigger picture', this thesis evaluates the economic growth theory from the perspective of development (in Chapter 2). The economic growth theory is revisited from the perspective of FDI and IIL in Chapter 3.

[98] Perry-Kessaris (n 97) 6.

The analysis of economic growth is complemented with concepts such as the aforementioned 'spillovers' (see section 2.1), which are economic concepts but are not part of the existing legal lexicon.

5.1. Limitations of this Thesis

This thesis is located within the law and development literature, particularly in relation to FDI. There has not been a lot of legal scholarship on this area, as the topic of FDI has primarily been approached from an economic or business perspective.[99] This study homes in on the economic aspects of law and development because the nexus between investment, law and development has not been given sufficient attention within IIL discourse. Additionally, the overlap between investment, law and development needs to be brought to the forefront within IIL in order to actualise development, so that the conceptualisation of development gains traction.

The importance of development is evident from the Sustainable Development Goals and progressive initiatives undertaken by regional institutions.[100] These initiatives are complementary to this thesis as they highlight that development is a holistic process and goal that all States need to strive towards. Nonetheless, it is not

[99] For legal analysis, see: Priscilla Schwartz, 'Capitalism, International Investment Law and the Development Conundrum' (2013) 6(2) Law & Development Review 217; Nitish Monebhurran, 'The (Mis)Use of Development in International Investment Law: Understanding the Jurist's Limits to Work with Development Issues' (2017) 10 Law & Development Review 451. For examples of literature from economics or business studies, see: Lutao Ning, Fan Wang, 'Does FDI Bring Environmental Knowledge Spillovers to Developing Countries? The Role of the Local Industrial Structure' (2018) 71 Environmental & Resource Economics 381; Nicholas Bailey, 'Exploring the Relationship Between Institutional Factors and FDI Attractiveness: A Meta-Analytical Review' (2018) 27 International Business Review 139.

[100] UNGA Res 70/1 (21 October 2015) UN Doc A/RES/70/1. See also: The African Commission on Human and Peoples' Rights, 'Pretoria Declaration on Economic, Social and Cultural Rights in Africa' (Dakar 7 December 2004) ACHRPR/Res.73(XXXVI)04, preamble; African Union, 'Five Year Priority Programme on Employment, Poverty Eradication and Inclusive Development' (Second Meeting of the Specialised Committee on Social Development, Labour and Employment, Algiers, April 2017) <https://au.int/sites/default/files/pages/33794-file-au-ilo_5ypp_-english.pdf> accessed 22 February 2022.

possible to include these wider and varied approaches to development,[101] because these wider strands would 'blur' the focus of this thesis and mean that this researcher would be unable to do justice to the central research question. Instead, these laudable wider strands need to be read in conjunction with this thesis, as part of the bigger 'puzzle' in relation to investment, law and development.

To unravel part of the development puzzle, Chapter 4 focuses on investment. This thesis acknowledges that within the IIL literature, there is much-needed debate surrounding the fair and equitable treatment standard, especially in relation to the constraining potential this provision has on the flexibility of developing host States to enact legislation or policies, which feeds into their ability to regulate for the public interest.[102] Rather than re-tread the ground where scholars have already critiqued the FET standard,[103] this thesis, instead, addresses provisions of IIAs to provide an alternate contribution to the existing knowledge base.

To unify the aforementioned main strands of FDI and development, this thesis is not purely based in the discipline of law, it also tackles non-legal concepts because the relationship between FDI and development is not a strictly legal one and requires

[101] See: UNGA Res 41/128 (4 December 1986); UN Brundtland Commission, 'Report of the World Commission on Environment and Development: Out Common Future' (*UN*, 1987) para 27 <http://www.un-documents.net/wced-ocf.htm> accessed 1 March 2022; Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2011) 143-145.

[102] Jean Kalicki, Suzana Medeiros, 'Fair, Equitable and Ambiguous: What is Fair and Equitable Treatment in International Investment Law?' (2007) 22 ICSID Review 24; Jason Haynes, 'The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns – The Case for Regulated Rebalancing (2013) 14 Journal of World Investment & Trade 114.

[103] For further examples, see: Roland Kläger, *Fair and Equitable Treatment in International Investment Law* (CUP 2011) 154; Yulia Levashova, 'Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law' (2020) 67 Netherlands International Law Review 233; Jacob Stone, 'Arbitrariness, the Fair and Equitable Treatment Standard and the International Law of Investment' (2012) 25 Leiden Journal of International Law 77; Surya Subedi, *International Investment Law: Reconciling Policy and Principle* (4th edn, Bloomsbury 2020) 210-220.

an interdisciplinary line of inquiry. The relationship between FDI and development is a complex area of study because it is so broad, which means it can be approached from a myriad of perspectives. Law, is but one strand within this multi-layered puzzle and so, law needs to be considered as a piece of this bigger puzzle. To that end, this thesis touches on a particular aspect of the law and development in relation to developing States, which is presented in Chapter 4 in the form of the analytical framework. The thesis tests the analytical framework within the case study chapters but there is scope for study to further apply this framework to other developing countries and other investment-related domestic legislation.

For reasons relating to time and space, the researcher focuses on relevant aspects of domestic legislation and certain provisions of IIAs. This is because it is not possible to cover all aspects of law. To that end, relevant provisions of the Constitutions of Ethiopia and Tanzania will be examined, in addition to relevant provisions of relevant investment legislation.

For financial reasons, this research is desk-based. Therefore, it should be noted that all efforts have been made to access the latest literature. However, this researcher does not read Amharic or Kiswahili. Accordingly, due to the limited economic resources of the case study countries, up-to-date materials in English may not be readily available online. Given that development is also a subjective and sensitive concept, the case study countries may not even publish materials in relation to this area. However, all efforts have been made to ensure that the sources are up-to-date and reliable but it should be noted that the researcher is reliant on resources which are online and also in English.

The case study countries have been chosen carefully in relation to the relevance to the subject-matter of this thesis. These case studies have also been chosen on the basis of the availability of information and accessibility of this information. However, as developing States, the context is subject to rapid change and whilst all endeavours have been made to keep up-to-date as much as possible, this is only possible within the time constraints of this thesis and the ability of these States to publish this information.[104] Nonetheless, this thesis uses this material to offer insights into how developing States can use FDI to their advantage, which also provides the basis for suggestions for reform in relation to the analytical framework.

Within the existing literature, much has been written between the asymmetric relationships between developed States and developing States, such as, Ethiopia and Tanzania. In particular, scholars have examined the colonial legacy that continues to adversely affect developing States which contributes to the availability (or more accurately, the lack of) choice that these States have (further analysed in Chapter 2, section 2.2).[105] Given that this colonial legacy mires the relationship between

[104] Within the course of writing this thesis, the COVID-19 pandemic occurred and also the President of Tanzania died in March 2021. Neither of these circumstances were anticipated in the planning of this research project.
For details about the death of Tanzania's President, see: BBC News, 'John Magufuli: Tanzania's President Dies Aged 61 After COVID Rumours' (*BBC News,* 18 March 2021) <https://www.bbc.co.uk/news/world-africa-56437852> accessed 23 September 2021.

[105] For further academic discussion on the implications of the colonial legacy on developing States, please see: Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 156; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP 2003) 107-108; Radha D'Souza, 'International Law and Development : From 'Company Raj' to Global Governance Via Indirect Rule' in Sam Adelman, Abdul Paliwala (eds), *The Limits of Law and Development: Neoliberalism, Governance and Social Justice* (Routledge 2020) 170; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013) 151; Lauge Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP 2015) 46; José Alvarez, Contemporary Foreign Investment Law: An Empire of Law or the Law of Empire (2009) 60 Alabama Law Review 943, 955.

developed and developing States, new(er) actors in the form of MNCs[106] and other developing States have stepped forward, which is an emerging but still under-explored area of study. This thesis explores the FDI-development nexus between developing States, more specifically from the context of China-Ethiopia and China-Tanzania.

China is used by this thesis as an example of a developing capital-exporting State.[107] China is a noteworthy point of further study because of its rapid economic rise, which is nothing short of remarkable.[108] This economic rise has, in turn, fuelled its ability to make socio-economic improvements to its society.[109] However, China is a unique hybrid among developing States, as it straddles the line between its classification as a developing State, yet it is also considered to be a developed economic superpower.[110] China is a good point of reference and instructive even if it is not a perfect analogy because, as will be further argued for in this thesis, China

[106] The significance of MNCs in relation to society and whether they have responsibility within international law is an important area of further study that overlaps with this thesis. Due to time and space, it was not feasible to include detailed analysis on this topic but the researcher is aware of relevant issues. For further information on this area of law, please see: Address of the Secretary-General, 'World Economic Forum in Davos' (1999) UN Doc SG/SM/6881/Rev.1; UNCHR, Res 2005/69 (2005) UN Doc E/CN.4/2005/91, 1; UNCHR, Report of the Special Representative of the Secretary-General on The Issue Of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (7 April 2008) UN Doc A/HRC/8/5, paras 3, 5; Andrew Clapham, Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2001) 24(3) Hastings International & Comparative Law Review 339; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 12.

[107] Kevin Cai, 'Outward Foreign Direct Investment: A Novel Dimension of China's Integration into the Regional and Global Economy' (1999) 160 The China Quarterly 856; Karl Sauvant, Michael Nolan, 'China's Outward Foreign Direct Investment and International Investment Law' (2015) 18(4) Journal of International Economic Law 893.

[108] Zhu Tian, *Catching Up to America: Culture, Institutions, and the Rise of China* (CUP 2021) 13; Yi Wen, *The Making of an Economic Superpower: Unlocking China's Secret of Rapid Industrialization* (World Scientific 2016) 100.

[109] Tian (n 108) 23; Yanlai Wang, *China's Economic Development and Democratization* (Ashgate 2017) 10.

[110] Yueh refers to this as an unusual paradox. See: Linda Yueh, *China's Growth: The Making of an Economic Superpower* (OUP 2013) 32. For further analysis on China's rise as an economic superpower, see: Wang (n 109) 10; Edward Friedman, 'How Economic Superpower China Could Transform Africa' (2008) 14 Journal of Chinese Political Science 1; Lawrence Sullivan, 'China's Growth: The Marking of an Economic Superpower' (2015) 88 Pacific Affairs 163.

represents how a State can forge its own path without losing its own identity. To that end, this study proposes suggestions for reform based on China's (and other newly-industrialised countries) experiences in relation to FDI and development (see Chapter 7), although it is noted that these examples and suggestions may be difficult to implement in practice. Nonetheless, change remains necessary if all States are to benefit from a higher state of being, which is why this research project is warranted.

6. OUTLINE OF STRUCTURE

Chapter 2 introduces the concept of development and reviews the literature that underpins this research in order to understand how development has been used by academics and also, developing States. Drawing on the theory of economic growth, this chapter highlights that development has traditionally been conceptualised from a rigid and Western perspective. Owing to this perspective, it is argued that this conceptualisation is not suitable for developing States and development needs to be considered from a more inclusive manner, which also includes an IHRL approach. And indeed, while law and development studies have moved on, IIL remains grounded in that old myopic understanding of (economic) development.

Chapter 3 builds on the previous chapter and reviews the literature in relation to the nexus between FDI, IIL and development. This chapter identifies how FDI has the potential to enable inclusive development, which draws on China as an example of how a host State has managed to use FDI to its own advantage. Chapter 3 examines the IIL literature in relation to

whether IIAs equate to more FDI and also, the compatibility of IIL rules with IHRL as an exemplar of inclusive development.

Chapter 4 develops an analytical framework for inclusive development within which to assess the foundational principles which are needed in order to allow developing States to harness FDI, so that FDI benefits their societies. Chapters 5 and 6 applies and tests the analytical framework within the context of Ethiopia and Tanzania respectively. Chapters 5 and 6 provide key insights into the Global South context by firstly analysing the domestic frameworks of these case study countries, before further applying the analytical framework to the South-South context in relation to Ethiopia's and Tanzania's investment agreements with China. These case studies provide insights into what gaps exist in relation to FDI and inclusive development within the developing State context.

By identifying these gaps in relation to these case study chapters, Chapter 7 further identifies areas that need reform and provides recommendations. Chapter 7 highlights the applicability of the analytical framework by using further examples of best practice from China and other NICs in order to address the central research question of how developing States can use FDI so it positively contributes to their development without compromising their own needs.

Finally, Chapter 8 summarises the key arguments from this thesis. This chapter links back to broader issues in light of the conceptualisation of development and economic growth. It outlines the further applicability of the analytical framework in relation to developing States as a way-forward for future change and discusses areas for further research.

CHAPTER 2 – CENTRAL THEMES

INTRODUCTION

It is a complex task finding a working definition of development, especially because it is not a strictly legal concept.[1] Scholars have attempted to define development and have chronologically mapped the evolution of the concept within the law and development setting.[2] Rather than replicate the work of these excellent scholars, this author scrutinises central themes in relation to the conceptualisation of development with a particular focus on developing countries in the Global South.

Traditionally, development is viewed from an economic perspective, but it is argued that this is too narrow and constricting since it is based on Western thinking and experience;[3] rather, development needs to be examined as an inclusive, shifting and wider concept. To achieve this chapter's aims, it will first offer a definition of development through the lenses of expectations and aspirations as a transformative process, which is and should be, divorced from traditional Western notions. Secondly, a critique of the classic (Western) economic perspective to development is offered, arguing that law can play both an enabling and a regulating role rather than keeping it rooted in Western traditions. Thirdly, the chapter will expand on development as a more inclusive, shifting and wider concept that holistically embraces its transformative powers. To that end, the most fundamental level of need to drive development is explored: the right to food – used as an exemplar of development. The chapter

[1] Wouter Vandenhole, 'The Interplay Between Human Rights Law and Development Law: Potential, Ambiguities and Tensions' (2008) 2 Human Rights & International Legal Discourse 3, 5.
[2] Elliot Burg, 'Law and Development: A Review of the Literature and a Critique of "Scholars in Self-Estrangement"' (1977) 25 American Journal of Comparative Law 492, 495; David Trubek, Marc Galanter, 'Scholars in Self Estrangement: Reflections on the Crisis in Law and Development Studies' (1974) Wisconsin Law Review 1062, 1065.
[3] Sam Adelman, Abdul Paliwala (eds), *The Limits of Law and Development: Neoliberalism, Governance and Social Justice* (Routledge 2020) 5.

concludes with an argument that development is more than an economic end-goal, it is a fundamental human rights issue and ought therefore to sit within the IHRL discourse. To that end, this thesis offers an alternative insight into development by bridging law and development studies and IIL.

1. DEFINING DEVELOPMENT

Development is about progress; it is about achieving a higher stage of 'being'.[4] For those seeking a 'developed status', development is about satisfying basic needs, including access to food, shelter, education, healthcare, reduction of poverty, and technological and scientific advancement amongst others.[5] How development is achieved, however, is subject to controversy and debate.[6] There is no single formula, especially since there is no agreed upon definition but many different conceptualisations.[7]

From a classic (and narrow) perspective, development is tied to modernisation and income per capita.[8] This economic perspective, however, is rooted in Western capitalist theories which place an emphasis on classic Statehood (Westphalian modelling) and capital as mechanisms

[4] Zuhayr Mikdashi, *The Evolution of Economic Wellbeing: Progress-Driven Economic Policies in the Era of Globalization* (Routledge 2019) 4.
[5] Luca D'Acci, 'Measuring Well-Being and Progress' (2011) 104 Social Indicators Research 47, 49.
[6] John Heffron*, The Evolution of Development Thinking: Governance, Economics, Assistance and Security* (Palgrave Macmillan 2016) 6; Howard Handelman, Rex Brynen, *Challenges of the Developing World* (9th edn, Rowman & Littlefield 2019) 3; The State Council of the People's Republic of China, 'The Right to Development: China's Philosophy, Practice and Contribution' (*The State Council of the People's Republic of China*, 1 December 2016) part III <http://english.www.gov.cn/archive/white_paper/2016/12/01/content_281475505407672.htm > accessed 10 April 2020.
[7] Celine Tan, 'Beyond the 'Moments' of Law and Development: Critical Reflections on Law and Development Scholarship in a Globalized Economy' (2019) 12(2) Law & Development Review 285; Kerry Rittich, 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social' (2004) 26 Michigan Journal of International Law 199, 203.
[8] Abbas Mirakhor, Hossein Askari, 'The Evolution of the Western Concept of Development' in Abbas Mirakhor, Hossein Askari (eds), *Islam and the Path to Human and Economic Development* (Springer 2010) 1.

for change.[9] For many developing States in the Global South which have followed this approach, this has not led to the desired results. Arguably, the reason for this can be found in the fact that these States are modelled on classic Statehood templates without having the necessary history or experience to 'grow' into said templates.[10]

In contrast to the aforementioned traditional perspective, development should be considered from a more inclusive perspective. As part of this inclusive conceptualisation, development is a multidimensional and subjective concept; how it is conceived is dependent on the discipline from which it is conceived and who is approaching the concept.[11] Accordingly, there is no 'one size fits all' approach. Diverse understandings to development are welcome, as they contribute to a richer understanding and arguably facilitate a holistic discourse. At the same time, these diverse stances can also be a challenge. This is because it makes the concept even more intangible and unwieldy, especially since there is no intrinsic core as to what elements constitute development.[12] As scholars work on alternative but innovative conceptualisations, the implicit transformational potential of development is acknowledged but

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[9] Kanishka Jayasuriya, 'Globalization, Law, and the Transformation of Sovereignty: Emergence of Global Regulatory Governance' (1999) 6(2) Indiana Journal of Global Studies 425, 431.

[10] Jayasuriya (n 9) 431; Shahar Hameiri, *Regulating Statehood: State Building and the Transformation of the Global Order* (Springer 2010) 25.

[11] Tan (n 7) 288; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP 2003) 149; Burg (n 2) 494.
Development is studied within politics, sociology and economics, for example, see: Anirudh Krishna, 'Who Became Poor, Who Escaped Poverty, and Why? Developing and Using a Retrospective Methodology in Five Countries' (2010) 29(2) Journal of Policy Analysis and Management 351; Simplice Asongu, Jacinta Nwachukwu, 'Foreign Aid and Inclusive Development: Updated Evidence from Africa, 2005-2012' (2016) 98 Social Science Quarterly 282; Silvia Terzi, 'How to Integrate Macro and Micro Perspectives: An Example of Human Development and Multidimensional Poverty' (2013) 114(3) Social Indicators Research 935; Vincenzo Mauro, Mario Biggeri, Filomena Maggino, 'Measuring and Monitoring Poverty and Well-Being: A New Approach for the Synthesis of Multidimensionality' (2016) 135 Social Indicators Research 75; Simplice Asongu, Jacinta Nwachukwu, 'The Comparative Inclusive Human Development of Globalisation in Africa' (2017) 134(3) Social Indicators 1027; William Rees, 'An Ecological Economics Perspective on Sustainability and Prospects for Ending Poverty' (2002) 24 Population and Environment 15; Christian Berndt, 'Behavioural Economics, Experimentalism and the Marketization of Development' (2015) 44(4) Economy and Society 576; Nasreddine Kaidi, Sami Mensi, Mehdi Ben Amor, 'Financial Development, Institutional Quality and Poverty Reduction: Worldwide Evidence' (2019) 141 Social Indicators Research 131.

[12] Tan (n 7) 288.

rarely expanded upon. This transformational potential needs to be addressed further in order to understand how the concept can be of use to States located in the Global South.

Before this can be addressed, however, we have to return to economic development because it is the dominant approach. While flawed and ill-fitting from the perspective of the Global South, it is a starting point for analysis and critique is needed in order to understand why it is not appropriate for developing States.

2. A CRITIQUE OF THE CLASSIC ECONOMIC PERSPECTIVE TO DEVELOPMENT

Development has not always been concerned with the potential for positive transformation, as this has often been seen as secondary to economic performance.[13] As part of the 'trickle-down' theory, optimal economic performance is said to promote employment and wages.[14] In turn, increased wages in the form of additional income is said to boost the standard of living.[15] Yet, the desired outcome of improvements to the standard of living via economic development has not been achieved across the world.[16]

2.1. Identifying Economic Development

[13] Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton University Press 2008) 2
[14] David Trubek, 'Law and Development: Forty Years After 'Scholars in Self-Estrangement' (2016) 66(3) University of Toronto Law Journal 301, 303.
[15] Joseph Stiglitz, 'Inequality and Economic Growth' (2016) 86 Political Quarterly 134.
[16] John Galbraith sardonically uses the metaphor, 'If you feed the horse enough oats, some will pass through to the road for the sparrows' in relation to the 'trickle-down' approach.
John Galbraith, 'Recession Economics' (*New York Review of Books*, 4 February 1982) <https://www.nybooks.com/articles/1982/02/04/recession-economics/> accessed 15 August 2020.

Economic growth is a key aspect of economic development.[17] Economic development is measured by gross domestic product (GDP) per capita and is an indication of a country's overall wealth.[18] Although economic development is still measured in GDP, there has been a shift to use gross national income (GNI) as a more inclusive indicator of economic development.[19] While GDP traditionally refers to the value of finished products and services within a given country,[20] GNI also includes further statistics, such as population, household income, unemployment, imports, exports, inflation, foreign exchange reserves and imported capital.[21] The outcome produces a set of figures, which helps identify whether a country is 'developed' or not.

High-income economies are to be considered as 'developed' when the GNI per capita exceeds US$12,536.[22] Upper-middle-income economies are *en route* to 'developed status' and refer to those countries where the GNI per capita ranges from US$4,056 to US$12,535.[23] Lower-middle income economies, where the GNI per capita ranges from US$1,036 to US$4,045, and low-income economies where the GNI per capita is US$1,035 or less are

[17] Daron Acemoglu, 'Introduction to Economic Growth' (2012) 147 Journal of Economic Theory 545, 546.
[18] Acemoglu (n 17) 546.
[19] James Cypher, James Dietz, *The Process of Economic Development* (Routledge 2008) 34.
[20] Henrik Van Den Berg, *Economic Growth and Development* (3rd edn, World Scientific 2016) 61; Tatyana Soubbotina, Katherine Sheram, *Beyond Economic Growth: Meeting the Challenges of Global Development* (World Bank 2000) 9.
[21] The World Bank, 'World Development Indicators: Economy' (*The World Bank*, 2020) <https://datatopics.worldbank.org/world-development-indicators/themes/economy.html> accessed 27 April 2020.
[22] The categorisation of developing and developed shifts as the global economy expands. According to the World Bank, developing countries are classified as low or middle-income economies. Low income countries are those with a GNI per capita of US$1,025 or less; lower middle-income countries refer to those with a GNI per capita of US$1,026-US$3,995. For further details, see: World Bank Data Team, 'New Country Classifications by Income Level: 2019-2020' (*The World Bank*, 1 July 2019) <https://blogs.worldbank.org/opendata/new-country-classifications-income-level-2019-2020> accessed 28 April 2020; World Bank Data (a), 'World Bank Country and Lending Groups' (*The World Bank*, 2019) <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> accessed 28 April 2020; World Bank Data (b), 'How Are the Income Group Thresholds Determined?' (*The World Bank*, 2019) <https://datahelpdesk.worldbank.org/knowledgebase/articles/378833-how-are-the-income-group-thresholds-determined> accessed 28 April 2020.
[23] World Bank (a) (n 22); World Bank (b) (n 22).

considered to be 'developing'.[24] Almost 32% of countries surveyed by the World Bank are classified as 'developing' which suggests that the level of necessary economic development has not been achieved and reform is still needed.[25]

Additionally, GNI as an indicator for economic development still does not go far enough to capture life's idiosyncrasies.[26] According to these figures, Ethiopia is considered to be a low-income economy and Tanzania is categorised as a lower-middle income economy.[27] That is, both are still developing countries. These classifications do not provide any detail about the measures for development already in place, or the types of reform that may be needed. Furthermore, since GNI is still premised on economic output and quantitative data, it focuses on goods and productivity over people and their respective needs.[28] Furthermore, as an aggregate statistic, GNI is not representative of subtle disparities that may exist within a given country's context and so certain individuals or groups may be overlooked.[29] This seems contrary to the notion of development referred to in the previous section, which is concerned with the positive transformation of lives. To facilitate this positive transformation, the State needs to play an active role in managing economic growth, but the irony is that economic growth is premised on the non-intervention of the State. This argument is further pursued throughout this thesis but is particularly explored in Chapter 4 (section 2).

[24] World Bank (a) (n 22); World Bank (b) (n 22).
[25] World Bank (a) (n 22); World Bank (b) (n 22).
[26] The World Bank Helpdesk, 'Why Use GNI per Capita to Classify Economies into Income Groupings?' (*The World Bank*, 2020) <https://datahelpdesk.worldbank.org/knowledgebase/articles/378831-why-use-gni-per-capita-to-classify-economies-into> accessed 10 August 2020.
[27] World Bank (a) (n 22); World Bank (b) (n 22).
[28] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 1994) 60.
[29] Amanda Perry-Kessaris, 'Prepare Your Indicators: Economics Imperialism on the Shores of Law and Development' (2011) 7(4) International Journal of Law in Context 401, 405.

2.2. Economic Growth – Constraints On The State

Economic growth has been marketed by Western States and international financial institutions as a path to modernisation and (economic) development.[30] The idea that economic growth mobilises development is based on classic theories put forward by Western economists, *inter alia*, Adam Smith, John Maynard Keynes and David Ricardo.[31] This approach places the onus on markets and commercial entities (as private actors) to self-regulate and efficiently allocate resources.[32] In theory, with increased efficiency among private actors, labour-intensive primary industry will be replaced with secondary and tertiary industries, which are more profitable for individuals and corporations.[33]

In contrast, the State was seen as an exogenous actor in relation to the economy and regulatory interventions are discouraged.[34] Instead, a complex blend of legal and institutional frameworks were recommended so that private actors could operate freely in order to advance

[30] Lee also argues that economic development has been underpinned by neoliberal ideals put forward by international institutions via the Washington Consensus.
Yong-Shik Lee, *Law and Development: Theory and Practice* (Routledge 2018) 21-24.
See also: Brian Tamanaha, 'The Primacy of Society and the Failures of Law and Development (2011) 44(2) Cornell International Law Journal 209, 212; Sol Picciotto, *Regulating Global Capitalism* (CUP 2011) 161; Julio Faundez, 'International Economic Law and Development: Before and After Neo-Liberalism' in Julio Faundez, Celine Tan (eds), *International Economic Law, Globalization and Developing Countries* (Edward Elgar 2010) 25; Burg (n 2) 506.
[31] For further details about these economists and their theories, see: Linda Yueh, *The Great Economists: The Thinkers Who Changed the World and How They Can Help Us Today* (Penguin 2018) 7-9. See also: Clair Gammage, 'Overcoming the Development Deficit of Article XXIV: Promoting Equality Through North-South RTAs' (2016) 9 Law & Development Review 69, 75; Mark Skousen, *The Big Three in Economics: Adam Smith, Karl Marx and John Maynard Keynes* (Routledge 2007) x-xi.
[32] Adam Przeworski, 'The Neoliberal Fallacy' (1992) 3(3) Journal of Democracy 45, 48.
[33] In economic or business terms, this is referred to as 'added value'.
For further details, see: Michael Porter, *The Competitive Advantage of Nations* (Simon and Schuster 2011) 773.
[34] Tan refers to this as a 'decentring of the state from its regulatory and function roles… through increasing outsourcing of the state's prescriptive and enforcement functions to private entities…'
For further details, see: Tan (n 7) 296. See also: Picciotto (n 30) 161; Faundez (n 30) 12; Michael Trebilcock, Mariana Mota Prado, *Advanced Introduction to Law and Development* (Edward Elgar 2014) 18-19; Colin Crouch, 'The Paradoxes of Privatisation and Public Service Outsourcing' in Michael Jacobs, Mariana Mazzucato (eds), *Rethinking Capitalism: Economics and Policy for Sustainable and Inclusive Growth* (Wiley Blackwell 2016) 237.

economic growth.[35] Law became a tool concerned with formalising property rights and contractual relationships, which were based on Western concepts.[36] These concepts reinforced the rights of private actors rather than advance and enable the betterment of society.[37] It also meant that Western States could better secure their assets abroad in developing countries because their private rights were protected through law.[38] Arguably, law has become an instrument that subverts the interests of developing countries in favour of the West whilst at the same time market fundamentalist ideals were also embedded.[39]

Markets and private actors continue to be viewed as drivers for economic growth but they do not always make the best decisions for society. If a 'trickle-down' approach is to percolate through to society, markets and private actors need greater supervision by the State to ensure that the benefits are equitably distributed.[40] Instead, when corporations gain benefit in the form of profit, this is internally retained and also gives them greater economic influence over the State.[41] Baxi asserts that this influence is particularly acute in developing countries

[35] Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (2nd edn, Reed Elsevier 2002) 88-89; Gillian MacNaughton, Diane Frey, 'Introduction' in Gillian MacNaughton, Diane Frey (eds), *Economic and Social Rights in a Neoliberal World* (CUP 2018) 3.
[36] Santos (n 35) 88-89; MacNaughton, Frey (n 35) 3.
[37] Duncan Kennedy, Three Globalizations of Law and Legal Thought: 1850-2000 in David Trubek, Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 36. See also: Sundhya Pahuja, 'Decolonising International Law: Development, Economic Growth and the Politics of Universality' (DPhil thesis, University of London 2008) 75-76.
[38] For example, John Locke and Jeremy Bentham, see: Radha D'Souza, 'International Law and Development: From 'Company Raj' to Global Governance via Indirect Rule in in Sam Adelman, Abdul Paliwala (eds), *The Limits of Law and Development: Neoliberalism, Governance and Social Justice* (Routledge 2020) 167.
[39] This was further reinforced by further neoliberal policies advocated by international financial institutions.
Sam Adelman, Abdul Paliwala (eds), *The Limits of Law and Development: Neoliberalism, Governance and Social Justice* (Routledge 2020) 5; Julio Faundez, 'Rule of Law or Washington Consensus: The Evolution of the World Bank's Approach to Legal and Judicial Reform' in Amanda Perry-Kerraris (ed), *Law in the Pursuit of Development* (Routledge 2010) 180; Upendra Baxi, 'Voices of Suffering and the Future of Human Rights' (1998) 8 Transnational Law & Contemporary Problems 125, 163.
[40] Przeworski (n 32) 46; Baxi (n 39) 164-165.
[41] Jernej Cernic, *Corporate Accountability under Socio-Economic Rights* (Routledge 2017) 79; Kate Macdonald, 'Re-Thinking 'Spheres of Responsibility': Business Responsibility for Indirect Harm' (2011) 99 Journal of Business Ethics 549, 553.

owing to the disparity of revenues between the State and corporations operating within them.[42] The difficulty then arises because the State is not supposed to interfere with the operations of private actors.[43]

The operations of private actors are not guaranteed to enhance society, especially without the interference of the State.[44] Even though affirmative State action is the paradoxical secret to economic growth that Western States have benefited from.[45] The economic growth model may have worked for Western countries in the past, the associated rules and systems are predicated on very different historic and social conditions.[46] In other words, the model lacks historic and social connections in the context of developing countries?[47] This lack of connection forces developing countries onto a path that inherently limits their choices.[48] Scholars have argued that this is a form of path dependency, since the State is not able to act freely because they are constrained by the economic growth model, while at the same time

[42] Baxi (n 39) 164-165.
[43] Muthucumaraswamy Sornarajah, 'The Clash of Globalizations and the International Law on Foreign Investment' (2003) 10(2) Canadian Foreign Policy Journal 1, 12-13; Robert McCorquodale, 'Corporate Social Responsibility and International Human Rights Law' (2009) 87 Journal of Business Ethics 385, 387; Baxi (n 39) 164-165; Upendra Baxi, 'Market Fundamentalisms: Business Ethics at the Altar of Human Rights' (2005) 5 Human Rights Law Review 1, 19.
[44] Kerry Rittich, 'The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social' in David Trubek, Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 228; Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (2nd edn, Princeton University Press 2012) 5.
[45] F. Charles Sherman, 'Law and Development Today: The New Developmentalism' (2009) 10(9) German Law Journal 1257, 1270.
See also: Raymond Plant, *The Neo-Liberal State* (OUP 2010) 30-31; Joseph Stiglitz, 'Creating the Institutional Foundations for a Market Economy' in Duncan Kennedy, Joseph Stiglitz (eds), *Law and Economics with Chinese Characteristics* (OUP 2013) 96.
[46] M. Forsyth, B. Haggart, 'The False Friends Problem for Foreign Norm Transplantation in Developing Countries' (2014) 6(2) Hague Journal on the Rule of Law 202, 203.
[47] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 6.
See also: Julio Faundez, 'Introduction: Legal Technical Assistance' in Julio Faundez (ed), *Good Government and Law: Legal and Institutional Reform in Developing Countries* (Springer 1997) 3; Jaako Husa, 'Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law' (2018) 16(2) Chinese Journal of Comparative Law 129, 130.
[48] Francis Snyder, 'Law and Development in the Light of Dependency Theory' (1980) 14(3) Law and Society Review 723, 748

existing historical and social linkages are ignored.[49] Economic growth as a template for development lacks the flexibility which is needed.[50] This, however, is not acknowledged by the economic model.[51]

In addition to path dependency as a constraint on the State, economic development may sit 'at odds' with existing values within a given State.[52] As previously mentioned, economic growth is a reflection of the Western experience for development and so fails to acknowledge that development may mean something different for societies in developing countries.[53] Poverty and growing socio-economic inequalities in developing countries requires a fresh look at how the notion of development is applied, particularly because economic growth through law lacks meaningful value.[54] Lee argues that ideological incompatibility is one of the inherent problems of this given model.[55] Ideological compatibility is particularly important when considering law as an enabling tool for positive change. Without rooting law within a historical and social context, developing States will struggle to build enough momentum for political will and capacity that are necessary to give effect to development strategies.[56]

Clearly, for economic growth to have meaning and lead to development it needs to be complemented by wider social factors.[57] Baxi extends this argument further, by stating that human rights need to work in tandem with economic growth and need to be contextualised in order to be of real use to developing countries.[58] He acknowledges that economic growth is

[49] Snyder (n 48) 748; Mariana Prado, Michael Trebilcock, 'Path Dependence, Development, and the Dynamics of Institutional Reform' (2009) 59(3) University of Toronto Law Journal 341, 344.
[50] Joachim Savelsberg, 'Dialectics of Norms in Modernization' (2002) 43(2) Sociological Quarterly 277, 282.
[51] Yong-Shik Lee, 'General Theory of Law and Development' (2017) 50(3) Cornell International Law Journal 415, 425.
[52] Sam Adelman, 'Between the Scylla of Sovereignty and the Charybdis of Human Rights: The Pitfalls of Development in Pursuit of Justice' (2008) 2 Human Rights & International Legal Discourse 17, 20.
[53] Adelman (n 52) 22.
[54] Lee (n 51) 434-435.
[55] Lee (n 51) 434-435.
[56] Lee (n 51) 455.
[57] Amartya Sen, *Development as Freedom* (OUP 1999) 40.
[58] Baxi (n 39) 166.

necessary but there needs to be greater scrutiny of how it is conceived and the ways in which it is pursued.[59] Development needs to be more inclusive and not simply based on economic growth.[60] Further scholars have echoed and expanded upon this call; they have urged for more diverse conceptualisations of development.[61]

3. DEVELOPMENT – A MORE INCLUSIVE, SHIFTING AND WIDER CONCEPT

As examined in the previous section, development is often viewed as an outcome that is dependent on economic growth. However, economic growth is by no means the only aspect of development. Development as a constantly moving target is a means to improve, and is also the means to boost societal well-being.[62] This means that States cannot and should not rest on their laurels once an objective has been achieved.[63] Instead, the more economically advanced the State, the more it needs to work towards other goals, such as ensuring that the well-being of society is achieved in an equitable manner.[64] As such, economic growth is not the only aspect of development, it is merely a facilitating aspect.

[59] Baxi (n 39) 166. See also: Upendra Baxi, 'Some Emergent Geographies of Injustice: Boundaries and Borders in International Law' (2016) 23 Indiana Journal of Global Studies 15, 28.
[60] Escobar (n 28) 17.
[61] Trubek (n 14) 320; Sen (n 57) 19; Colin Crawford, 'Redefining and Analyzing "Development" and the Role and Rule of Law' (2015) 8(2) Law & Development Review 237, 242-243; Lee (n 51) 444. See also: Ada Ordor, Faizel Ismail, 'Mapping Law and Development from African Perspectives: An Overview' (2018) 11(2) Law & Development Review 251; Maartje De Visser, 'The Constitutionalization of Development' (2019) 12(3) Law & Development Review 637.
[62] Sen (n 57) 160; Arjun Sengupta, 'The Human Right to Development' (2004) 32(2) Oxford Development Studies 179, 181; Yash Ghai, State, Society and Economy: Perspectives on African Constitutions (British Academy: Maccabaean Lectures in Jurisprudence, London, 1 October 2015); Sakiko Fukuda-Parr, 'The Human Development Paradigm: Operationalizing Sen's Ideas on Capabilities' (2003) 9 Feminist Economist 301, 307-208.
[63] Ghai (n 62); Sengupta (n 62) 181.
[64] Alston argues that the State needs to continuously work towards social human rights, see: UNCHR, 'Report of the Special Rapporteur on extreme poverty and human rights' (23 April 2019) UN Doc A/HRC/41/39/Add.1, para 95.

3.1. Integrating the Economic Sphere Within Inclusive Development

While economic growth is a part of the wider picture of development, it is not and should not be the dominant aspect.[65] Increased employment opportunities can enhance societal well-being because it enables individuals to have greater choices and capability in life, so they not only purchase basic necessities but also have the means to afford healthcare and education.[66] However, not everyone benefits equally because there may be barriers to employment such as lack of education or skills. In turn, these barriers limit the 'social opportunities' afforded to these individuals. To overcome these barriers, economic growth cannot work in vacuum, as there needs to be wider investment in social opportunities, for example in education. Otherwise, further employment opportunities from (economic) development are meaningless and will not contribute to an improved standard of living.[67] Arguably, the economic aspect of development is a piece of the overarching puzzle but is not the sole factor.[68]

The strength of this part of the puzzle refers to its ability to positively transform lives by giving individuals the financial means to determine and pursue their own goals.[69] This is referred to as a form of personal sovereignty or agency.[70] This personal sovereignty does not come naturally because the State needs to channel economic growth into opportunities.[71] As

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[65] Sen (n 57) 11.
[66] Sen refers to this as the '"agency aspect" of the individual… someone who acts and brings about change'.
See: Sen (n 57) 18.
[67] S. Chandrasekhar, 'Population Growth, Socio-Economic Development and Living Standards' (1954) 69 International Labour Review 527, 528; Paul Dalziel, Caroline Saunders, Joe Saunders, *Wellbeing Economics: The Capabilities approach to Prosperity* (Palgrave Macmillan 2018) 5.
[68] Sen (n 57) 10.
[69] Sen (n 57) 14-15; Flavio Comim, 'Building Capabilities: A New Paradigm for Human Development' in Flavio Comim, Martha Nussbaum (eds), *Capabilities, Gender, Equality* (CUP 2014) 134.
[70] Mark Fleurbaey, 'Capabilities or Functionings? Anatomy of a Debate' in Flavio Comim, Martha Nussbaum (eds), *Capabilities, Gender, Equality* (CUP 2014) 158.
[71] Fleurbaey (n 70) 158; Daniel Khneman, Alan Krueger, 'Developments in the Measurement of Subjective Well-Being' (2006) 20 Journal of Economic Perspectives 3, 8.

previously argued according to traditional economic theory, regulatory interference by the State ought to be avoided. This argument is counter-intuitive because, in theory, the State has the power and is the most able actor to provide inroads to development. These pathways to development are dependent on 'social constructs' and 'social arrangements', which fall within the remit of the State.[72] Arguably within this puzzle, law is an integral part of the social arrangements that coordinates development, which is not always acknowledged by scholars.[73]

3.2. Putting The Pieces Of Development Together

As identified in section 1, development is concerned with progress and the betterment of society as a whole.[74] It is subjective since there is no 'one size fits all' approach.[75] Its subjective nature is part of the beauty as it is flexible to accommodate society in terms of individuals, communities, regions, and even States. Whilst there has been much debate about the individualistic nature of human rights, development transcends this because it is applicable to all levels of society.[76]

Development is further worthwhile because it provides counterbalance for individual parts of the whole, for example economic development *with* social development. By framing development in this manner, development can be more attuned to the ideological values of developing countries, which historically have been overlooked.[77] By being more socially

[72] Sen (n 57) 31.
[73] Celine Tan, 'Navigating New Landscapes: Socio-Legal Mapping of Plurality and Power in International Economic Law' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2013) 21.
[74] Lucy Williams, *International Poverty Law: An Emerging Discourse* (Zed Books 2006) 41; Daniel Aguirre, *The Human Right to Development in a Globalized World* (Ashgate 2008) 225.
[75] Tan (n 7) 288; Rajagopal (n 11) 149; Crawford (n 61) 239; Amy Chua, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' (1998) 108 The Yale Law Journal 1, 13-14; Kevin Davis, Michael Trebilcock, 'The Relationship Between Law and Development: Optimists Versus Skeptics' (2008) 56(4) American Journal of Comparative Law 895, 898.
[76] Aguirre (n 74) 13.
[77] Lee (n 51) 434-435.

attuned, development is more meaningful, which helps its 'uptake' within a given society.[78] Only by doing so, can development fulfil its aspirational core of providing a path away from avoidable poverty, hunger, illness and death.[79] This requires not only a shift in development thinking but also in relation to law's formulation, purpose and how it is used by States. As further examined in the next section, law is a tool with which to achieve development.

4. WHAT ROLE CAN LAW PLAY?

Law has been used by Western States to push forward their agendas.[80] This was undertaken in the name of development even though there was little or no benefit to developing countries.[81] Law as used by the West to shape developing countries (usually former colonies) imposed structures without due consideration for local cultures, which has facilitated Western entities to flourish.[82] In this form, law has not been instrumental in achieving progress within developing countries. In order to proceed, law can offer a way forward; it is complementary to development but its purpose and use need to be considered carefully in order to ascertain how it can facilitate development.

[78] Lee (n 51) 434-435.
[79] Adelman (n 52) 18.
[80] Peer Zumbansen, 'Theorizing as Activity: Transnational Legal Theory in Context' in Upendra Baxi, Christopher McCrudden, Abdul Paliwala (eds), *Law's Ethical, Global and Theoretical Contexts: Essays in Honour of William Twining* (CUP 2018) 281; Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 82.
[81] Sornarajah (n 80) 82.
[82] Bronwen Morgan, Karen Yeung, *An Introduction to Law and Regulation* (CUP 2007) 5.

4.1. Law As An Enabler Within The Economic Sphere

To revisit the themes presented in section 2.2, law was used as a mechanism for reforming markets, facilitating supply chains and the movement of capital as part of the economic growth template.[83] Law was concerned with privatisation and deregulation in order to ensure that economies were 'market-friendly'.[84] Instead of solidifying the relationship between the State and markets, law was about weakening the former's ability to oversee or regulate the behaviour of private actors.[85]

Law in this form is not about diverse perspectives but focusses on 'a particular set of interests – white, male, [Western, economic] values'.[86] These 'values' continue to be backed as part of the 'Washington Consensus'[87] without evaluating whether this is appropriate for developing countries.[88] As part of the Washington Consensus, law continues to smooth the way for market actors to determine their own choices without constraint, when development should be about providing individuals with the ability to live their best lives.[89] As an enabler in this form, law reinforces the disconnect between the economic and social spheres, in contrast to what is necessary for development.[90] In order for law create new pathways and overcome this divide, law needs to also be a regulatory tool so that the economic sphere is not simply

[83] Sornarajah (n 80) 84; Howard Mann, 'NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments and Lessons for the FTAA' (2003) 97 American Society International Law Proceedings 247, 248.
[84] Chua (n 75) 9.
[85] Aguirre (n 74) 23.
[86] Corinne Blacock, 'Neoliberalism and the Crisis of Legal Theory' (2014) 77 Law & Contemporary Problems 71, 75.
[87] The Washington Consensus was a term coined by the economist, John Williamson. It refers to a set of policy reforms for development. These reforms include, *inter alia*, deregulation, privatisation, deregulation of FDI flows and strong property rights.
For further details, see: John Williamson, 'A Short History of the Washington Consensus' (2009) 15 Law and Business Review of the Americas 1, 9-10.
[88] Faundez (n 34) 11.
[89] For further details, see: Adam Smith, *The Wealth of Nations* (CreateSpace Independent Publishing 2014) 243; Kate Nash, 'The Cultural Politics of Human Rights and Neoliberalism' (2019) 18(5) Journal of Human Rights 490, 494-495.
[90] Nash (n 89) 494-495.

left to its own devices, so that the social sphere is brought back into the development fold, since the economic aspect already exists within development.

4.2. Law As A Regulatory Tool Within The Economic Sphere

Law is necessary to not only enable development (further examined in section 5) but it is also required in its regulatory form. In this form, law addresses the shortcomings of the economic sphere by challenging the Western experience as a template for development. Contrary to free-market approaches that underpin the Western experience, Morgan and Yeung argue that 'unfettered markets' and freely operating private actors will lead to a 'misallocation of resources' because their self-interest is paramount to them.[91] This means that societal well-being will always be subordinated within the eyes of the free-market approach since it lacks economic value, which is reflected in the fact that societal well-being seldom forms the core of decisions or strategies developed and adopted by private actors.[92]

Conversely, law as a regulatory tool is not overly concerned with economic value but the impacts on society – good or bad. It channels the activity of private actors when markets cannot or when they are unwilling to align themselves with the wider interests of a given society.[93] In other words, regulation shapes the behaviour of private actors, so that their activity can be harnessed so that their operations actually benefit wider aspects of society.[94]

In this form, law provides the State with an alternative pathway to re-establish the links between itself, the economy and society.[95] Where the State has been divorced from the economy in the past, law as regulation 'is justified because the regulatory regime can do what

[91] Morgan, Yeung (n 82) 27.
[92] Morgan, Yeung (n 82) 27.
[93] Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Hart 2004) 5.
[94] Morgan, Yeung (n 82) 21.
[95] Morgan, Yeung (n 82) 26.

the market cannot… market-correcting, general-interest [development] policies…'[96] Law, in this form, is not about reasserting the Western experience or even simply allowing private actors to continue operating unchecked. It is about enabling the State with a mechanism to ensure that development positively transforms lives in a meaningful fashion. Whilst at the same time, law is also about keeping private actors in line. In other words, to help realise development through law, the latter needs to be both an enabler and a regulator.

4.3. Law As Both Enabler And Regulator

Development through law has a dual nature; it is both an enabler and regulator. As an enabler, law is a mechanism to meet development goals.[97] Prosser argues that '[T]hese ends are not arbitrarily decided by the state but have an essential moral [and social] element….' [98] To that end, these elements are not pre-determined by market influences but are guided by the moral values of that society.[99] As a normative reflection of society, law needs to be constructed so that this is acknowledged.[100] After all, law does not simply exist; it is a social construct that reflects relationships within society, for example, between the State, markets and individuals.[101] This means stepping away from the Western roots of development through law and requires an acknowledgement that diverse approaches are welcome and necessary. Law, therefore, needs to be malleable so that it can reflect wider traditions that gives individuals choice and opportunities, whilst also supplying law with the ability to meet future challenges.[102]

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[96] Ogus (n 93) 5.
[97] Tony Prosser, *Nationalised Industries and Public Control* (Wiley Blackell 1986) 63-64.
[98] Prosser (n 97) 63-64.
[99] Prosser (n 97) 63-64.
[100] Morgan, Yeung (n 82) 31; Eugen Ehrlich, 'Montesquieu and Sociological Jurisprudence' (1916) 29 Harvard Law Review 582, 589.
[101] William Twining, *Globalisation and Legal Theory* (Butterworths 2000) 139.
[102] Lone Wandahl Mouyal, *International Investment and the Right to Regulate* (Routledge 2018) 19.

Law's other aspect or regulatory-side needs to be acknowledged when States design the relevant frameworks so that law retains further malleability.[103] The State must recognise the 'regulatory and enforcement gaps' so that they can be plugged by rules which promote the overall interests of society.[104] Within the economic sphere, these gaps refer to the *laissez-faire* or non-interventionist development templates which have become the norm. However, to achieve development through law, private activity needs to be converted into real opportunities for individuals, which would provide a point of engagement between private actors and wider society.[105] Law is a form of regulatory oversight that aligns private actors with the outcome of improving the society in which they operate by requiring them to abide by regulatory standards.[106] Braithwaite asserts that the regulatory aspect of law oscillates between creating legal obligations, frameworks, systems and societal benefits.[107] This requires law to be responsive and socially-aligned.[108] This has not always been the case. In relation to the narrow perspective of development through law, law has been transposed without contextual adaptation. This transposition is problematic in the global context because it means that foreign concepts are imported within developing countries but these concepts are misaligned in respect to the domestic and societal context, which means that not all States can use law to enable their development.[109]

[103] Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7(4) Law & Society Review 719, 720.
[104] UNCHR, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (25 May 2011), UN Doc A/HRC/17/31/Add.3 para 10.
[105] Valerie Braithwaite, 'Closing the Gap Between Regulation and the Community' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017)25.
[106] Braithwaite (n 105) 29-30.
[107] Braithwaite (n 105) 31.
[108] Braithwaite (n 105) 32.
[109] For further discussion about this issue in relation to the structural factors that prevent developing States harnessing law for development, see: Pahuja (n 37) 75-76; Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (CUP 2015) 104-105;

4.4. Contextualising Law for Development

Development through law has not always been a positive experience for developing countries.[110] Development through law referred to the harmonisation of legal and institutional frameworks but in accordance to the Western model.[111] This model formalised law based on Western understandings of how law should operate rather than taking into account local practices.[112] These concepts further lock developing countries into a rigid template, which is ill-suited to their own experiences.[113] Tensions arise when following the template due to the lack of historical and social connections.[114] These concepts cannot gain traction because they ignore the way in which the State, society and context operate.[115] By ignoring the context, development through law also ignores the 'political, social and economic identity' of a given developing State and its society, which is necessary for positive change.[116]

Adelman and Paliwala argue that rather than to completely reject Western thought, since it has already disseminated across the globe, Western thinking can be incorporated where it is not antithetical to existing values.[117] To do so requires acknowledging the failures of past legal reforms and also law's flaws, whilst shaping the law to the needs of society.[118] This is prudent given that most States have already begun this journey and it is too late to turn back.

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[110] Brian-Vincent Ikejiaku, 'International Law, the International Development Legal Regime and Developing Countries' (2014) 7 Law & Development Review 131, 142; Escobar (n 44) 13; Tan (n 7) 288.
[111] Julio Faundez, 'Introduction: Legal Technical Assistance' in Julio Faundez (ed), *Good Government and Law: Legal and Institutional Reform in Developing Countries* (Springer 1997) 3.
[112] For example, the framing of law as a form of regulatory command to instil behaviour within society.
Thomas Hobbes, *Leviathan* (C.B. Macpherson ed, Penguin Classics 1985) 261.
[113] Santos (n 35) 187.
[114] Watson (n 47) 6.
See also: Faundez (n 111) 3; Husa (n 47) 130.
[115] Husa identifies that legal transplants, like law itself, do not operate within a vacuum. See: Husa (n 47) 130.
[116] Faundez (n 111) 2-3.
[117] Adelman, Paliwala (n 3) 3.
[118] Adelman, Paliwala (n 3) 5.

Law is what the State designs it to be, there is no guarantee as to its outcomes.[119] It is an imperfect tool, which is created, implemented and amended by people in light of changes to society.[120] Contrary to Tamanaha, these should not be seen as failures but lessons that can be learned, so that improvements can be made.[121] Law has its flaws. It is not an overnight or instant solution and can take time to successfully enact and implement, especially in relation to development.[122] Only by acknowledging law's imperfections can it be improved and changed.[123] As an ever-shifting concept, development means that law should be malleable in order to evolve with the times.[124] This is particularly important when thinking about development and law with regards to IHRL.[125] Using the exemplar of the right to food, the next section examines the relationship between law, development and basic needs as an aspect of inclusive development.

[119] Santos (n 35) 187.
[120] Amanda Perry-Kessaris, 'What Does It Mean to Take a Socio-Legal Approach to International Economic Law?' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2013) 9; John Kleinig, Nicholas Evans, 'Human Flourishing, Human Dignity, and Human Rights' (2013) 32 Law & Philosophy 539; Lawrence Friedman, 'Legal Culture and Social Development' (1969) 4 Law & Society Review 29.
[121] Tamanaha (n 30).
[122] Thomas Pogge, 'Severe Poverty as a Human Rights Violation' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP 2007) 26.
[123] Emma Mawdsley, 'Human Rights and South-South Development Cooperation: Reflections on the "Rising Powers" as International Development Actors' (2014) 36(3) Human Rights Quarterly 630, 647.
[124] Mawdsley (n 123) 647.
[125] Mawdsley (n 123) 647.

5. TOWARDS INCLUSIVE DEVELOPMENT – THE RIGHT TO FOOD AS A LENS

As previously highlighted, the positive transformation potential of development lies in the opportunities that it provides for individuals.[126] At its most rudimentary level, development is simply about ensuring and enabling that basic needs are met, so that individuals have enough for everyday functioning and not having to worry about their next meal.[127] The right to food is a good exemplar of inclusive development conceptualisation, but before this can be addressed, the relationship between development and IHRL needs to be examined first.

5.1. Development and IHRL

Development is concerned with aspirations of how to improve society but lacks a concrete basis because of its fluid nature.[128] Due to its aspirational qualities centred around human well-being, it is not unusual that development is intertwined with IHRL.[129] This entwinement is often discussed in rhetorical terms.[130] However, this relationship is not just rhetorical, development and IHRL are mutually-reinforcing to advance the overall goal of well-being. [131]

Development is the goal and process to progress human life in a meaningful manner and is a reminder that the benefits need to be shared equitably across society.[132] Similarly, States need to continuously endeavour to progressively realise IHRL (particularly economic, social and cultural rights) to improve the overall standard of living, which will contribute to

[126] Richard Arneson, 'Equality and Equal Opportunity for Welfare' (1989) 56 Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition 77, 85.
[127] Jean Drèze, Amartya Sen, *Hunger and Public Action* (OUP 1991) 12-13.
[128] Adelman (n 52) 18.
[129] Adelman (n 52) 18.
[130] Aguirre (n 74) 53.
[131] UNGA Res 41/128 (4 December 1986) preamble.
[132] The Brundtland Report refers to intergenerational equity. See: United Nations, 'Report of the World Commission on Environment and Development' UNGA Res 42/187.

development.[133] Development and IHRL are arguably two sides of the same coin, where that coin is concerned with progressing well-being within society.[134]

Development is the promise of the 'not yet', but what 'could be'; it provides hope for the future in the form of ambition.[135] Within IHRL, these ambitions are more concrete as they are framed in terms of rights that set a minimum standard of treatment for a given individual and what he or she is entitled to.[136] This is sometimes referred to as a legal entitlement.[137] This is where development and IHRL begin to diverge. Although there is a corresponding duty on the State in relation to these legal entitlements within IHRL, there is no equivalent duty on the State when it comes to development.[138] Within IHRL, the State is obliged to adopt affirmative action in order to protect and give effect to these rights.[139] Although development and IHRL are similar in nature, IHRL has a more concrete legal foundation than development, which makes it a useful 'home' for development.

5.2. IHRL – Providing Development With A 'Home'

As a legal regime, IHRL sets a legal baseline in relation legal entitlements vis-à-vis the State.[140] Within this framing, food, water, education and shelter are basic rights which

[133] International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 2(1); Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) art 55(a).
[134] Brigitte Hamm, 'A Human Rights Approach to Development' (2001) 23 Human Rights Quarterly 1005, 1006; Kerstin Mechlem, 'Food Security and the Right to Food in the Discourse of the United Nations' (2004) 10(5) European Law Journal 631, 640.
[135] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge 2007) 380.
[136] Patrick Macklem, *The Sovereignty of Human Rights* (OUP 2015) 7.
[137] Macklem (n 136) 7.
[138] Serges Djoyou Kamga, *The Right to Development in the African Human Rights System* (Routledge 2018) 43; Philip Alston, 'The Shortcomings of a Garfield the Cat Approach to the Right to Development' (1985) 15(3) California Western International Law Journal 510, 515.
[139] Djoyou Kamga (n 138) 43; Alston (n 138) 515.
[140] Aguirre (n 74) 33; Shedrack Agbakwa, 'Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 Yale Human Rights and Development Law Journal 177, 181; Hans-Otto Sano, 'Development and Human Rights: The

everyone is entitled to and must have access to.[141] Furthermore, IHRL establishes that these rights are owed to all individuals.[142] That way, everyone, no matter where they live, is '…entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'.[143]

Within this framework, the State must act in order to not only protect these rights but also facilitate them.[144] The State also has a legal obligation to take affirmative action for furthering these rights, which also means that it is accountable for any omissions or violations of these rights by private actors.[145] This clearly delineates the role and duty of the State, which is not clear in relation to development alone.[146] Furthermore, non-legal conceptualisations of development have a tendency to overlook rights but IHRL is a framework which actualises development in a more concrete manner.[147] By housing development within the IHRL discourse, it is a way of grounding it within a legal framework; it establishes a legal baseline for development, which it normally would not have.[148] This provides a solid foundation when considering development in light of the right to food because it provides a legal basis from which to work.

Necessary, but Partial Integration of Human Rights and Development' (2000) 22 Human Rights Quarterly 734, 748.

[141] Sano (n 140) 748.

[142] Oscar Schachter, 'Human Dignity as Normative Concept' (1983) 77 American Journal of International Law 848.

[143] UNGA Res 41/128 (4 December 1986) UN Doc A/RES/41/128 art 1(1).

[144] Aguirre (n 74) 92; Margot Salomon, 'Legal Cosmopolitanism and the Normative Contribution of the Right to Development' (2008) LSE Law, Society and Economy Working Papers 16/2008, 11 <http://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2008-16-Salomon.pdf> accessed 1 May 2020; Oche Onazi, *Human Rights from Community: A Rights -Based Approach to Development* (Edinburgh University Press 2013) 74; Clare Ferguson, *Global Social Policy Principles: Human Rights and Social Justice* (DFID 1999) 23.

[145] Andrea Cornwall, Celestine Nyamu-Musembi, 'Putting the 'Rights-Based Approach' to Development into Perspective' (2004) 25(8) Third World Quarterly 1416, 1417.

[146] Djoyou Kamga (n 138) 15.

[147] Aguirre (n 74) 3; David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (CUP 2009) 1.

[148] Aguirre (n 74) 11; Djoyou Kamga (n 146) 43.

5.3. The Right to Food And Hunger – The Need For Development And The State's Legal Duties Under IHRL

There is '[n]o aspect of development [that] appears to be as straightforward as hunger'.[149] Where an individual is suffering from hunger, he or she will be unable to fully participate in life or even achieve his or her full potential, simply due to lack of material sustenance.[150] As a manifestation of adequate food, hunger goes against the very grain of development as an inclusive and transformational tool.[151]

Food is an integral aspect of life and every individual should and must have access to food as an inherent right.[152] Without adequate food, lives can be cut short due to illness or premature death.[153] Food is essential for everyday functioning.[154] However, food is so much more than about everyday function; it enables the personal sovereignty of individuals to be able to live a life of their choosing, providing them with the opportunity to pursue other goals, for example, providing a child with enough energy to attend school.[155] Food, therefore, is an exemplar of the transformational aspect of development because it is centred around the

[149] Escobar (n 44) 102.
[150] Issa Shivji, *The Concept of Human Rights in Africa* (African Books Collective 1989) 27-28.
[151] Shivji (n 150) 28.
[152] Escobar (n 44) 103.
[153] Jean Zieger, Christophe Golay, Claire Mohan, Sally-Anne Way*, The Fight for the Right to Food: Lessons Learned* (Springer 2011) 1.
[154] Ziegler, Golay, Mohan, Way (n 153) 3.
[155] International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 11; UNCHR, 'CESCR General Comment No. 12: The Right to Adequate Food (Art.11)' (12 May 1999) UN Doc E/C.12/1999/5 para 4; Ziegler, Golay, Mohan, Way (n 153) 3.
Food also allows individuals to further contribute to society, for example, by having the energy to work or participate in other socio-legal ways. See: Jennifer Mersing, 'How to Phase Out Rich Country Agricultural Subsidies Without Increasing Hunger in the Developing World' in Olivier de Schutter, Kaitlin Cordes (eds), *Accounting for Hunger: The Right to Food in the Era of Globalisation* (Bloomsbury 2011) 180; Jacqueline Mowbray, 'The Right to Food and the International Economic System: An Assessment of the Rights-Based Approach to the Problem of World Hunger' (2007) 20(3) Leiden Journal of International Law 545; Karen Kong, 'The Right to Food for All: A Rights Based Approach to Hunger And Social Inequality' (2009) 32 Suffolk Transnational Law Review 526, 531; Drèze, Sen (n 127) 12-13.

advancement of individuals, not just on a basic level but also in terms of equipping individuals with value in their lives.[156]

Arguably, it is imperative that everyone has a right to adequate food, which can be accessed through economic or physical means.[157] The State is responsible for protecting and implementing this right in an inclusive and continuous manner.[158]

The State must design frameworks to enable this aspect of development through law so that it protects this right.[159] The State also has further responsibilities in relation to ensuring respect for this right.[160] The duty to respect refers to the law as a regulatory tool, as the State must not only refrain from interfering with the right to food, it also must prevent private actors from depriving or adversely affecting access to food.[161]

States have an additional enabling duty (beyond the obligation to protect) that requires them to be extra pro-active.[162] This refers to the duty to fulfil.[163] Under this head of the right to food, the State must promote access to food in a way that uses available resources and this must be undertaken to the best of its ability.[164] Although this duty is subjective and will depend on the resources of a given State, resource constraint is not and should not be used as an excuse for not taking steps.[165] It is a reflection that similar to development, the State needs to strive towards a higher goal of ensuring adequate food, regardless of their economic status.[166]

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[156] Ziegler, Golay, Mohan, Way (n 153) 4.
[157] ICESCR (n 133) art 11; UNCHR (n 155) para 15.
[158] UNCHR, 'CESCR General Comment No. 3: The Nature of States Parties' Obligations (art. 2, para 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23 para 8; Tahmina Karimova, *Human Rights and Development in International Law* (Routledge 2016) 69.
[159] UNCHR (n 155) para 15; UNCHR, 'Report of the Special Rapporteur on the right to food, Jean Ziegler' (23 July 2001) UN Doc A/56/210, para 26.
[160] UNCHR (n 155) para 15.
[161] UNCHR (n 155) para 15; UNCHR, 'Report of the Special Rapporteur on the right to food, Jean Ziegler' (16 March 2006) UN Doc E/CN.4/2006/44, paras 22, 45; UNCHR, 'Report of the Special Rapporteur on the right to food, Jean Ziegler' (28 August 2003) UN Doc A/58/330, para 45.
[162] UNCHR (n 155) para 15; UNCHR (n 161) paras 24, 37.
[163] UNCHR (n 155) para 15; UNCHR (n 161) para 34.
[164] UNCHR (n 155) para 15; UNCHR, 'Report of the Special Rapporteur on the right to food, Olivier de Schutter' (19 December 2011) UN Doc A/HRC/19/59/Add.5 para 2.4.
[165] UNCHR (n 155) para 15.
[166] UNCHR (n 155) para 36; UNGA Res 41/128 (n 143) arts 3, 4.

Developing States that lack the economic means should not be left out of this equation.[167] Economic capacity is not the only means to fulfil the right to food and the State must still enable this right through other steps.[168] These steps include but are not limited to: State coordination of strategies designed to enhance the right to food at the international, national, regional and local level.[169]

States are the central actors within IHRL since they need to develop legal and policy strategies in order to give effect to rights, for example, ensuring access to food within their territories.[170] At the very least, States must take action in order to assuage hunger at all times.[171] Otherwise, hunger will prevent individuals from living their best possible version of their lives and the positive transformation aspect of development will simply be unmet. The State is a central actor as the duty bearer of these obligations but as an actor, it is not always well-equipped in relation to pre-requisite understanding and the application of these obligations. This argument will be further explored in the next chapter in relation to the relationship between development and investment.

CONCLUSION

Development is multidimensional. It is both means and ends, as it is concerned with the betterment of individual lives, which also refers to its transformational potential. Furthermore, it is an inclusive and ever-shifting yardstick which States need to keep aiming for.

[167] UNCHR (n 155) para 5; UNGA Res 41/128 (n 143) arts 3, 4.
[168] UNCHR (n 155) para 22; UNCHR (n 159) para 89; UNCHR, 'Report of the Special Rapporteur on the right to food, Jean Ziegler' (7 February 2001) UN Doc E/CN.4.2001/53 para 12.
[169] UNCHR (n 155) para 22; UNCHR (n 159) para 26; UNCHR, 'Report of the Special Rapporteur on the right to food, Jean Ziegler' (24 January 2005) UN Doc E/CN.4/2005/47 paras 30, 40.
[170] UNCHR (n 155) para 15.
[171] UNCHR (n 155) para 6.

However, the economic perspective has been the preoccupation of States and has determined approaches to development. This has meant that law has been used to enable and further the interests of Western States and their private actors. Law needs to be not only an enabler of inclusive development but it also needs to be a regulatory tool to guide economic growth as part of the bigger puzzle.

This chapter also identifies that development should be housed within IHRL, so that it can be given legal effect. The right to food is an exemplar of an inclusive conceptualisation of development. As a legal right, the right to food places a legal duty on the State to protect, respect and fulfil. The economic sphere in relation to development can be an enabler of the right to food but if domestic capital is missing, what can the State do? Many States have turned to FDI as a solution, but is it really a solution? The role of international investment is further examined in the next chapter.

CHAPTER 3 – INVESTMENT AND DEVELOPMENT

INTRODUCTION

The nexus between investment and development is often implied in the literature but this nexus is not always explored in enough detail within the existing scholarship. Instead, scholars imply that investment often leads to development without explaining how or why. Chapter 3 examines the argument as to whether investment can lead to beneficial development for developing States but does so from an IIL perspective.

As identified in the previous chapter, the narrow perspective of development places an emphasis on the Western experience, which focusses on modernisation and the movement of capital. Investment, as a form of capital, can be an enabler for economic growth but requires the State to take action to channel that capital in order to facilitate development. This ability has previously been taken away from or denied to developing States, as discussed in chapter 2. Moreover, within this framing, the 'State' is a Western concept where the State is supposed to be able and willing to take steps for development. This perspective on the role of the State brings its own problems as not all States are willing or able to foster development even though it is their responsibility to do so.[1]

With this in mind as part of this chapter's objective, it will first consider how investment can be an enabler for development with a particular focus on the experiences of China. China is the focus here because it is a Global South country that has demonstrated that it is willing

[1] It is understood that this is a contentious issue and not all States will be willing and able to even comply with their wider international human rights obligations. Nonetheless, this thesis argues that all States need to strive for positive change, even this change is incremental and slow.
For further discussion on the difficulties that States face, see: Ryan Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent' (2017) 96 American Journal of International Law 531, 537; Ryan Goodman, Derek Jinks, 'How to Influence States: Socialization and International Human Rights' (2004) 54 Duke Law Journal 524, 629; John Knox, 'Horizontal Human Rights' (2008) 102 American Journal of Human Rights 1, 31.

and able to facilitate development through investment, even though its history as a State has not been a smooth experience for it.[2] It is further argued that China's success is based on its willingness to shape investment law in accordance with these experiences and its own interests, rather than depending on the existing Western experience.[3]

China is able to adapt to investment for its own development path because it took charge of the process and used law as a tool for both enabling economic growth and regulating the activities of foreign investors.[4] Such an approach can be challenging for developing States because it requires an ideological resistance to the Western experience for law and development.[5] It also requires the State to have sufficient know-how when designing and implementing legal and policy frameworks for investment and development.[6] Challengingly, this is not always possible due to the path dependencies already embarked upon for economic development (as discussed in Chapter 2, section 2.2) by many developing countries.

The second part of this chapter further challenges the idea that investment equates to development by examining the issues that developing countries face when trying to square investment with development. Part of this analysis refers to the conclusion of investment agreements and why it has worked for China but not necessarily for other developing countries.

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[2] Randall Peerenboom, 'What Have We Learned About Law and Development? Describing, Predicting, And Assessing Legal Reforms in China' (2006) 27(3) Michigan Journal of International 823, 826.

[3] Peerenboom (n 2) 827; Albert Chen, 'Rational Law, Economic Development and the Case of China' (1999) 8(1) Social & Legal Studies 97; Donald Clarke, 'Economic Development and the Rights Hypothesis: The China Problem' (2003) 51 American Journal of Comparative Law 89, 108.

[4] In contrast to the free-market approach, China unusually restricted the activities of foreign investors and corporations within its territory. China, for example, did not permit foreign investors to operate within certain sectors including the telecommunications sector. For further details, see: Guiguo Wang, *International Investment Law: A Chinese Perspective* (Routledge 2014) 8.

[5] Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (CUP 2003) 228.

[6] Mavluda Sattarova, 'Reassertion of Control and Contracting Parties' Domestic Law Responses to Investment Treaty Arbitration: Between Reform, Reticence and Resistance' in Andreas Kulick (ed), *Reassertion of Control Over the Investment Treaty Regime* (CUP 2017) 59.

There seems to be an implicit assumption by developing countries that being party to more investment agreements will mean more capital for development. Yet, this sits at odds with the origins of IIL, which scholars have claimed is designed to protect the private interests of investors.[7] In that regard, scholars argue that investment agreements were not originally intended to be instruments for development, when development is of a public nature but rather instruments to protect investment.[8] Before moving on to the third part of this chapter, the analysis will consider the private-public divide that exists between investment and development.

The third part of the chapter expands on the relationship between IIL and IHRL as a means of investigating whether development has been sufficiently addressed within IIL. The chapter concludes that development has been alluded to within the IIL framework and there are some lessons to take on board, but further discussion is needed in order to consider development from a wider perspective. Before tackling the relationship between investment and development, investment needs to be examined as an enabler of development which also requires analysis of what constitutes as an investment first.

[7] Jeswald Salacuse, 'The Treatification of International Investment Law' (2007) 13 Law & Business Review of the Americas 155, 156; Zachary Douglas, 'Property, Investment, and the Scope of Investment Protection Obligations' in Zachary Douglas, Joost Pauwelyn, Jorge Viñuales (eds), *The Foundations of International Investment: Bringing Theory into Practice* (OUP 2014) 364; Piero Bernardini, 'Investment Protection Under Bilateral Investment Treaties and Investment Contracts' (2001) Journal of World Investment & Trade 235, 240-241; Asha Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime' (2009) Harvard International Law Journal 491, 497; Henok Gabisa, 'The Fate of International Human Rights Norms in the Realm of Bilateral Treaties (BITs): Has Humanity Become a Collateral Damage' (2014) 48 International Lawyer 153, 154-155; Klara Polackova Van der Ploeg, 'Protection of Regulatory Autonomy and Investor Obligations: Latest Trends in Investment Treaty Design' (2018) 51 International Lawyer 109, 115; Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113 The American Journal of International Law 1, 3.

[8] Salacuse (n 7) 156; Douglas (n 7) 364; Bernardini (n 7) 240; Kaushal (n 7) 497, Gabisa (n 7) 154-155; Arato (n 7) 3.

1. THE NOTION OF INVESTMENT

There are different legal definitions of investment.[9] Broadly speaking for the purposes of this thesis, investment concerns the assets of an investor and FDI is the movement of said assets from one country, commonly known as the home State, to be used in another, commonly known as the host State.[10] An investor within this context is the owner of those assets that is located in the home State. This can be an individual but is more likely to be a multinational corporation that has the financial means to invest abroad.[11] Although investment is defined broadly, it generally refers to the capital or the value of input from the investor but can also refer to a wider array of tangible and intangible objects.[12] This means that investment can include physical property, such as machinery or equipment. It can also refer to intangible assets that have monetary worth such as the shares of a company.[13] As a form of capital transfer, investment can and *should* also enable transfers of knowledge, skill and technology to the host State to help facilitate economic growth.[14]

Indeed, in the case *Quiborax v Bolivia*[15] it is said that investment should lead to economic development; in fact, as examined in Chapter 2, investment can be an enabler of

[9] For example, in *CSOB v Slovakia*, it is acknowledged that 'An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment'.
Ceskoslovenska Obchodni Banka, A.S. v The Slovak Republic (24 May 1999) ICSID Case No. ARB/97/4 para 72. See also: *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco* (31 July 2001) ICSID Case No. Arb/004, Decision on Jurisdiction para 52; *Quiborax S.A., Non-Metallic Mineral S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia* (27 September 2012) ICSID Case No. ARB/06/2 paras 198-199.
[10] Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 60.
[11] Muthcumarawamy Sornarajah, *The International Law on Foreign Investment* (CUP 2017) 77.
[12] Sornarajah (n 11) 11.
[13] Sornarajah (n 11) 11.
[14] Liesbeth Colen, Miet Maertens, Johan Swinnen, 'Foreign Direct Investment as an Engine for Economic Growth and Human Development' in Olivier de Schutter, Johan Swinnen, Jan Wouters (eds), *Foreign Direct Investment and Human Development* (Routledge 2013) 107.
[15] *Quiborax v Bolivia* (n 9) paras 198-199.

development,[16] although the causal link between investment and development is not always straight-forward.[17] Economic development is but one aspect of the inclusive development framework.[18] In order to strive towards inclusive development, the economic sphere should not overshadow but is complementary to other equally important aspects of the framework, such as the public interest. Investment needs to be further harnessed by the host State, so that it converts the additional capital into real benefits. In order to truly contribute to economic development, knowledge, skill and technological transfers also need to be complemented by increases in wages and employment opportunities, which are necessary for sustained economic growth.[19] Economic growth does not simply happen; it requires the State to strategically plan for the future. The State needs to be willing and able to allocate the necessary resources in relation to the industries or areas that need these resources or assets.[20] Furthermore, the State also needs to channel these resources so that they have a positive impact on the standard of living so that individuals have access to quality food, housing, healthcare and education.[21] The State needs to have a degree of oversight so that the appropriate policies and frameworks are devised and put in place.[22] China is a good example of a developing State that has 'stepped up' in devising these policies and frameworks, which will be further explored in the next section.

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[16] The argument that investment leads to development is one that that academics have echoed or alluded to. Sasi Iamsiraroj, 'The Foreign Direct Investment-Economic Growth Nexus' (2016) 42 International Review of Economics & Finance 116; Maria Carkovic, Ross Levin, 'Does Foreign Direct Investment Accelerate Economic Growth?' in Theodore Moran, Edward Montgomery Graham, Magnus Blomstrom (eds), *Does Foreign Direct Investment Promote Development* (Peterson Institute 2005) 195.
[17] Amartya Sen, *Development is Freedom* (OUP 1999) 19.
[18] This inclusive framework is further discussed in Chapter 4.
[19] Krista Nadakavukaren Schefer, 'The Law of Investment Protection and Poverty Reduction' in Stephan Schill, Christian Tams, Rainer Hofman (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar 2015) 369.
[20] Schefer (n 19) 369.
[21] Olivier de Schutter, Johan Swinnen, Jan Wouters, 'Introduction: Foreign Direct Investment and Human Development' in Olivier de Schutter, Johan Swinnen, Jan Wouters (eds), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge 2013) 9.
[22] De Schutter, Swinnen, Wouters (n 21) 14.

1.1. Investment As An Enabler of Development – China As An Example

China's unprecedented but sustained economic growth is a useful reference point in order to see how a developing State has achieved economic development through the use of FDI and legal measures.[23] Although undergoing this rapid economic change and becoming a major economic actor, China is still a developing country and emerging State actor.[24] In particular, there are still high poverty rates and large numbers of individuals are still unable to fulfil their basic needs.[25] Even China identifies itself as a developing country.[26] Furthermore, China's model for economic development does not strictly follow the existing Western template, since it follows its own path towards a socialist market economy.[27] As a developing country, China's experiences are more recent than Western actors and this potentially means that it is more empathetic of the experiences of other developing countries in relation to investment and development.[28]

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[23] Carsten Holz, 'China's Economic Growth 1978-2025: What We Know Today About China's Economic Growth Tomorrow' (2008) 36(10) World Development 1665, 1666.

[24] Jin Ling, Su Xiaohui, 'How the West Perceives China's Developing Country Status' (2010) China International Studies 138, 146.

[25] For example, by the World Bank and the United Nations Development Programme (UNDP). The World Bank, 'The World Bank in China' (*The World Bank*, 2020) <https://www.worldbank.org/en/country/china/overview> accessed 18 September 2020; UNDP, Human Development Report 2019 (*UNDP*, 9 December 2019) 119 <http://hdr.undp.org/sites/default/files/hdr2019.pdf> accessed 18 September 2020.

[26] It should be noted that this is highly contested. For further details, see: Mel Gurtov, 'China's Third World Odyssey: Changing Priorities, Continuities, and Many Contradictions' in Carla Freeman (ed), *Handbook on China and Developing Countries* (Edward Elgar 2015) 67; Clara Weinhardt, 'Emerging Powers in the World Trading System: Contestation of the Developing Country Status and the Reproduction of the Inequalities' (2020) 34(3) Global Society 388, 396-397; Zheng Bijian, 'China's "Peaceful Rise" to Great-Power Status' (2005) 84 Foreign Affairs 18, 19.

[27] National People's Congress of the People's Republic of China, Constitution of the People's Republic of China (2004) preamble, art 1.

[28] The Ministry of Foreign Affairs of the People's Republic of China asserts that developing States need to mutually support each other's experience in pursuit of development. See: Ministry of Foreign Affairs of the People's Republic of China, 'China's Position on South-South Cooperation' (*Ministry of Foreign Affairs of the People's Republic of China*, 24 August 2003) <https://www.fmprc.gov.cn/esp/wjdt/wjzc/t25296.htm> accessed 12 October 2020.

Since its 'Open Doors Policy' (1978), FDI has interestingly been a central tenet of Chinese economic policy.[29] Although FDI is welcomed and a focal point for China, it is not without conditions; for example, China set conditions to enable technological transfer between foreign and domestic investors.[30] To enable these transfers, China as a State entity is self-aware enough to identify its core competences and channel this investment into geographically strategic areas where there is a large, low-cost labour force and strong infrastructure.[31]

However, it should be noted that China has not always been so amenable to foreign actors. Historically, China has resisted interventions from Western actors due to ideological differences, which means it has also viewed foreign actors and international frameworks with a degree of scepticism.[32] Due to this scepticism, China even approaches international law tentatively, selectively adopting only the rules that align with its own goals.[33] Equally, although

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Marcus Power, Giles Mohan, May Tan-Mullins, *China's Resource Diplomacy in Africa: Powering Development* (Palgrave Macmillan 2012) 65; Daniel Lemus Delgado, 'Discourse, Identify and International Development Cooperation: China, Africa and FOCAC' (2015) 15(2) Asia-Pacific Social Science Review 1, 6; Randall Peerenboom, 'The Fire-Breathing Dragon and the Cute, Cuddly Panda: The Implication of China's Rise for Developing Countries, Human Rights and Geopolitical Stability' (2006) 7 Chicago Journal of International Law 17, 38;

[29] Guocang Huan, 'China's Open Door Policy, 1978-1984' (1986) 39(2) Journal of International Affairs 1, 7.

[30] Huan (n 29) 5.

[31] Huan (n 29) 10; Shang-Jin Wei, Zhuan Xie, Xiaobo Zhang, 'China's Transition to a More Innovative Economy: Progress and Challenges' in Ligang Song, Ross Garnaut, Cai Fang, Lauren Johnston (eds), *China's New Sources of Economic Growth* (Australian National University Press 2017) 177; Central Committee of the Communist Party of China, 'The 13th Five-Year Plan for Economic and Social Development of the People's Republic of China' (Central Committee of the Communist Party of China, 2016) chapter 37, section 3 <https://en.ndrc.gov.cn/policyrelease_8233/201612/P020191101482242850325.pdf> accessed 15 September 2020.

[32] For example, following disagreements with Western missionaries sent in the 16th century, foreign trade was suspended and restricted to the Canton region.
China's resistance to Western intervention was further entrenched following the Opium War in the 18th century
See: Andrew Watson, Xin Luolin, 'China's Open-Door Policy in Historical Perspective' (1986) Australian Outlook 40(2) 91; Phil Chan, 'China's Approaches to International Law Since the Opium War' (2014) 27(4) Leiden Journal of International Law 859, 867.

[33] Chu Li-Lu states that, 'International law is one of the instruments of settling international problems. If this instrument is useful to our country… we will use it… However, if this instrument is disadvantageous… we will not use it and should create a new instrument to place it.'
Chu Li-Lu cited by Hungdah Chiu, 'Communist China's Attitude Toward International Law' (1966) 60(2) American Journal of International Law 245, 248; Chan (n 32) 880.

FDI has always underpinned China's economic strategy since opening up its economy, it still views foreign investment with caution.[34] This is because, historically, conditions that benefited foreign investors were imposed on China through the use of force.[35] Foreign investors continued to benefit at the expense of China during its occupation at the beginning of the 20th century, by not paying taxes or keeping wages of local workers low.[36]

Out of 'fear of foreign domination', China did not embrace the IIL regime with open arms, and did not start concluding IIAs until the 1980s, where it started to welcome foreign investment in earnest.[37] To complement this admission of foreign investment, China also adopted an industrial policy to enhance socio-economic goals through the regulation of capital, for example, improvements to education and manufacturing.[38] To that end, China limited the activity of foreign actors through the enactment of a complex blend of domestic laws.[39] Article 4(3) of the Joint Ventures Using Chinese and Foreign Investment Law (2007) requires investments to align with China's interests and focus on science and technology sectors.[40] Articles 24 and 25 stipulate that the foreign investor must provide proven benefits to China in relation to this transfer of technology, for example by physically providing essential equipment where needed,[41] or by enhancing efficiency or through the reduced costs of the venture.[42]

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[34] Michael Enright, 'China's Inward Investment: Approach and Impact' in Julien Chaisse (ed), *China's International Investment Strategy: Bilateral, Regional and Global Law and Policy* (OUP 2019) 24;

[35] Enright identifies the Treaty of Nanking (1842) not only was imposed on China, the cession of Hong Kong but also the opening of five strategic ports for Western actors to use freely. For further details, see: Enright (n 34) 23.

[36] Enright (n 34) 23.

[37] Wenhua Shan, 'China and International Investment Law' in Leon Trakman, Nicola Ranieri, *Regionalism in International Investment Law* (OUP 2013) 222.

[38] The State Council of China, 'The 7th Five-Year Plan' (*China Daily*, 23 February 2011) <http://www.chinadaily.com.cn/china/2012npc/2011-02/23/content_14689653.htm> accessed 4 May 2022; The State Council of China, 'The 8th Five-Year Plan' (*China Daily*, 23 February 2011) <http://www.chinadaily.com.cn/china/2013npc/2011-02/23/content_16261368.htm> accessed 4 May 2022.

[39] Enright (n 34) 23.
For example, *inter alia*: China's Regulation on the Implementation of the Foreign Investment Law of the People's Republic of China (2020); Special Administrative Measures for Foreign Investment (2019); Catalogue of Encouraged Industries for Foreign Investment (2019).

[40] Joint Ventures Using Chinese and Foreign Investment Law 2007 art 4(3).

[41] Joint Ventures Using Chinese and Foreign Investment Law 2007 arts 24, 25(1).

[42] Joint Ventures Using Chinese and Foreign Investment Law 2007 art 25(2).

Furthermore, in order to ensure that foreign investors adhere to this, China has passed further legislation to regulate which investors were and are subject. This legislation also delineated and continues to delineate the conditions of investment in the country; the other key legislation for investment are Law on Enterprises Operated Exclusively with Foreign Capital (2000) and Sino-Foreign Cooperative Joint Ventures Law (1988).[43] China, in that regard, channels investment for development through law by requiring foreign investors to abide to its terms; its stance is not so much about admittance of investment but rather maintaining control over foreign investment.

China was able to harness investment by adopting an active and consistent stance (in relation to its industrial policy) based on its own experiences to regulate foreign investment, particularly in strategic sectors.[44] Through that stance, China has gradually admitted investment through a process of trial and error regarding its legal frameworks, which were based on its observations of the West.[45] As China's economy has grown, it still actively shapes domestic rules to protect its interests whilst offering a business environment that is attractive to foreign investors.[46] This is not just on the domestic plane but also, applies to its approach to IIAs. An example of China's active approach to investment can be found in its inclusion, or

[43] Enright (n 34) 25.
It should be noted that this author is aware that China enacted the Foreign Investment Law (2020) on 1st January 2020, which replaces these key three pieces of legislation. At the time of writing, further rules complementing the Foreign Investment Law were still in progress.
Ministry of Commerce People's Republic of China, 'The Ministry of Commerce Revised and Adopted the Rules of Handling Complaints of Foreign-Invested Enterprises' (*MOFCOM*, 2 September 2020) <http://english.mofcom.gov.cn/article/newsrelease/significantnews/202009/20200902998232.shtml> accessed 23 September 2020.
[44] Norah Gallagher, Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (OUP 2009) 35; The State Council of China (n 38).
[45] Gallagher, Shan (n 44) 36.
[46] Gallagher, Shan (n 44) 36; Vivienne Bath, 'The South and Alternative Model of Trade and Investment Regulation: Chinese Investment and Approaches to International Investment Agreements' in Fabio Morosini, Michelle Ratton Sanchez Badin (eds), *Reconceptualizing International Investment Law from the Global South* (CUP 2017) 54.

lack of, the national treatment principle in its early investment agreements, during a time when it was primarily a host economy for FDI and wanted to protect its fledgling industries.[47]

China, therefore, offers a good example of a developing country actively using its initiative to wield domestic law in relation to foreign investment to its own benefit. In turn, this has allowed it to use investment to fuel its economic growth, which has contributed to the rising standard of living within China.[48] On first impressions, it might be argued that not all developing States will be able to follow in China's footsteps, especially since China is now considered to be a world superpower and has substantially more influence than many developing States.[49] Nonetheless, China serves as a good example in terms of its tentative approach to investment and through its wise employment of domestic regulation based on its own needs.[50] However, this does not mean that it has a comprehensive template for economic development that developing States can easily emulate because this approach requires time and a process of trial and error. In contrast to China, many developing States from the Global South have not had the time or learning process to build their understanding of Statehood or develop the relevant domestic frameworks to regulate investment, as this Western model has been foisted upon them.[51] Developing States lack the relevant experience necessary for negotiating and engaging with FDI. This experience is necessary in order to harness and derive benefit from investment. Given that investment frameworks are built on Western understandings of capital,

[47] Gallagher, Shan (n 44) 8.
China's early BITs do not include a national treatment provision, for example, see: Agreement between the Government of the People's Republic of China and the Government of the Kingdom of Norway on the Mutual protection of Investments (adopted 21 November 1984, entry into force 10 July 1985). In contrast, China's more recently concluded BITs include such a provision, for example, see: Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments (adopted 19 April 2011, entry into force 1 September 2011) art 3.
[48] Chris Bramall, *Chinese Economic Development* (Routledge 2008) 103
[49] Asei Ito, 'China Reshaping Asia: Economic Transition and the Rise of an Economic Superpower' in Kenta Goto, Tamaki Endo, Asei Ito (eds), *The Asian Economy: Contemporary Issues and Challenges* (Taylor & Francis 2020) 57.
[50] Peerenboom (n 28) 31-32.
[51] David Fidler, 'Revolt Against or From Within the West?: TWAIL and the Developing World, and the Future Direction of International Law' (2003) Chinese Journal of International Law 29, 34.

these frameworks are not suitable for developing States since they do not reflect non-Western experiences.[52]

In that regard, the next section will continue to analyse investment but from the perspective of IIL and will assess the challenges in relation to development, which prevent developing countries from using and shaping investment to their own benefit successfully.

2. THE CHALLENGE OF EMBEDDING DEVELOPMENT WITHIN INTERNATIONAL INVESTMENT AGREEMENTS

As discussed in Chapter 2, the betterment of society is not one of the priorities of private actors when it comes to their business activities for profitability.[53] Yet, developing countries seem to be joining the IIL regime by entering into IIAs in the hopes to kickstart their economies without fully considering the role of law and the State. Law, however, is necessary as both an enabler and regulatory tool to link society, private actors and the State, which is not always clear from the economic growth model. This template is reliant on two factors, which are not always appropriate for developing countries. Firstly, that the State will oversee and proactively employ the law as necessary, but also secondly, that capital is the main means for development. This brings certain challenges which will be further explored in this section. Before going into more detail about these challenges, the original purpose of IIL and IIAs needs to be discussed first.

[52] Fidler (n 48) 36; Obiora Chinedu Okafor, 'After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa' (2000) 41 Harvard International Law Journal 503, 514.
[53] Kenneth Vandevelde, 'The Economics of Bilateral Investment Treaties' (2000) 41(2) Harvard International Law Journal 469, 474.

2.1. The Origins of IIL – A Brief Introduction

Following the decolonisation of developing States, Western States could no longer rely on imperialism as a means to control and retain ownership over their assets abroad and needed alternative legal rules to do so.[54] These Western States could also no longer resort to the use of force when attempting to settle disputes and further their interests.[55] At this time, the hosts were newly independent States with little or no capital to export but were trying to retain some domestic capital.[56] However, it was the Western States with property abroad that sought to find rules and mechanisms to protect their interests.[57] Unequal treaties, for example those imposed on China, were one such mechanism.[58]

States continued to seek different avenues to protect their property abroad through diplomatic protection and attempts to expand on the State responsibility for the taking of foreign property.[59] During this period, 'friendship, commerce and navigation' (FCN) treaties, which were the precursor to IIAs, were being concluded by the United States.[60] FCN treaties were a means of securing the interests of the United States through economic and political alliances.[61] With these alliances in mind, the United States made a conscious effort to reinforce them through FCN treaties following the World War II.[62] In the background, newly-independent developing countries set out on the economic growth model (as examined in Chapter 2)

[54] Sornarajah (n 11) 24, 26.
[55] Sornarajah (n 11) 24.
[56] Sornarajah (n 11) 24; Nitish Monebhurrun, 'The (Mis)Use of Development in International Investment Law: Understanding the Jurist's Limits Work With Development Issues' (2017) 10(2) Law & Development Review 451, 453.
[57] Sornarajah (n 11) 31.
[58] Kate Miles*, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013) 25.
[59] Jeswald Salacuse, *The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital* (OUP 2013) 313.
[60] Sornarajah (n 11) 214.
[61] Sornarajah (n 11) 215; Maria Gwynn, *Power in the International Investment Framework* (Palgrave Macmillan 2016) 27-28.
[62] Kenneth Vandevelde, 'The Liberal Vision of the International Law on Foreign Investment' in Chin Leng Lim (ed), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (CUP 2016) 46.

without providing clear assurances for the protection of investment.[63] IIAs emerged as a tool to safeguard investments and facilitate economic cooperation in relation to investments.[64]

As the number of IIAs increased, the web of rules and mechanisms also expanded which contributed to the complex web of IIL.[65] Today, IIL is one of the most dynamic areas of international law but with this expansion the emerging rules have been the subject to critique.[66] Arguably, owing to its origins, IIL reflects a form of path dependency, which 'locks in' the interests of Western States rather than also accommodating the idiosyncratic interests of developing States, which are joining the regime at a later stage.[67]

To examine how this path dependency manifests, the critique of the IIL framework needs to be further explored. There are two main aspects to the critique of IIL.[68] Firstly, why do developing host States sign up to IIAs when there is no legal requirement for the home State or foreign investor to provide extra capital?[69] Secondly, the private characterisation of investment within arbitration means that convergences with IHRL have not been given sufficient attention,[70] which requires further research. Before, this can be discussed, we must turn our attention to why developing States conclude IIAs.

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[63] Rudolf Dolzer, Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff 1995) 11. See, in particular: Lauge Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP 2015) 172; Taylor St. John, *The Rise of Investor-State Arbitration: Politics, Law and Unintended Consequences* (OUP 2018) 63-64, 73.

[64] Dolzer, Stevens (n 63) 12.

[65] Fabio Morosini, Michelle Ratton Sanchez Badin, 'Reconceptualizing International Investment Law from the Global South: An Introduction' in Fabio Morosini, Michelle Ratton Sanchez Badin (eds), *Reconceptualizing International investment Law from the Global South* (CUP 2017) 6.

[66] Zachary Douglas, Joost Pauwelyn, Jorge Viñuales, 'Introduction' in Zachary Douglas, Joost Pauwelyn, Jorge Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 1.

[67] Salacuse (n 59) 72; Richard Peet, Elaine Hartwick, *Theories of Development: Contentions, Arguments, Alternatives* (3rd edn, Guilford Press 2015) 188.

[68] Joost Pauwelyn, 'Rational or Accidental? The Emergence of International Investment Law' in Zachary Douglas, Joost Pauwelyn, Jorge Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 12-14.

[69] Pauwelyn (n 68) 11.

[70] Luke Eric Peterson, Kevin Gray, 'International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration' (2003) IISD Research Paper, 16 <https://www.escr-

Arguably, developing countries enter into these legal arrangements in order to encourage foreign inward-investment flows.[71] As Salacuse and Sullivan argue, the trade-off for the prospect of more investment is that developing countries promise to protect said investment once it enters their territory.[72] In that regard, it is thought that investment agreements reflect a bargain where both the host and home State should derive equal benefit and responsibility.[73] This relationship between the two States needs to be further explored before examining whether IIAs result in inward capital flows.

1.1. The Challenge of Whether IIAs Lead to Increased Capital

As a source of IIL, IIAs are noteworthy instruments that codify the obligations of States.[74] BITs[75] (concluded between two States) are one of the main forms of IIAs and the conclusion of these instruments has significantly accelerated within the last fifty years.[76] As mentioned already, by signing IIAs, host States are committing themselves to protect foreign investment and by protecting this investment, States are also promising not to interfere with investors and

net.org/sites/default/files/Luke_Peterson___IHR_in_bilateral.pdf> accessed 12 October 2020.

[71] Jeswald Salacuse, Nicholas Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 Harvard International Law Journal 67, 77; Jonathan Crystal, 'Sovereignty, Bargaining, and the International Regulation of Foreign Direct Investment' (2009) 23(3) Global Society 225, 229.

[72] Salacuse, Sullivan (n 71) 77.

[73] Salacuse, Sullivan (n 71) 77.

[74] This author is aware that are alternative sources of IIL, for example, regional treaties, customary international law, general principles, unilateral statements.
For further details, see: Dolzer, Schreurer (n 10) 13-19.

[75] Since BITs are a dominant form of IIA, this author uses the term interchangeably but acknowledges that IIAs also refer to FTAs as well as sectoral and regional treaties.

[76] Dolzer, Schreurer (n 10) 13; Patrick Dumberry, 'Are BITs Representing the New Customary International Law International Investment Law' (2010) 28 Penn State International Law Review 675, 681; Lauge Skovgaard Poulsen, 'The Importance of Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' in Karl Sauvant (ed), *Yearbook on International Investment Law and Policy* (OUP 2010) 540.

their assets.[77] Moreover, by entering into these agreements, host States have committed themselves to resolving investment disputes with foreign investors.[78]

However, the promise on the part of the host State strikes at the heart of its ability to enable the betterment of society, allocate resources and regulate private actors.[79] This is because with this 'non-interference', host States are promising that any domestic legislative or policy steps, which are needed to achieve a particular goal, will not affect foreign investment.[80] However, 'interference' may be necessary in order to achieve wider development goals but, by taking action, disputes with foreign investors may arise.[81] Having committed themselves to dispute resolution, host States leave themselves exposed to potential claims from foreign investors if these perceive that the host has interfered with their investments.[82] In that instance, external arbitrators may scrutinise the host State's actions and 'award public funds to businesses' which can put a strain on the budgets of host States and divert funds away from achieving goals that may be important to society.[83] So, while there is no legal obligation on the home State or foreign investor to provide investment or even a minimum amount of investment, investors have the assurance that their property will be protected and even have procedural rights to challenge the host State if their investment has been adversely affected.[84]

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[77] Olivia Chung, 'The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration' (2006) 47(4) Virginia Journal of International Law 953, 963.
[78] Pauwelyn (n 68) 11.
[79] Howard Mann, 'International Investment Agreements: Building the New Colonialism?' (2003) 97 Proceedings of the Annual Meeting of American Society of International Law 247, 248.
[80] Mann (n 79) 248;
[81] Karl Sauvant, Federico Ortino, 'Improving the International Investment Law and Policy Regime: Options for the Future' (2017) King's College London Law School Research Paper No. 2017-10, 33 <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2926906_code2159956.pdf?abstractid=2896922&mirid=1> accessed 30 April 2020.
[82] Surya Subedi, *International Investment Law: Reconciling Policy and Principle* (2nd edn, Hart 2012) 82.
[83] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 4.
[84] Paulsson refers to this as 'arbitration without privity'.
Jan Paulsson, 'Arbitration Without Privity' (1995) 10(2) ICSID Review 232, 255

In spite of this unequal relationship, developing States still enter into IIAs in the hope for more foreign capital because the economic growth model (referred to in Chapter 2) emphasises that capital is an enabler for (economic) development.[85] Even China's own experience of rapid economic growth is premised on encouraging inward flows of foreign investment (as discussed in section 1). However, this is just one example and does not mean that the Chinese experience will work for other developing countries.

Indeed, whether IIAs lead to more capital is a difficult question to answer. Some scholars argue that there is some correlation between IIAs and inward capital flows.[86] Other scholars, with whom this author agrees, are less convinced by this argument and assert that the data is inconclusive.[87] After all, developing countries have been entering into IIAs for many years, but there are limited examples of countries that can match China's rapid economic growth. They are limited examples because these refer to industrialising economies (such as, Brazil, India and South Africa) that have the economic influence to put forward their interests, which is not a path that other developing States can easily follow.[88]

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[85] St. John and Poulsen argue that there are additional rationales underlying why developing States sign IIAs, see: Poulsen (n 63) 71, 111; St. John (n 63) 31-32, 39-49.
See also: Matthias Busse, Jens Königer, Peter Nunnenkamp, 'FDI Promotion Through Bilateral Investment Treaties: More Than a BIT?' (2010) 146 Review of World Economics 147, 148; Kenneth Vandevelde, 'A Brief History of International Investment Agreement' in Karl Sauvant, Lisa Sachs (ed), *Effect of Treaties on Foreign Direct investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP 2009) 14.

[86] Salacuse, Sullivan (n 71) 67; Eric Neumayer, Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' in Karl Sauvant, Lisa Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009) 226; Jennifer Tobin, Marc Busch, 'A BIT is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements' (2010) 62 World Politics 1.

[87] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (CUP 2017) 222; Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit… and They Could Bite' (2003) World Bank Research Working Paper 3121,
<http://documents.worldbank.org/curated/en/113541468761706209/pdf/multi0page.pdf>
accessed 1 April 2020; Jennifer Tobin, Susan Rose-Ackerman, 'When BITs Have some Bite: The Political-Economic Environment for Bilateral Investment Treaties' (2011) 6 The Review of International Organizations 1; Jason Webb Yackee, 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42(4) Law & Society Review 805.

[88] These examples will be further discussed in Chapter 7.

These studies highlight that the conclusion of IIAs is not the sole determining factor for promoting inward flows of investment. Inward-FDI is dependent on a wider range of domestic factors, for example, the internal '[legal], political and economic climate'[89] within the host State. Clear legal frameworks for investment that demarcate investor rights and obligations are among the factors that attract more FDI and this requires the State to take action in order to enact these frameworks.[90] However, under the current framing within IIAs, investors have rights but no obligations.[91] Without clear obligations, foreign investors can exploit gaps in the domestic legal framework and endanger local communities, which goes against the notion of inclusive development.[92] These gaps are particularly problematic in the developing State context because they are coping with other political challenges following independence, for example, apartheid or internal conflict.[93]

China is a good example of a State adapting to the IIL regime because it tailored its IIAs to serves its own strategic interests and used domestic frameworks to foster and regulate FDI.[94] The enactment of domestic rules does not seem to discourage foreign investors as China still manages to attract significant amounts of FDI.[95] This suggests that law in its regulatory capacity (which was referred to in Chapter 2, section 4.2) can be an enabler for foreign investment, which can potentially be of benefit for developing countries.[96] In reference

[89] Sornarajah (n 11) 222.
[90] Hallward-Dreimeier (n 87) 21; Tobin, Rose-Ackerman (n 87) 5; Eric Neumayer, Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries' (2005) 33(1) World Development 1567; Salacuse (n 59) 137.
[91] Caroline Foster, 'A New Stratosphere? Investment Treaty Arbitration as 'Internationalized Public Law' (2015) 64 International & Comparative Law Quarterly 461, 474.
[92] Peterson, Gray (n 70) 19; Rachel Anderson, 'Reimagining Human Rights Law: Towards the Global Regulation of Transnational Corporations' (2010) 88 Denver University Law Review 183, 225.
[93] Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 The Yale Law Journal 443, 503.
[94] Gallagher, Shan (n 44) 36.
[95] It is estimated that China received US$124 billion in 2011, which was the largest amount received by any developing or industrializing economy at the time.
Ken Davies, 'Inward FDI in China and Its Policy Context in 2012' (2012) 4 Transnational Corporations Review 4.
[96] The relationship between investment and inclusive development will be revisited and further explored in the next chapter.

to IIAs, developing countries should not be in such a rush to conclude them without first attempting to ensure that the appropriate domestic frameworks are in place in order to regulate investment.[97] This is not an easy task. The task is further complicated because developing States are required to square investment with other aspects of their role as legal actors and creators of law.[98] However, this is in accordance with the Westphalian model for Statehood and does not reflect the experiences of developing States (as argued in Chapter 2, section 1).

1.2. The Tension and Prioritisation of Rules in Relation to IIL and IHRL

In reference to the second challenge, the characterisation of IIL has been an issue that scholars have wrangled with.[99] Arguably, IIL is a branch of public international law because it refers to the relationship between States and treaties are among the main sources of IIL, but IIL has a hybrid nature which makes it unique within this wider framework. [100] Its hybrid nature stems from the fact there are private aspects of this regime, for example, its dispute settlement system follows a commercial model of arbitration.[101] Furthermore, substantively IIL also involves aspects of private international law, such as international contracts.[102]

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[97] Olivier de Schutter, 'Transnational Corporations as Instruments of Human Development' in Philip Alston, Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (OUP 2005) 403.
[98] Claire Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27(2) Review of International Studies 133, 137.
[99] For example, see: Rene Uruena, 'Subsidiarity and the Public-Private Distinction in Investment Treaty Arbitration' (2016) 79 Law & Contemporary Problems 99; Eric de Brandebere*, Investment Treaty arbitration as Public International Law* (CUP 2014) 18-19; Valentina Vadi, *Analogies in International Investment Law and Arbitration* (CUP 2015) 3; Tony Cole, *The Structure of Investment Arbitration* (Routledge 2013) 45; Caroline Foster, 'A New Stratosphere? Investment Treaty Arbitration as 'Internationalized Public Law'' (2015) 64(2) International & Comparative Law Quarterly 461, 463.
[100] Pauwelyn (n 68) 13.
[101] Van Harten (n 83) 50; Alex Mills, 'The Public-Private Dualities of International Investment Law and Arbitration' in Kate Miles, Chester Brown (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 100.
[102] Pauwelyn (n 68) 13; Campbell Mclachlan, 'Investment Treaties and General International Law' (2008) 57(2) International and Comparative Law Quarterly 361, 370.

Some scholars argue that IIL can be characterised by its private nature in referring back to its original purpose, which is concerned with investment protection.[103] From this perspective, IIL is primarily concerned with the relationships between private actors because it focusses on providing stability and predictability to foreign investors.[104] In particular, Miles argues that the rules within IIL have become a tool to protect private actors of the West and their interests because of the focus on investment protection and because of the colonial roots of the regime, which must be acknowledged and overcome.[105] Given this critique of IIL, it is surprising that developing countries join the regime in the hope of gaining more capital for economic growth even though this capital is not guaranteed and their interests are not secured.[106] IIAs are not the only route for capital or economic growth and indeed there is evidence to suggest that IIAs do not result in economic growth.[107] Yet, in practice most States follow this route to attract capital for economic growth.[108] This sets the trend or a dominant paradigm and an increasing number of States follow this approach, even though it does not reflect their experiences as

[103] De Brandebere (n 99) 1; Pauwelyn (n 68) 40.
[104] De Brandebere (n 99) 1; Dolzer, Schreuer (n 10) 21; Subedi (n 82) 84.
[105] Miles (n 58) 19.
[106] Muthucumaraswamy Sornarajah, *Resistance and Change in the international Law on Foreign Investment* (CUP 2015) 13.
[107] Brazil only has 2 BITs in force, yet still attracts large amounts of FDI. In contrast, Tanzania has 11 BITs in force but does not receive the same amount of FDI flows as Brazil, whilst Ethiopia has 21 BITs in force and remains one of the world's poorest countries.
See respectively: UNCTAD, 'International Investment Agreement Navigator – Brazil' (*UNCTAD*, 2022) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil> accessed 3 May 2022; UNCTAD, 'International Investment Agreement Navigator: The United Republic of Tanzania' (*UNCTAD*, 2022) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/222/united-republic-of-tanzania> accessed 2 May 2022; UNCTAD, 'International Investment Agreement Navigator: The Federal Democratic Republic of Ethiopia (*UNCTAD*, 2022) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia> accessed 2 May 2022.
For further analysis, see: Kevin Gallagher, Melissa Birch, 'Do Investment Agreements Attract Investment? Evidence from Latin America' (2006) Journal of World Investment & Trade 961; Dan Wei, 'Bilateral Investment Treaties: An Empirical Analysis of the Practices of Brazil and China' (2012) 33 European Journal of Law & Economics 663, 669; Parfait Bihkongnyuy Beri, Gabila Fohtung Nubong, 'Impact of Bilateral Investment Treaties on Foreign Direct Investment in Africa' (2021) 33 African Development Review 439, 441.
[108] Amanda Perry, 'An Ideal Legal System for Attracting Foreign investment? Some Theory and Reality' (2000) 15(6) American University International Law Review 1627, 1640.

capital-importing States. It also does not reflect the fact that developing States need to be able to balance public and private aspects of their role as a State.

As the IIL regime continues to expand with the growing number of IIAs concluded, the scholarship in relation to the public-private aspects of IIL has also grown.[109] Rather than focusing on the nature of IIL itself, scholars have tried to situate IIL in relation to other aspects of international law, for example in relation to IHRL.[110] These scholars attempted to identify whether IIL and IHRL represent a harmonious or a fragmented approach within the wider framework of international law.[111] The challenge that exists is that international law does not provide guidance what to do in the event of two competing *lex specialis* regimes,[112] which in this case would refer to IIL and IHRL. Without this guidance, scholars seem to have fallen back on the idea that generally, treaties should be abided by in good faith and with a degree of levelheadedness.[113] Problematically, 'levelheadedness' is not enough because as the expansion of international regimes like IIL and IHRL shows, it 'reshap[es the] spaces for the

[109] Sornarajah (n 106) 60.
[110] Sornarajah (n 106) 60.
[111] For example, see: Daria Davitti, 'On the Meanings of international Investment Law and International Human Rights Law: The Alternative Narrative of Due Diligence' (2012) 12(3) Human Rights Law Review 421; Lorenzo Cotula, 'Property in a Shrinking Planet: Fault Lines in International Human Rights and Investment Law' (2015) 11(2) International Journal of Law in Context 113; Silvia Steininger, 'What's Human Rights Got To Do With It? An Empirical Analysis of Human rights References in Investment Arbitration' (2018) 31 Leiden Journal of International Law 33; Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60(3) International & Comparative Law Quarterly 573; Johannes Fahner, Matthew Happold, 'The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic integration' (2019) 68(3) International & Comparative Law Quarterly 741; James Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 Duke Journal of Comparative & International Law 77.
[112] This refers to specific rules of international law, although it is clear that lex specialis rules have priority over the general, it is not clear what to do in event of two *lex specialis* rules. ILC, 'Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (11 August 2006) UN Doc A/CN.4/L.682 34-36.
[113] ILC (n 112) 40; Georg Schwarzenberger, *International Law* (Stevens and Sons 1957) 474; Joost Paulwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law (*CUP 2009) 388.

exercise of state sovereignty'[114] whilst at the same time principles of good faith and levelheadedness do not illuminate how to manage the potential conflict of these regimes.[115]

Guidance on how to manage this conflict would be helpful because it would provide clarification as to whether the rules of one regime should be prioritised over another, or whether such a prioritisation is flawed. It would be especially useful to have such guidance because the origins and aims of IIL are naturally different from IHRL.[116] As previously identified, IIL emanates from Western States' desire to protect their assets, whereas IHRL is premised on establishing a minimum standard of treatment that should be accorded to all human beings.[117]

The objectives of IIL and IHRL are not the same. On that basis, there may not be incompatibility in the strict sense, that is, where fulfilling one obligation defeats the achievement of another.[118] From an investment perspective, the obligations on the host State could mean that it refrains from taking important steps to protect human rights,[119] or avoids entering into further investment treaties.[120] None of these 'solutions' is ideal. Furthermore, a

[114] Cotula (n 111) 114.
[115] Cotula (n 111) 114.
[116] ILC (n 112) 19.
[117] This was following World War I and World War II, where States agreed that basic rights for individuals was imperative.
Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) preamble. For further discussion of the origins of IHRL and basic rights for individuals, see: Louis Henkin, *International Law: Politics, Values and Functions* (Martinus Nijhoff 1990) 208; Henry Steiner, Philip Alston, Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP 2008) 135.
[118] ILC (n 112) 19.
[119] This is referred to by scholars as a 'regulatory chill', where host States try to avoid investment claims by putting aside regulation which is needed.
For further details, see: Julia Brown, 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?' (2013) 3 Western Journal of Legal Studies 1, 9;
[120] South Africa seems to have taken this step and has discontinued its investment treaties, so that it can maintain domestic legislation for the enhancement of black citizens.
For further details, see: Sornarajah (n 11) 269; Uche Ewelukwa Ofodile, 'Africa-China Bilateral Investment Treaties: A Critique' (2013) 35 Michigan Journal of International Law 131, 136; Fabio Morosini, 'Making the Right to Regulate in Investment Law and Policy Work for Development: Reflections from the South African and Brazilian Experiences' (*IISD*, 30 July 2018) <https://cf.iisd.net/itn/2018/07/30/making-the-right-to-regulate-in-investment-law-and-policy-work-for-development-reflections-from-the-south-african-and-brazilian-experiences-fabio-morosini/> accessed 24 September 2020.

conflict may exist in the wider sense, where different sets of rules provide different solutions to similar problems.[121] In the case of development, a State may seek to encourage investment through IIAs but by doing so, this may adversely affect the implementation of another set of rules from IHRL.[122]

As Ruggie argues, 'To attract foreign investment, host States offer protection through bilateral investment treaties… They promise to treat investors fairly… with little regard to State's [wider] duties', for example their IHRL obligations.[123] The conflict in the wider sense refers to the fact that there is an imbalance of power when host States struggle to strengthen their human rights standards because they do not wish to be challenged by foreign investors or lose favour with these investors.[124] This conflict is further entrenched in investment arbitration due to the fact that a private model for dispute settlement is used to address and evaluate the suitability of public issues,[125] such as whether the State's actions to fulfil the right to food interfere with an investor's investment.

If, hypothetically, a given host State enacted an agricultural policy that could potentially mean that marginalised groups could access arable land for food, that State may be challenged by a foreign investor if that policy also affected the land or property of a foreign investor.[126] From an arbitration perspective, arbitrators evaluate the *public* actions of the State to protect and fulfil the right to food but through the lens of investment, which has a private

[121] ILC (n 112) 19; Mosche Hirsch, 'Investment Tribunals and Human Rights Treaties: A Sociological Perspective' in Freya Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (CUP 2013) 86.
[122] ILC (n 112) 19.
[123] UNCHR, 'Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (7 April 2008) UN Doc A/HRC/8/5, 12.
[124] UNCHR (n 123) 11.
[125] UNCHR (n 123) 11; Van Harten (n 83) 46; Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation' (2010) 104(2) American Journal of International Law 179, 191.
[126] Häberli and Smith rightly argue that states should refrain from entering into such agreements if there is a potentially adverse impact on the right to food in the host State. For further details, see: Häberli, Fiona Smith, 'Food Security and Agri-Foreign Direct Investment in Weak States: Finding the Governance Gap to Avoid 'Land Grab'' (2014) 77(2) Modern 189, 202.

origin.[127] Furthermore, not all arbitrators have the relevant human rights law background or knowledge to adjudicate such matters and may err on the side of investment protection rather than give more weight to important issues, such as the right to food.[128] This is clear from the dissenting opinion of Gary Born (who is an international commercial arbitrator) in *Biwater Gauff v Tanzania*,[129] where the intersectionality between the right to water and the State's intervention was not acknowledged in detail.[130] Instead, Born argued that the award should have been made in favour of the foreign investor.[131]

Within this setting, this means that public issues involving IHRL take a backseat.[132] This means that IIL is not designed to engage with the IHRL concerns in detail but also, highlights that within the investment context, State actors are not adequately equipped to fill the gaps when IHRL overlaps with IIL. This marginalisation of IHRL in relation to the State's regulatory autonomy is further examined in the next section, which critically assesses how IIL has dealt with these concerns as a way forward for the consideration of inclusive development within this regime.

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[127] Van Harten (n 83) 156; Gus Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims Against the State' (2007) 56(2) The International and Comparative Law Quarterly 371, 379

[128] Ksenia Polonskaya, 'Diversity in the Investor-State Arbitration: Intersectionality Must Be a Part of the Conversation' (2018) 19 Melbourne Journal of International Law 259, 284; Won Kidane, 'The China-Africa Factor in the Contemporary ICSID Legitimacy' (2014) 35 University of Pennsylvania Journal of International Law 559, 603; Julie Maupin, 'Public and Private in International Investment Law: An Integrated Systems Approach' (2014) 54(2) Virginia Journal of International Law 367, 395.

[129] *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (18 July 2008) ICSID Case No. Arb/05/22, Award, para 387.

[130] In contrast, Philippe Sands' (who has a strong background in public international law and environmental law) approach in Bear Creek v Peru progressively recognises IHRL issues and expressly refers to rights under ILO Convention 169 (Indigenous and Tribal Peoples Convention).
See: *Bear Creek Mining Corporation v Republic of Peru* (30 November 2017) ICSID Case No. Arb/14/21, Partial Dissenting Opinion of Professor Philippe Sands.

[131] *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (18 July 2008) ICSID Case No. Arb/05/22, Concurring and Dissenting Opinion.

[132] UNCHR (n 123) 11; Van Harten (n 83) 48.

3. IN SEARCH OF INCLUSIVE DEVELOPMENT WITHIN IIL

In the event of conflicts within international law, States should approach these conflicts in good faith.[133] This good faith approach is also applicable in the context of conflicts between IIL and IHRL.[134] Good faith, however, only goes so far when attempting to balance competing regimes. Investment tribunals provide a good example of this, as they have not always clearly established where the boundaries between investment and wider non-investment norms are.[135] This poses a challenge to IHRL as an aspect of inclusive development (previously discussed in Chapter 2) because it suggests that the balance between conflicting regimes has not been achieved. This section asserts that IHRL is not always fully acknowledged by tribunals as they are predominantly concerned with investment protection. This approach by tribunals also highlights the limitations of IIL as a narrowly interpreted regime in light of other equally important *lex specialis* regimes.

3.1. Investment Arbitration As A Hindrance to the State's Regulatory Autonomy

Investment tribunals have continually emphasised that the host State must provide a 'stable legal and business environment'[136] for foreign investors, which is one of the main commitments within this regime.[137] This is in recognition of the risk, commitment and cost that

[133] ILC (n 112) 154.
[134] Federico Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Values and Reasonableness* (OUP 2019) 128.
[135] *Saluka Investments B.V. v The Czech Republic* (17 March 2006) UNCITRAL, Partial Award, para 263; Ortino (n 134) 128.
[136] *CMS Gas Transmission Company v The Republic of Argentina* (12 May 2005) ICSID Case No. ARB/01/8 para 274.
[137] For example, see: *Metalclad Corporation v The United Mexican States* (30 August 2000) ICSID Case No. ARB(AF)/97/1; *Azurix Corporation v The Argentine Republic* (14 July 2006) ICSID Case No. ARB/01/12, Award, para 360; *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (24 July 2008) ICSID Case No. ARB/05/22, Award, para 729.

the investor incurs from every investment project.[138] Arguably, as Mouyal indicates, this emphasis on business stability is a reflection of the (private and the commercial) interest of the home State and foreign investor because it reinforces the protection of their property and also allows investors to plan for the future.[139] Consequently, the interests of the host State become infused with private characteristics because they are expected to provide stability for investment as a means of drawing in foreign capital, which sits uneasily with their (public) role in relation to the protection of human rights, such as the right to food.[140]

The conflict arises when the host State needs the flexibility to progress their wider (public) development goals, which includes their IHRL obligations.[141] Flexibility is further needed because these goals are ever-shifting and inclusive development is a continuous process.[142] In that regard, a State needs the room or freedom to be able to adopt legislation and/or policies to further these goals,[143] which is often referred to as their right to regulate or their regulatory

[138] Lauge Skovgaard Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' in Karl Sauvant (ed*), Yearbook on International investment Law & Policy 2009-2010* (OUP 2010) 543; Sornarajah (n 11) 87.
[139] Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective (*Routledge 2016) 19.
[140] Mouyal (n 139) 19.
[141] Mouyal (n 139) 19; Giorgio Sacerdoti, 'Investment Protection and Sustainable Development' in Steffen Hindelang, Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2012) 19.
[142] Mouyal (n 139) 19; Sacerdoti (n 141) 19; Simma (n 111) 576.
[143] For example, in *Piero Foresti v South Africa*, South Africa enacted the Black Economic Empowerment Act in conjunction with other mining legislation in order to redistribute shares to marginalised black people.
Piero Foresti, Laura de Carli & Others v The Republic of South Africa (4 August 2010) ICSID Case No. ARB(AF)/07/01, Award, para 64.
For further discussion, see: Jason Brickhill, Max du Plessis, 'Two's Company, Three's a Crowd: Public Interest Intervention in Investor-State Arbitration (Piero Foresti v South Africa)' (2011) 27 South African Journal on Human Rights 152; Annalisa Leibold, 'The Friction Between Investor Protection and Human Rights: Lessons from Foresti v South Africa' (2016) 38 Houston Journal of International Law 215.

autonomy.[144] Additionally, it allows the State to be responsive in the face of unexpected events,[145] for example, State responses to unforeseen economic crises.[146]

A State's regulatory autonomy does not end there. Although internal regulation is a major aspect of the State's autonomy, all States should have the agency to determine their own path in relation to external affairs.[147] This means that States ought to have the freedom to decide whether and how they join international regimes such as IIL.[148] It also means that they should have the freedom to choose the formats of the rules relating to the regimes that they join.[149]

In theory, States have the freedom to conclude treaties and have the capacity to act as duty bearers of human rights.[150] In practice, this freedom does not truly exist.[151] Within the Westphalian framing, all States are supposed to be equal as actors but this 'equality' ignores the plurality of States, which are not truly equal to act as they see fit as duty bearers of human rights.[152] Instead, developing States are expected to adopt Western legal and institutional frameworks, which ignores their autonomy to drive forward positive change through their own

[144] Alison Giest, 'Interpreting Public Interest Provisions in International Treaties' (2017) Chicago Journal of International Law 321, 332.
[145] Mouyal (n 139) 19; Aikaterini Titi, *The Right to Regulate in International Investment Law* (Hart 2013) 22.
[146] In response to the Argentine 2000-2002 financial crisis, see: *Enron Corporation and Ponderosa Assets L.P. v The Argentine Republic* (22 May 2007) ICSID Case No. ARB/01/3, Award paras 41-44; *Azurix Corporation v The Argentine Republic* (14 July 2006) ICSID Case No. ARB/01/12, Award, paras 187-188, *Siemens A.G. v The Argentine Republic* (17 January 2007) ICSID Case No. Arb/02/8 para 85*; CMS Gas Transmission v The Argentine Republic* (12 May 2005) ICSID Case No. ARB/01/8, Award, paras 53, 59-60; *National Grid Plc v The Argentine Republic* (3 November 2008) UNCITRAL, paras 59-60; *LG&E Energy Corporation, LG&E Capital Corporation and LG&E International Inc. v The Argentine Republic* (25 July 2005) ICSID Case No. ARB/02/1, Award, para 35.
[147] Titi (n 145) 32.
[148] Titi (n 145) 28.
[149] Titi (n 145) 27.
[150] Ilias Plakokefalos, 'Treaties and Individuals: Of Beneficiaries, Duty-Bearers, Users and Participants' in Christian Tams, Antonios Tzanakopoulos, Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edward Elgar 2014) 628.
[151] Jean Cohen, 'Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective' in Samantha Besson, John Tasioulas, *The Philosophy of International Law* (OUP 2010) 266.
[152] Cohen (n 151) 266.

experiences and mechanisms.[153] Investment arbitration is another example of how the State's autonomy is curtailed in practice.

Although experience from investment arbitration suggests that there has been some acknowledgement of the right to regulate, an approach that establishes the scope and parameters has yet to fully crystallise.[154] Accordingly, tribunals have, at times, decided in favour of the foreign investor despite the host State taking action for a legitimate purpose. Sornarajah rightly argues that this reflects a degree of insensitivity on the part of these tribunals.[155] Further contributing to this problem is the lack of a uniform approach adopted by tribunals on similar facts and disputes, which means that the right to regulate is further obfuscated by a lack of clear direction adopted by tribunals.[156]

3.2 Examples of Investment Arbitration's Limited Recognition of IHRL

In *S.D. Myers v Canada*,[157] the investment dispute concerned a foreign investor from the United States of America (USA) that wanted to process hazardous waste outside of Canada and therefore needed to export this waste from Canada to the USA.[158] At the time, Canada sought to comply with wider international law obligations under the Basel Convention

[153] Cohen (n 151) 266.
[154] *Saluka v Czech Republic* (n 135) 263. In some recent cases, 'lip-service' is paid to the public interest when there is an express right to regulate in the respective investment agreements but the references by the tribunals do not expand on the host State's right to regulate, for example, see: *Eco Oro Minerals Corporation v The Republic of Colombia* (9 September 2021) ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, para 398; *Bear Creek Mining Corporation v The Republic of Peru* (30 November 2017) ICSID Case No. ARB/14/21, Award, para 431.
[155] Sornarajah (n 11) 272.
[156] Vera Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs' (2016) 50 Vanderbilt Journal of Transnational Law 355, 395; Jan Kleinheisterkamp, 'Investment Treaty Law and Fear for Sovereignty: Transnational Challenges and Solutions' (2015) 78(5) Modern Law Review 793, 823.
[157] *S.D. Myers Incorporated v The Government of Canada* (13 November 2000) UNCITRAL, Partial Award.
[158] *S.D. Myers Incorporated v The Government of Canada* (13 November 2000) UNCITRAL, Partial Award, para 93.

on the Transboundary Movement of Hazardous Waste.[159] These obligations referred to the prohibition of the import and export of hazardous waste under the Basel Convention,[160] because the international community recognised that these chemicals pose a risk to the human right to health.[161] Canada, as the host, maintained that restrictions on the export of chemicals were necessary in order to protect human health and so, these chemicals should be destroyed domestically.[162] However, the Tribunal still concluded that Canada was in breach of the national treatment provisions under the North Atlantic Free Trade Agreement (NAFTA).[163] This is because Canadian waste-processing companies would be given more favourable treatment over companies located in the United States since the export of hazardous waste was banned under Canadian policy.[164]

In relation to the losses sustained by the foreign investor, the Tribunal awarded it US$6,050,000.[165] The Tribunal acknowledged that the host State had obligations under the Basel Convention and that the issue concerned chemicals that pose a real risk to human health.[166] Furthermore, the Tribunal identified that 'international law generally extends to the right of domestic authorities to regulate matters within their own borders'.[167] This is an admirable sentiment but it does not go far enough. This is because the Tribunal did not reduce the amount of compensation owed to the foreign investor and neither did it refer to the fact that the host State had to comply with the Basel Convention in its decision to award

[159] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entry into force 5 May 1992) 1673 UNTS 57.
[160] Basel Convention (n 159) arts 4(1)(a), 4(5), 4(6).
[161] Basel Convention (n 159) preamble.
[162] *S.D. Myers Incorporated v The Government of Canada* (13 November 2000) UNCITRAL, Partial Award, para 176, 178.
[163] North Atlantic Free Trade Agreement (adopted 17 December 1992, entry into force 1 January 1994) 32 ILM 289 arts 1102, 1105.
[164] *S.D. Myers Incorporated v The Government of Canada* (13 November 2000) UNCITRAL, Partial Award, para 322.
[165] *S.D. Myers Incorporated v The Government of Canada* (21 October 2002) UNCITRAL, Second Partial Award, para 301.
[166] *S.D. Myers Incorporated v The Government of Canada* (13 November 2000) UNCITRAL, Partial Award, para 107.
[167] *S.D. Myers Incorporated v The Government of Canada* (13 November 2000) UNCITRAL, Partial Award, para 263.

compensation.[168] Indeed, the Tribunal's earlier acknowledgement of the wider obligations of the host State seem to even lack hortatory value because it is not actively encouraging the host State to balance investment with the right to health. It is just stating that such an obligation and right exist. Arguably, this seems myopic on the part of the Tribunal in relation to the host State's right to regulate regarding external issues.

In contrast, tobacco manufacturer Philip Morris was not successful in its claim against Australia in 2017. The investment dispute arose in respect of Australia's enactment of the Tobacco Plain Packaging Act 2011.[169] The Act required changes to tobacco packaging in a bid to improve public health by discouraging people from smoking or to give it up.[170]

Following international arbitration, investors also sought to claim under Australian national law in *JT International v Australia* and *British American Tobacco v Australia*.[171] The claimants (the respective tobacco companies) alleged that the Act violated their property rights and also their rights under s 51(xxxi) of the Constitution because they did not consider the change to packaging as 'just'.[172] Accordingly, these investors claimed that the restrictions on tobacco packaging was tantamount to an acquisition of their property.[173]

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[168] *S.D. Myers Incorporated v The Government of Canada* (21 October 2002) UNCITRAL, Second Partial Award, para 301.

[169] Tobacco Plain Packaging Act 2011 (Cth).

[170] Tobacco Plain Packaging Act 2011 (Cth) s 3(a).

[171] For example, see: *Philip Morris Asia Ltd. v The Commonwealth of Australia*, UNCITRAL PCA Case No. 2012-12; *Philip Morris Brands Sàrl, Philip Morris Products S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7.
In particular, see: *JT International S.A. v The Commonwealth of Australia*; *British American Tobacco Australasia Limited and Others v The Commonwealth of Australia* [2012] HCATrans 43 (5 October 2012).

[172] *JT International S.A. v The Commonwealth of Australia*; *British American Tobacco Australasia Limited and Others v The Commonwealth of Australia* [2012] HCATrans 43 (5 October 2012) 2.
See also: The Constitution of the Commonwealth of Australia 1900 (Cth) s 51(xxxi), which states: 'The Parliament shall, subject to this Constitution have power to make laws for the peace, order, and good government of the Commonwealth with respect to: the acquisition of property on just terms from any State or person for any purpose of which the Parliament has power to make laws'.

[173] *JT International S.A. v The Commonwealth of Australia; British American Tobacco Australasia Limited and Others v The Commonwealth of Australia* (n 172) 20.

Australia argued that tobacco posed a threat to the right to health and the Act was necessary in order to address this issue.[174] In this circumstance, it was held that since there was no proprietary gain on the part of the host State, an acquisition of property did not occur.[175] Furthermore, the Australian High Court identified that there is a link between the host State's need to adopt regulatory policies in line with its wider IHRL commitments, which needs to be considered in the context of investment.[176] This recognition of the host State's right to regulate is important in helping it maintain the flexibility to ensure the betterment of society in line with the inclusive approach to development. It also demonstrates that tribunals can side-step the argument that the host State must provide a stable business environment for foreign investors at all times, even if it potentially conflicts with IHRL obligations. Arguably, this is a good example of the recognition of the host State's right to regulate.

The inconsistent approach between these examples of approaches taken in investment arbitration and also national law is indicative of a wider issue within the regime.[177] Arguably, tribunals have not developed a uniform approach to oversee IHRL and other non-investment issues, especially in light of the right to regulate.[178] Without consistency in approaches, the discourse regarding development through investment lacks clear guidance, which is necessary for host States to plan for the future. In contrast, the IIL regime is built around notions of stability which have been interpreted narrowly. This allows foreign investors to claim when the value of their investment has been adversely affected, even if tribunals have

[174] *JT International S.A. v The Commonwealth of Australia; British American Tobacco Australasia Limited and Others v The Commonwealth of Australia* (n 172) 22.
[175] *JT International S.A. v The Commonwealth of Australia; British American Tobacco Australasia Limited and Others v The Commonwealth of Australia* (n 172) 22.
[176] *JT International S.A. v The Commonwealth of Australia; British American Tobacco Australasia Limited and Others v The Commonwealth of Australia* (n 272) 22.
[177] Irene Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' (2013) 51 Columbia Journal of Transnational Law 418, 427.
[178] Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1532; Valentina Vadi, 'Towards Arbitral Path Coherence and Judicial Borrowing: Persuasive Precedent in Investment Arbitration' (2008) 5 Transnational Dispute Management 5; Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity, or Excuse?' (2007 Arbitration International 357, 373.

already ruled on similar facts and issues.[179] Investment arbitration emphasises that a host State has a duty to provide a stable business environment. As such, the host State's ability to provide a stable business environment is a pre-condition of the overarching IIL framework. After all, IIL originates from the desire to protect investment;[180] if interpreted narrowly within this vein, there is little room for expansive interpretation or adjustment.[181]

Notably, this means that tribunals cannot yet be relied upon to definitively 'weigh-in' on providing clearer guidelines as to the scope of host State obligations and their need to retain flexibility to regulate.[182] In that regard, States need to do this for themselves and this is particularly important for developing host States, which is an argument that will be expanded upon in the next chapter.

Although there are no clear guidelines, at the moment, there is some light at the end of the tunnel. Tribunals have begun to recognise that there are wider non-investment (or public) interests at stake, especially in terms of how IIAs are perceived by States in order for the regime to evolve and 'a blanket refusal [to acknowledge the public interest] could do positive harm'.[183] This means that tribunals *should* consider conflicts regarding non-

[179] For example, although the facts were materially similar as it involved the Argentinian financial crisis and the devaluing of the national currency, there were divergent decisions adopted by different tribunals. In *CMS v Argentina*, *Enron Corp. v Argentina*; *Sempra v Argentina*, the host State violated investment protection measures, whereas in LG&E and Continental, the host State was able to defend against claims arguing that its actions were due to a public emergency.
See: *CMS v Argentina* (n 136) Award, para 88; *Enron Corp v Argentina* (n 146) 288; *Sempra Energy International v The Argentine Republic* (28 September 2007) ICSID Case No. Arb/02/16 para 397.
[180] Dolzer, Schreuer (n 10) 6-7; Sornarajah (n 106) 14.
[181] Sornarajah (n 106) 20; Javier Garcia Olmedo, 'Recalibrating the International Investment Regime Through Narrowed Jurisdiction' (2020) 69 International Comparative Law Quarterly 301, 316.
[182] Cate (n 177) 437.
[183] *Methanex Corporation v The United States of America* (15 January 2001) 44 ILM 1345, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" para 49; *Eco Oro Minerals Corporation v Colombia* (n 154) para 398; *Bear Creek Mining Corporation v Peru* (n 154) para 431; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador* (5 October 2015) ICSID Case No. ARB/06/11 paras 407-408.

investment matters, which includes the intersectionality between investment and inclusive development as part of their remit.[184]

By acknowledging non-investment matters, this is a more inclusive approach that recognises that the host State needs greater flexibility; it is also an acknowledgement that the State is a duty bearer to actualise human rights and that it needs to act to and its enable the public interest.[185] In the context of food, the host State needs to adopt regulatory measures to protect the right, which needs to be acknowledged within the investment setting.[186]

In certain circumstances, the host State's regulatory actions may even be permissible under IIL, if these actions are for the public benefit or interest.[187] Arguably, it is in the public's interest that IHRL is furthered but it has been claimed by tribunals that this is within the host State's remit – to square investment obligations with its wider commitments to the public interest.[188] However, what is meant by the public interest has not been elaborated on by tribunals. The public interest angle will be further examined in the next chapter, which

[184] The intersectionality will be further explored in the analytical framework in Chapter 4.
The intersectionality is the focus of this thesis but this author acknowledges that tribunals should consider these conflicts. This not only requires a shift in mindset; it also requires further training in order widen the understanding of arbitrators in relation to non-investment matters, such as IHRL. The composition of tribunals is an issue that falls outside the scope of this thesis but this author is aware of this issue.
For further discussion on the matter, see: footnote in relation to Bear Creek (n 130); David Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes' (2010) 30 Northwestern Journal of International Law & Business 383, 395; Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25(2) ICSID Review 339, 345; Roberts (n 125) 207.
[185] UNCHR, 'General Comment No. 12: The Right to Adequate Food (Art. 11)' (1999) UN Doc E/C.12/1999/5 para 36; UNCHR, 'Report of the Special Rapporteur on the right to food, Hilal Elver' (2014) UN Doc A/HRC/28/65 para 34.
[186] UNCHR, 'Report of the Special Rapporteur on the right to food, Olivier de Schutter' (2011) UN Doc A/HRC/19/59/Add.5 para 6.1; Carmen Gonzalez, 'The Global Food Crisis: Law, Policy, and the Elusive Quest for Justice' (2010) 13(2) Yale Human Rights and Development Journal 462, 477.
[187] *CME Czech Republic B.V. v The Czech Republic* (n 254) Partial Award, para 149.

[188] *Urbaser S.A. and Consorcio de Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (8 December 2016) ICSID Case No. ARB/07/26, paras 1159-1160, 1210; *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (27 November 2006) ICSID Case No. ARB.05/22, Petition for Amicus Curiae Status, para 32; *Azurix v Argentina* (n 237) paras 261, 254.

constructs the analytical framework that provides a bridge between investment and wider inclusive development.

CONCLUSION

As the previous chapter indicates, investment can be an enabler for development through economic growth but this is not an instantaneous or guaranteed event. Although it seems that many developing countries conclude IIAs as a means to attract foreign capital, there is no guarantee that inward capital flows will be boosted. Arguably, IIL is puzzling. From the perspective of the developing host State, the State is driven by its desire to attract capital for development. Host States conclude IIAs in a bid to encourage inward-capital flows even though there is no certainty that these flows will happen. Moreover, by concluding these instruments, the regulatory autonomy of host States is restricted.[189] This is because host States are expected to protect foreign investment and these instruments reflect the interests of foreign investors rather than those of host States.[190]

At the moment, the tension seems to emphasise the investment protection over IHRL commitments due to the fact that investment protection is perceived to be the raison d'être of the IIL regime and this is compounded by the lack of clarity within investment arbitration. Although there are some references to the idea of State actions adopted in the interest of the public, or simply the public interest, this has not been expanded upon. In that regard, investment arbitration has tentatively tried to forge a path towards acknowledgement of the public interest, but there is still room for improvement.

Chapter 4 expands on what is meant by the public interest and how it can bridge investment and development, so as to achieve inclusive development. It builds an analytical

[189] Stephen Schill, *The Multilateralisation of International Investment Law* (CUP 2009) 373.
[190] Schill (n 189) 373.

framework or scaffold as to how law is necessary as both an enabler and regulator of investment. FDI can only be harnessed for inclusive development if the host State takes an active role in shaping the law for the benefit of society and through the regulation of investment.

CHAPTER 4 – THE ANALYTICAL FRAMEWORK

INTRODUCTION

The question of how to achieve development is one of the main challenges that developing countries face. This thesis argues that development is so much more than an economic end-goal, it is an ongoing process and it is a fundamental human rights issue. Accordingly, development needs to be situated within the IHRL discourse. Narrowly conceived, development has been underpinned by Western economic theories and notions of Statehood, which are not based on the actual experiences of developing States. Chapter 3 focussed on the nexus between development and investment, which identified that the economic sphere, in relation to investment, dominates over the non-investment issues such as development. In particular, it was argued that the existing investment framework is built on and around the private interests and property of Western (developed) States. Consequently, the non-investment interests of developing States are not adequately represented.

This chapter explores how to marry development and investment in a way that ensures inclusive development and shifts away from the existing focus on the economic sphere. Before the framework can be presented, this chapter will first analyse the role of the State from the perspective of developing States. This analysis is necessary in order to identify what is holding the States back from their duty-bearer role in relation to inclusive development before a framework for inclusive development is constructed so that development has both meaning and transformational value for developing States. The framework is built on three foundational pillars – freedom of choice, the public interest and law as an enabler and regulator – which will be applied in the context of the IIL regime.

Before assessing how IIAs, as negotiable instruments in IIL, can be amended to reflect an inclusive development approach, this chapter examines how and to what extent investment arbitration has started to recognise public interest arguments but there needs to be more than just recognition (as analysed in Chapter 3, section 3.2). Tribunals have made some headway, but this is not enough to reflect the needs of Global South States. For this reason, this author argues that change needs to start with amendments to BITs (as a form of IIA) so that tribunals are reminded of the interests of developing States.

For reasons of time and space within this thesis, this chapter focusses especially on reforms to the preambles, point of admission, national treatment and general exception provisions. These provisions provide important points of reform within BITs because they are areas where the host State has more flexibility (than other aspects) to determine their scope. This means that they can be negotiated and phrased in such a way that accommodates their interests, which is necessary for inclusive development. The aforementioned framework and changes to BITs establish the analytical framework of this thesis, so that the aspects of this framework can be applied in the upcoming case study chapters.

1. THE STATE AS A DUTY-BEARER

The previous chapters have demonstrated that the dominant understanding of development has been framed from a Western economic growth perspective.[1] This approach places an emphasis on capital as a facilitator for development and FDI should be used when

[1] Priscilla Schwartz, 'Capitalism, International Investment Law and the Development Conundrum' (2013) 6(2) Law & Development Review 217, 218.

domestic capital is unavailable.[2] Yet, developing States that have adopted this approach have not benefitted in a meaningful manner. As Schwartz indicates, many developing States '…have had a long relationship with foreign capital but… have not attained high economic growth rates or high levels of social development over extended periods'.[3]

The existing economic growth model for development is not working; it is time for change and a more inclusive model is needed. In particular, a more inclusive model needs to account for the experiences of developing States in order to avoid a continuation of the existing model that is based on Western perspectives.[4] The rigidity of the existing model means that it is especially inadequate for developing States because it does not have the flexibility to account for the domestic context when applied without changes. Indeed, the limited successes of the economic growth model are not because the model has been rigidly adhered to but are rather due to the fact that States like China have not stuck strictly to it. Instead, as explored in the previous chapter, China has chosen the elements that suit its own needs, which allow it to restrict the activities of private actors within its territory and gradually open its economy to foreign investors. To do this, however, a State needs to be empowered to act and is willing to do so, which is not always the reality.

Developing States are not always empowered. This is because, as part of the Westphalian approach to Statehood, the non-Western State 'never possessed the absolute power over its own territory and people'.[5] As a result, developing States lack a true sense of self, which inhibits their understanding of how to wield legal and institutional frameworks to their

[2] Deborah Swenson, 'Why Do Developing Countries Sign BITs?' (2005) 12 University of California Davis Journal of International Law & Policy 131, 134; Jeswald Salacuse, 'Of Handcuffs and Signals: Investment Treaties and Capital Flows to Developing Countries' (2017) 58 Harvard International Law Journal 127, 139.
[3] Schwartz (n 1) 217.
[4] Michael Trebilcock, Mariana Mota Prado, *Advanced Introduction to Law and Development* (Edward Elgar 2014) 18.
[5] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP 2005) 254.

advantage.[6] This leads to lack of political will as the State continues to be divorced from the regulatory functions that it should undertake because of uncertainty when implementing relevant frameworks.[7] The divide between the developing State and its regulatory functions is further deepened by the lack of adequate resources to educate officials designing legal frameworks as well as the actual implementation of legal frameworks in the development context.[8]

In pursuit of the economic growth model, developing States have been 'locked' into a paradigm where the emphasis is on deregulation of markets and privatisation.[9] This has further contributed to the divide between the State and its regulatory role and further inhibits its ability to enable inclusive development. As explored in Chapter 2, the 'laissez-faire' approach to the economy implied under the current model of economic growth divorces the State from its own economy. In practice, this renders the State unable to regulate the private sphere even when it is needed, which means that it is limited when it comes to foreign investment. This is the irony because Western States and even China that have used the economic growth model incrementally liberalised their economies, so they had time to adjust to these changes. In comparison, many developing States have not had the time to adjust to these changes gradually and have been juggling this approach with their newly found independence.[10]

The inability of developing States to make sense of the law and its role limits the achievement of inclusive development. The inclusive development framework articulated in

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[6] Francis Fukuyama, *Identity: Contemporary Identity Politics and the Struggle for Recognition* (Profile Books 2018) 10.
[7] Marie-Claire Cordonier Segger, Ashfaq Khalfan, 'Addressing Implementation Challenges' in Marie-Claire Cordonier Segger, Ashfaq Khalfan (eds), *Sustainable Development Law: Principles, Practices and Prospects* (OUP 2004) 228.
[8] Yong-Shik Lee, *Law and Development: Theory and Practice* (Routledge 2018) 19.
[9] Tor Krevor, 'Law, Development, and Political Closure Under Neoliberalism' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2016) 24; David Trubek, 'Law and Development: Forty Years After 'Scholars in Self-Estrangement' (2016) 66 University of Toronto Law Journal 301, 306.
[10] Brian-Vincent Ikejiaku, 'International Law, the International Development Legal Regime and Developing Countries' (2014) 7 Law and Development Review 131, 142-143.

section 1 relies on the State to be a central actor and that means it has to manage the law in both its forms – the aspect that enables the public interest, and the private aspect that regulates the actions of private actors.[11] With this expectation on the State to manage these two aspects of law, it also means that the State must address the public-private dichotomy.[12]

The public-private dichotomy is a Western construct, which refers to the separation of rules and systems dealing with different aspects of society.[13] The public aspect refers to the rules governing the vertical relationship between the State and society.[14] Whereas the private aspect refers to the rules and the horizontal relationship between private actors and among citizens.[15]

At first glance, it might seem that subordination is the answer to harmonising these sets of rules but this is the wrong way of viewing the 'divide'.[16] Both sets of rules have commonalities, which revolve around upholding values and regulating the behaviour of actors (public or private) with the overall aim of achieving positive change.[17] Furthermore, there is an increasing blurring of these areas of law and society, which the State needs to address.[18] This requires a conceptual shift in thinking and an acknowledgement that this divide is artificially unhelpful.[19]

The State needs the agency to recognise and actualise the public interest so that inclusive development is advanced.[20] As a central actor, the State can no longer take a backseat when

[11] Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Hart 2004) 46; Daniel Aguirre, *The Human Right to Development in A Globalized World* (Ashgate 2008) 225.
[12] Hilary Charlesworth, 'The Public/Private Distinction and the Right to Development in International Law' (1992) 12 Australian Year Book of International Law 190, 194.
[13] Steve Lierman, 'Law as a Complex Adaptive System: The Importance of Convergence in a Multi-Layered Order' (2014) 21(4) Maastricht Journal of European and Comparative Law 611, 617.
[14] Lierman (n 13) 617; Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10(2) European Journal of International Law 387, 389.
[15] Lierman (n 13) 617.
[16] Lierman (n 13) 619; Chinkin (n 14) 389.
[17] Dawn Oliver, *Common Values and the Public-Private Divide* (Butterworths 1999) 11.
[18] Oliver (n 17) 14-15; Chinkin (n 14) 395.
[19] Oliver (n 17) 13; Margaret Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed), *Public and Private Feminist Legal Debates* (OUP 1995) 2.
[20] Amartya Sen, *Resources, Values and Development* (Harvard University Press 1997) 371. See also: Thomas Hobbes, *Leviathan* (C.B. Macpherson ed, Penguin Classics 1985) 190.

it comes to the activities of private actors, which are becoming increasingly influential within society.[21] Private activities need to be regulated so that the public interest angle is not overlooked by these private actors in their pursuit of profit and their activities align with the public interest.[22] This is particularly important if investment is to be an enabler for inclusive development. However, the State cannot do this alone and law has an instrumental role to play. The State and legal frameworks need to be further supported, which is where the framework for inclusive development comes into play.

2. THE FRAMEWORK FOR INCLUSIVE DEVELOPMENT

The inclusive framework for development is underpinned by three foundational pillars. To help illustrate the operation of this framework, the metaphor of a three-legged stool is used. The State sits at the top and is the seat of the 'stool' because it connects and oversees the three foundational pillars.[23] Arguably, this is a reminder of the centrality of the State as an actor and duty-bearer. The State needs to progressively realise the three foundational pillars. These three pillars are freedom of choice, the public interest and law in its enabling and regulatory role.

These pillars are complementary, which makes them equal relative to each other. When working together, these pillars support the State in its pursuit of inclusive development. In order to understand how these pillars support the State, they need further discussion. Freedom of choice is the logical starting point in relation to these pillars because without this freedom, the State will be unable to pursue the public interest and cannot operationalise the

[21] Ciara Hackett, Luke Moffett, 'Mapping the Public/Private-Law Divide: A Hybrid Approach to Corporate Accountability' (2016) 12(3) International Journal of Law in Context 312, 326.
[22] Barnett refers to this as a sense of morality.
Larry Barnett, 'The Public-Private Dichotomy in Morality and Law' (2010) 18 Journal of Law & Policy 542, 542; Hackett, Moffett (n 21) 314.
[23] Kulick rightly argues that the State is and remains a central actor within the wider public international law, which is an important point that must not be overlooked.
Andreas Kulick, *Global Public Interest in International Investment Law* (CUP 2012) 91.

public interest through law. Freedom of choice allows the State to pursue its own goals towards inclusive development.

2.1. Freedom Of Choice

For inclusive development, choice by itself is not sufficient because there must be *freedom* of choice. Freedom of choice refers to the ability to determine one's own trajectory within society and life.[24] This path is not pre-determined, nor is it decided by others but based on one's own needs and interests.[25] By adopting an internally-attuned approach, freedom of choice means that positive and meaningful change can be actualised due to the better alignment with the ideology of the given State.[26]

In turn, this means that the State has greater autonomy to act in its public role to enable inclusive development within the respective society.[27] This autonomy is not just introspective but also must encompass its external relationships with other State actors.[28]

The State needs the space to choose how and when it joins international regimes, which should be undertaken on its own terms; not because it is expected to, or feels compelled to join a particular regime such as IIL.[29] Yet, in Chapter 3, it was argued that developing States conclude IIAs based on the illusory perception that IIAs are the main route to attracting FDI,

[24] Dominic Dagbanja, 'The Conflict of Legal Norms and Interests in international Investment Law: Towards Constitutional-General International Law Imperatives Theory' (2015) 6(3) Transnational Legal Theory 518, 524; Kanishka Jayasuriya, 'Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance' (1999) 6(2) Indiana Journal of Global Legal Studies 425, 454.
[25] Yong-Shik Lee, 'General Theory of Law and Development' (2017) 50(3) Cornell International Law Journal 415, 453-454.
[26] Peter Kragelund, Padraig Carmody, 'Who is in Charge – State Power and Agency in Sino-African Relations' (2015) 49 Cornell International Law Journal 1, 8.
[27] Lee (n 25) 454.
[28] States need to be both inward and outward-looking.
See: Christian Häberli, Fiona Smith, 'Food Security and Agri-Foreign Direct Investment in Weak States: Finding the Governance Gap to Avoid 'Land Grab'' (2014) 77(2) Modern Law Review 189, 206.
[29] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP 2003) 151.

even though there is no certainty that more IIAs lead to more FDI. Developing States are not necessarily willing actors within this framework and actually are compelled to join the IIL regime because of the pressure to seek capital.

Moreover, as duty-bearers tasked with protecting and promoting human rights, States should not be constrained when seeking to mitigate the harmful impacts of private actors from regimes such as IIL.[30] The State needs to be realigned so that it is once again a central actor that can play a key role towards progressing inclusive development.[31] The centrality of the State is fundamental in order to enable individuals to have their own personal sovereignty, and upholding rights is an integral aspect of this.[32] The exemplar of the right to food is a good illustrative point here.

The State needs the freedom to identify inconsistencies between IIAs and the right to food, so that ultimately the right to food prevails.[33] To do so requires the State to have the space and capacity to meet its human rights obligations.[34] This is not always possible within IIL owing to the economic leverage that the home State has vis-à-vis the host State. In this context, the host State is trying to attract FDI for economic growth and also improve access to the right to food by using this additional capital.[35] However, the State should not have to make an 'either/or' decision but rather be able to have freedom of choice to pursue the right to food

[30] UNCHR, 'Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (19 February 2007) UN Doc A/HRC/4/35 para 1.
[31] UNCHR (n 30) paras 3-4.
[32] Mark Fleurbaey, 'Capabilities or Functionings? Anatomy of a Debate' in Flavio Comim, Martha Nussbaum (eds), *Capabilities, Gender, Equality* (CUP 2014) 158. See also: Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (CUP 2018) 158.
[33] UNCHR, 'Report of the Special Rapporteur on the right to food, Oliver de Schutter' (19 December 2011) UN Doc A/HRC/19/59/Add.5, para 1.1.
[34] UNCHR, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (21 March 2011) UN Doc A/HRC/17/31 para 9.
[35] UNCHR (n 33) para 2.6. See also: UNHCR, 'Report of the Special Rapporteur on the right to food, Olivier de Schutter' (24 January 2014) UN Doc A/HRC/25/57, para 15.

without the added pressure of being coerced into the IIL regime, when it is supposed to be acting as the duty-bearer for the right to food.[36]

To help bring the State to the forefront as the duty-bearer and give it greater freedom of choice, the public interest is needed. The public interest is needed because it is a reminder that the economic sphere cannot come at the expense of IHRL and is another foundational pillar of the framework for inclusive development.

2.1. The Public Interest

The public interest is a broad concept. At its heart though, the public interest refers to the integrity and well-being of a given society.[37] As identified in Chapter 2, the public interest is a normative approach that should be adopted by the State, so that the overall welfare of society is advanced.[38] In that regard, the underlying aspect of the public interest is concerned with the baseline of interests of society, which best fits that context and is often reflected by a constitutionalism approach that is based on fundamental values.[39] The right to food is a good exemplar of the public interest because it is the interest of any society to ensure that individuals have access to adequate food as a form of societal welfare.

The public interest is a necessary pillar for the analytical framework. This is because it is a salient reminder of the fact that the State is imbued with responsibility by the relevant society and must act as a duty-bearer for the good of that society.[40] In other words, it is a reminder of

[36] Ivan Šimonovic, 'State Sovereignty and Globalization: Are Some States More Equal?' (2000) 28(3) Georgia Journal of International & Comparative Law 381, 384; Kaitlin Cordes, Anna Bulman, 'Corporate Agricultural Investment and the Right to Food: Addressing Disparate Protections and Promoting Rights-Consistent Outcomes' (2016) 20 University of California Los Angeles Journal of International Law & Foreign Affairs 87, 112.
[37] Jean-Jacques Rousseau, *The Social Contract* (Christopher Betts tr, OUP 1994) 7.
[38] Stavros Brekoulakis, Margaret Devaney, 'Public-Private Arbitration and the Public Interest Under English Law' (2017) 80 Modern Law Review 22, 28.
[39] Brekoulakis, Devaney (n 38) 28.
[40] Rousseau (n 37) 21; Confucius, *The Analects of Confucius* (Burton Watson tr, Columbia University Press 2007) 32.

the State's public-facing role, which requires the State to be self-reflective.[41] The public interest, as a reflection point, counterbalances the overemphasis on the economic sphere that has previously occupied development attempts. The public interest provides balance because it is a hortatory tool that highlights that the society in question needs to benefit from inclusive development, which is not simply focussed on economic growth alone.[42]

Within the context of investment, the public interest emphasises that the State needs to ensure that society benefits from its economic activities.[43] From a public interest angle, investment should be conducted by the State in a manner that creates, but is not limited to, positive spillovers for technological and skill transfers. For these transfers to take place, the State is required to 'step-in' in order to channel the activities of investors in a way that is appropriate. However, the State needs the flexibility to act in the public interest but it cannot do so without having freedom of choice, so it has the autonomy to make the appropriate decisions.[44] This is why the public interest is so crucial as a foundational and complementary pillar for inclusive development; it supports and interconnects with the freedom of choice.

With these two aforementioned pillars in mind, the freedom of choice and the State realising the public interest, the next interconnecting pillar is concerned with giving these aspects effect. It is vital that the State constructs and uses the law in both its forms, as an enabler for inclusive development and also as a regulator of the economic sphere.

[41] Häberli, Smith (n 28) 206.
[42] Paul Barker, 'Legitimate Regulatory Interests: Case Law and Developments in IIA Practice' in Andreas Kulick (ed), *Reassertion of Control Over the Investment Treaty Regime* (CUP 2017) 234; Aguirre (n 11) 225.
[43] Aguirre (n 11) 268.
[44] UNCHR (n 34) para 9.

2.2. Law as Enabler And Regulator

Law is the third pillar of the analytical framework for inclusive development. To safeguard the public interest, law in its enabling capacity is needed. As an enabler, this refers to law's public nature where it codifies and protects the well-being of citizens within a given State.[45] This is sometimes referred to as constitutionalism.[46] This should not be confused with a State's constitution although the constitution is a reflection of the State's commitment to its citizens and so is a good indicator of constitutionalism.[47] This public aspect to law is not its only purpose as identified in the previous chapters.

Law is not only an enabler but it is also a regulator, which is an important aspect of inclusive development. This regulatory aspect of law is necessary in order for the State to claw-back its power in relation to the economy.[48] This power refers to the State's ability to regulate private actors and ensure respect for IHRL;[49] for example, the State is obliged to ensure that private actors do not pollute local food supplies in their business activities.[50]

How the State wields the law is not only important for IHRL as an enabler of inclusive development but the State needs to take regulatory action in the face of foreign investment. As identified in Chapter 3, China is a qualified example of a developing State that proactively regulated foreign investors and only gradually opened up its economy.[51] China has managed

[45] Yash Ghai, 'The State and Constitutionalism in Postcolonial Societies in Africa' in Upendra Baxi, Christopher McCrudden, Abdul Paliwala (eds), *Law's Ethical, Global and Theoretical Contexts: Essays in Honour of William Twining* (CUP 2015) 166.
[46] Ghai refers to constitutionalism as distinct from a constitution. He asserts that constitutionalism 'is an ideology based on certain values, practices and procedures.'
Ghai (n 45) 182.
[47] Ghai (n 45) 182.
[48] Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What It Cannot* (Edward Elgar 2011) 8.
[49] John Braithwaite, Peter Drahos, *Global Business Regulation* (CUP 2001) 19.
[50] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v Nigeria* (2002) paras 65-66.
[51] Guoqiang Long, 'China's Policies on FDI: Review and Evaluation' in Theodore Moran, Edward Graham, Magnus Blomström, *Does Foreign Direct Investment Promote Development?* (Institute for International Economics 2005) 321.

foreign investment by imposing legal conditions on foreign investors and first designed a robust framework to harness investment in accordance with its own needs.[52] Learning from China's approach, law in its regulatory capacity needs to clearly demarcate rules and expectations for the behaviour of foreign investors.[53]

The regulatory function of law should also extend beyond national frameworks and should be used in the context of IIAs. As previously explored in Chapter 3, IIAs traditionally have enabled the protection of the interests of Western States but IIAs need also to better reflect the regulatory interest of the host State. By better accommodating the regulatory interests of the host State, it repositions the host State within the IIL framework as a central actor.[54] The unifying connection within this inclusive development framework is the State as a central actor, although that is not always apparent given that the power of foreign investors exceeds that of developing host States.[55]

In recent investment arbitration, tribunals have been making headway for the recognition of non-investment concerns.[56] This is a step in the right direction for inclusive development because it reflects acknowledgement of the societal impact of investment, which goes beyond the economic sphere. At the same time, acknowledgement only goes so far towards development. To aim for more inclusive development, States also need to actively forge a path forward. The next part of this chapter examines how and to what extent this can be done from an IIL perspective.

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[52] Long (n 51) 321; Lu Yuan, Terence Tsai, 'Foreign Direct Investment Policy in China' (2000) China Review 223, 226.
[53] Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Hart 2004) 26.
[54] Aguirre (n 11) 233.
[55] Drahos and Braithwaite refer to this as the host State's loss of moral autonomy. See: Drahos, Braithwaite (n 49) 85.
[56] *David R. Aven and Others v Republic of Costa Rica* (18 September 2018) ICSID Case No. UNCT/15/3, Award, para 412; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (8 December 2016) ICSID Case No. ARB/07/26, Award, 1193; *Bear Creek Mining Corporation v The Republic of Peru* (30 November 2017) ICSID Case No. ARB/14/21, Award, para 247.

3. TOWARDS INCLUSIVE DEVELOPMENT WITHIN IIL

As previously discussed in Chapter 3, tribunals have referenced the good faith approach when dealing with conflicts between IIL and IHRL.[57] Expanding on the good faith principle, tribunals have gone as far as identifying that foreign investors need to respect human rights so as not to cause the conflict in the first place.[58] Given their increasing influence within domestic and global society, it is even more imperative that foreign investors respect human rights.[59]

Respect for human rights is important for inclusive development. This is to ensure that foreign investors do not (directly or indirectly) cause violations. Respect for human rights is one factor but it does not always lead to positive results for the host State.[60] The host State needs to be better empowered, so that it can monitor the situation and create legal frameworks to not only protect human rights but also, to prevent tensions between IIL and human rights arising in the first place.[61] After all, foreign investors are 'guests' in the host State and need to act accordingly, so that foreign investors can and do have a positive influence for the society of the host State.[62]

Tribunals have acknowledged this influence by highlighting that foreign investors have an important social role to play within society, which goes beyond profitability.[63] Foreign investors should have a positive impact on the host State, for example, the provision of jobs so that

[57] *Bear Creek v Peru* (n 56) 241; *Urbaser v Argentina* (n 56) para 1200.
[58] *Urbaser v Argentina* (n 56) 1193.
[59] *Urbaser v Argentina* (n 56) 1195; *Bear Creek v Peru* (n 56) Dissenting Opinion of Philippe Sands, para 33.
[60] UNCHR (n 34) 8-9.
[61] UNCHR (n 60) 8-9; UNCHR, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (25 March 2011) UN Doc A/HRC/17/31/Add.3 10-11.
[62] José Alvarez, *The Public International Law Regime Governing International Investment* (Martinus Nijhoff 2011) 20.
[63] *Phoenix Action Ltd. v The Czech Republic* (15 April 2009) ICSID Case No. ARB/06/5, Award, para 27; *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (24 July 2008) ICSID Case No. ARB/05/22, Award, para 377.

beneficial technological and skill transfers take place.[64] By facilitating these transfers, foreign investors can play a positive role towards enhancing society in a way that promotes the standard of living as an aspect of IHRL.[65]

Although foreign investors can play a positive role, tribunals also emphasise that as private actors the scope of their responsibility does not exceed that of the State.[66] Essentially, the State is tasked with the fulfilment of human rights, such as providing food where necessary.[67] The State also needs to construct the necessary frameworks to channel investment so that law advances society.[68] This is a reminder of the centrality of the State, which is needed to protect and ensure respect for human rights.[69]

To ensure respect for human rights, the State must have the freedom of choice in order to make the right decisions for the public interest. Moreover, because the State is the connecting point between the foundational pillars of this framework, it reminds foreign investors of their social value which bridges the economic sphere with the public interest.

Within the framing of inclusive development, the State is the central actor which must use law to enable aspects of IHRL, such as the right to food and regulating foreign investors. In order to enable IHRL and regulate foreign investors, a way forward is to embed the inclusive approach to development in IIAs. The focus in relation to amending IIAs in the next section assesses changes to BITs as the main form of IIAs.

[64] *Bear Creek v Peru* (n 56) Dissenting Opinion of Philippe Sands, para 39.
[65] *Bear Creek v Peru* (n 56) Dissenting Opinion of Philippe Sands, para 39.
[66] *Urbaser v Argentina* (n 56) 120; *Biwater Gauff v Tanzania* (n 63) para 602.
[67] *Urbaser v Argentina* (n 56) 1208.
[68] *Urbaser v Argentina* (n 56) 1208.
[69] *Urbaser v Argentina* (n 56) 1209.

3.1. Testing the Analytical Framework on BITs

While it is important to instil change in the IIL regime, it must also be acknowledged that a complete overhaul of the regime is unlikely and so change must start with IIAs.[70] Given that States conclude IIAs as a means to attract more capital, it is apt that IIAs are an important starting point for inclusive development.[71] In particular, reforms to IIAs are necessary in order to allow for more interpretive flexibility so that in arbitration non-investment considerations are better incorporated into the main instruments for IIL. Consequently, IIAs should be more balanced and nuanced instruments in order to accommodate and reflect the interests of developing States and not just the interests of developed States.[72]

As identified in the previous chapter (section 2.1), BITs are the dominant form of IIAs and so this thesis focusses on BITs. This, however, does not mean that this author envisages BITs as complete tools for development. Nevertheless, they can be tools to enable inclusive development by reflecting and incorporating host State interests. To reflect these interests, host States as State entities need to negotiate better provisions. Whilst this author is aware of the debates surrounding reforms of investment agreements, which include a more definitive approach to the fair and equitable treatment (FET) standard,[73] this chapter focuses on

[70] Andrew Newcombe, 'Developments in IIA Treaty-Making' in Armand de Mestral, Celine Levesque (eds), *Improving Investment Agreements* (Routledge 2013) 16; Fabio Morosini, Michelle Raton Sanchez, 'Reconceptualizing IIL from the Global South: An Introduction' in Fabio Morosini, Michelle Raton Sanchez (eds), *Reconceptualizing IIL from the Global South* (CUP 2018) 4.

[71] Vera Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs' (2017) 50 Vanderbilt Journal of Transnational Law 355, 362.

[72] Morosini, Raton Sanchez (n 70) 4.

[73] Scholars argue that the ambiguity of the fair and equitable standard in IIAs poses a challenge to the tenuous balance between the host State's right to regulate for the public interest and maintaining a stable business environment for foreign investors. For example, see: Federico Ortino, 'The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?' (2018) Journal of International Economic Law 845, 849; Moshe Hirsch, 'Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law' (2011) 12(6) Journal of World Investment & Trade 783, 784; Roland Kläger, 'Fair and Equitable Treatment: A Look at the Theoretical Underpinnings of Legitimacy and Fairness (2010) 11 Journal of World Investment & Trade 435, 453; Eric de Brandebere, '(Re)Calibration, Standard-Setting and the Shaping of Investment Law and Arbitration (2018) 59(8) Boston

reforming the preamble, pre-admission controls, national treatment and general exception clauses. These particular provisions have been chosen because they are areas that have greater flexibility to reflect the interests of developing host States and also are areas where the foundational pillars of the analytical framework would be of most use.[74]

Firstly, the State needs freedom of choice when it comes to entering into the agreement, it should not be coerced into joining the IIL regime. Arguably, the State needs freedom of choice in relation to the wording of the provisions, so that it can preserve flexibility for itself to act in its public role when needed. It should not be locked into measures that prioritise investment measures to the extent where it does not have the choice to protect the public interest. Without freedom of choice, the current IIL regime is skewed, which means that developing host States do not truly benefit from IIL as reciprocity is deceptive.[75]

Instead, developing States do not proactively engage with the IIL rules. By doing so, it is even more difficult for them to regulate private actors within their society, which impedes their ability to generate benefits for inclusive development.[76] As acknowledged in Chapter 2, this is a form of path dependence or pre-determined trajectory for developing States. In order to avoid this issue, developing States need to adopt a form of resistance, for example, acknowledging the flaws of the IIL regime but adapting and embracing it like China has.[77] In other words, developing States need to actively negotiate the terms within BITs to best reflect

College Law Review 2607, 2619; Kendra Leite, 'The Fair and Equitable Treatment Standard: A Search for a Better Balance in International Investment Agreements' (2016) 32 American University International Law Review 363, 396-297.

[74] For further details for substantive reforms to IIAs: Suzanne Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13(3) Journal of International Economic Law 1037, 1059; 22; Nicolás Perrone, Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules (OUP 2021) 22;

[75] Aguirre (n 11) 9.

[76] Morosoni, Raton Sanchez (n 70) 3; Aguirre (n 11) 9.

[77] Morosoni, Raton Sanchez (n 70) 5; Vivienne Bath, 'The South and Alternative Models of Trade and Investment Regulation: Chinese Investment and Approaches to International Investment Agreements' in Fabio Morosini, Michelle Sanchez Badin (eds), *Reconceptualizing International Investment Law from the Global South* (CUP 2017) 47.

their interests, so that these instruments can work to their advantage as a form of freedom of choice. Notably, freedom of choice will not work on its own for inclusive development.

Secondly, it is imperative that the State is able to pursue measures for the good of society in its capacity as a duty-bearer for IHRL. As hosts for foreign investment, developing States need the flexibility to protect and ensure respect for rights, including the right to food.[78] This is because IIAs can disproportionately restrict the flexibility of host States to realise their obligations under IHRL.[79] Instead of passively accepting and protracting this asymmetry within IIL, which is also a reflection of the aforementioned public-private dichotomy, developing host States need to act more holistically.[80] Host States are required to balance IIL obligations against IHRL obligations.[81]

Accordingly, host States need to think carefully about IIAs (including BITs) and ensure that these instruments expressly recognise IHRL commitments within the relevant text, particularly in the preamble and relevant provisions.[82] As part of the wider ambit of the public interest, express recognition of IHRL standards within BITs is important. These inclusions within BITs are vital because they confer greater freedom of choice for developing host States to pursue their inclusive development goals, such as the right to food.[83] It also means that these States are not inadvertently limiting their options to regulate for the public interest in the future, as regulation is also a foundational pillar of the analytical framework.[84]

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[78] Aguirre (n 11) 9; Spears (n 74) 1039; Gus Van Harten, *Investment Treaty Arbitration and Pubic Law* (OUP 2008) 17; Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 International and Comparative Law Quarterly 573, 578.
[79] UNCHR, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (22 April 2009) UN Doc A/HRC/11/13, para 30.
[80] Van Harten (n 78) 39.
[81] Heckels argues that current IIAs do not currently provide enough instructive guidance to tribunals as to how to balance these obligations. See: Caroline Heckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (CUP 2015) 6.
[82] UNCHR (n 79) para 31.
[83] UNCHR, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (9 April 2010) UN Doc A/HRC/13/27, para 23.
[84] UNCHR (n 83) para 25.

Thirdly, although BITs enable investment protection, in their traditional form they do not reflect the regulatory aspect of law especially in the context of the host State's ability to regulate foreign investors. For IIAs to be conducive to inclusive development, they need to reflect law's duality. Not only do IIAs need to be formulated in a manner that not only recognises and enables the host State to act in the public interest but these instruments also need to allow them space to regulate foreign investors.[85]

As argued in Chapter 3 (section 3.1), this form of regulation is needed, so that the developing host State can harness investment for inclusive development. Developing States cannot afford to passively consent to IIAs without tailoring the text.[86] By incorporating a regulatory aspect into relevant provisions, developing States will be better placed to ensure that they get the best out of these instruments in relation to technological and skill transfers.[87] These transfers can only take place if the host can regulate private actors so that their societies benefit.[88] Consequently, the text of IIAs needs to be crafted in such a way that it allows the host States to regulate, so that reciprocal benefits are actually created for them (and by them).[89]

Based on the three foundational pillars of the analytical framework, the next section of this chapter examines how BITs should be amended in order for FDI to benefit developing countries and operationalise towards inclusive development. Starting with the preamble, the next section examines the provisions within BITs which are most in need of reform.

[85] Sornarajah rightly argues that whilst investment protection measures have been definitively outlined within IIAS, non-investment measures have not been given the same importance. See: Muthucumaraswamy Sornarajah, *The Pursuit of Nationalized Property* (Marinus Nijhoff 1986) 31-32. See also: Van Harten (n 78) 140.
[86] Van Harten (n 78) 141.
[87] Van Harten (n 78) 140; Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Routledge 2016) 140.
[88] Van Harten (n 78) 150; Drahos, Braithwaite (n 49) 29; Haines (n 48) 8; Jason Rudall, 'Green Shoots in a Barren World: Recent Developments in International Investment Law' (2020) 67 Netherlands International Law Review 453, 456.
[89] Drahos, Braithwaite (n 49) 22.

3.1.1. The Preamble

The preamble outlines the context and the scope of a given treaty, in which the substantive provisions are to be interpreted, as recognised by the Vienna Convention on the Law of Treaties.[90] In that vein, express reference to the public interest would grant a greater degree of flexibility in ensuring that the substantive obligations are read in light of wider societal concerns.[91] While the preamble establishes the objective of a given treaty, which can lead to an expansive reading of the obligations in line with the public interest, it is not the only way to rebalance these agreements for more inclusive development, which will be addressed later in this section. Nonetheless, a definite reference in the preamble would serve as a reminder to investment tribunals of the wider factors that they need to take into account when interpreting the treaty in question.[92]

Contemporary IIAs are increasingly incorporating non-investment issues, such as sustainable development, within the preambles.[93] The preamble of China's BIT with Canada, for example, positively refers to sustainable development but is too brief to establish the right tone for a more balanced agreement.[94] Whereas China's BIT with Uzbekistan is an example of a preamble which is attempting to be more balanced, since it not only provides for sustainable development but also that this development needs to improve societal welfare.[95]

[90] The Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(2)(a).
[91] Aikaterini Titi, *The Right to Regulate in International Investment Law* (Hart 2013) 19.
[92] Tarcisio Gazzini, 'Bilateral Investment Treaties and Sustainable Development' (2014) 15 Journal of World Investment & Trade 929, 941.
[93] For example: Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (signed 9 September 2012, entered into force 1 October 2014); Agreement Between Canada and Mongolia for the Promotion and Protection of Investment (signed 8 September 2016, entered into force 24 February 2017).
[94] Canada-China BIT (n 93) preamble.
[95] Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments (signed 19 April 2011, adopted 1 September 2011) preamble.

Arguably, these are positive signs within the IIL framework.[96] However, this is still far from the norm; many of the dominant capital-exporting States have not, yet, adopted this approach.[97] There is still room for improvement within this framework as, on the whole, the preambles of China's BITs are still too brief. The preamble should explicitly recognise the fact that investment can be an enabler for development through the enhancement of technological and skill transfer.[98] However, the preamble should not only refer to investment, it also needs to be balanced with the public interest as part of the framework for inclusive development. One way of doing this would be to explicitly refer to the right to regulate in the public interest and also acknowledge that the State has wider human rights obligations. While few BITs do this,[99] there are a few exceptions, such as the Nigeria-Morocco BIT which expressly establishes that the agreement needs to be read in line with human rights and the host State's right to regulate.[100]

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[96] Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112(3) American Journal of International Law 410, 413.

[97] For example, the United States, Germany, and the United Kingdom. See: Treaty Between the Government of the United States of America and the Government of the Republic of Estonia for the Encouragement and Reciprocal Protection of Investment (signed 18 April 1994, adopted 16 February 1997) preamble; Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment (signed 1998, adopted 13 June 2004) preamble; Agreement between the Federal Republic of Germany and the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of investments (signed 13 November 2007, adopted 28 August 2010) preamble; Agreement between the Arab Republic of Egypt and the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments (signed 16 June 2005, adopted 22 November 2009) preamble; Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia (signed 17 March 2010, entered into force 10 October 2014) preamble; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States (signed 12 May 2006, entered into force 25 July 2007) preamble.

[98] The Morocco-Nigeria BIT refers to technological transfer but not skills or knowledge. Reciprocal Investment Promotion and Protection Agreement of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (adopted 3 December 2016, not yet in force) preamble.

[99] Giest aptly argues that this is due to the public-private dichotomy that exists within IIAs because an investor is a private entity but for public interest provisions to have greater weight, 'horizontal equality between the two [S]tates' is needed. For further analysis on this issue, see: Alison Giest, 'Interpreting Public Interest Provisions in International Investment Treaties' (2017) 18 Chicago Journal of International Law 321, 332.

[100] Morocco-Nigeria (n 98) preamble.

3.1.2. Pre-Admission Controls: Limiting the Scope of the Agreement

Before admitting foreign investment, developing States need to carefully navigate how that investment will be treated domestically once it enters the economy. This is because, once in operation, foreign investors have additional rights under IIL and have embedded business practices within a given territory, which need protection.[101] The pre-admission provision is important for an IIA because it determines the extent to which the host State has the flexibility to revise domestic laws after the treaty is in force,[102] although often they are vaguely worded, for example:

> Each Contracting State shall in its territory promote as far as possible investments by investors of the other Contracting State and admit such investments in accordance with its laws and regulations.[103]

In this common formulation, the host State is not legally required to amend existing laws relating to the admission of investment following the ratification of the BIT.[104] The extent of this provision can be extended further, so that the host State has the flexibility to amend domestic laws even after the BIT is in force.[105] An example of this would be to stipulate the time period in which this provision is applicable, for example,

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[101] Richard Chen, 'Bilateral Investment Treaties and Domestic Institutional Reform' (2017) 55 Columbia Journal of Transnational Law 547, 549.
[102] Peter Muchlinski, 'The Framework of Investment Protection: The Content of BITs' in Karl Sauvant, Lisa Sachs (eds), *The Effect of Treaties on Foreign Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP 2009) 40.
[103] China-Uzbekistan BIT (n 95) art 2(1).
[104] Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 89.
[105] Dolzer, Schreuer (n 104) 89.

> […] whether made before or after the coming into force of this Agreement, but [this provision] shall not apply to any dispute raised before the entry into force of this Agreement.[106]

Nonetheless, the reading of this provision will be further dependent on other parts of the BIT in relation to the treatment of foreign investors. The point of admission can be tied to the National Treatment principle because amendments to domestic legislation may affect investors once they operate within the host. However, depending on the wording of the point of admission clause and whether it is tied to the national treatment provision may mean that foreign investors can expect like treatment before entry into the host State. In order to understand pre-admission clauses in light of national treatment, it is important to also outline the principle of national treatment.

3.2. The National Treatment Provision

The national treatment clause within BITs is a common feature as part of the standards of treatment owed to foreign investors.[107] National treatment refers to the 'like treatment' of foreign investors in comparison to domestic ones.[108] National treatment is necessary to ensure that foreign investors are not disadvantaged in a new business environment.[109] However, it is also an important provision that permits a State to justifiably treat its own investors more favourably and so its wording is important for a host State if it wishes to preserve flexibility for its own industries as part of the inclusive development approach.[110] The differentiation of

[106] Morocco-Nigeria BIT (n 98) art 3.
[107] Muchlinkski (n 102) 50.
[108] Dolzer, Schreuer (n 104) 198-199.
[109] Dolzer, Schreuer (n 104) 198; Muchlinkski (n 102) 50.
[110] Muthucumaraswamy Sornarajah, *The Foreign Law on Foreign Investment* (4th edn, CUP 2017) 239.

treatment between foreign and domestic investors could be justified if such measures are needed to advance the public interest in the host State. In order to do so, it is even more imperative that such a provision is designed with precision, so that it delineates the extent of the rights of the foreign investor and the possible grounds for lawful but differentiated treatment under the BIT. Such a provision should define what are 'like circumstances' and also the relevant exceptions, for example, a list of strategic sectors where the principle does not apply.[111]

In relation to the previous section 3.3, broad national treatment provisions can mean that foreign investors are granted market access before the point of admission. This is an approach that is often adopted by Western capital-exporting States, such as Canada and the United States. Developing States, however, do not have the same resources and established economies as Western States. Domestic industries and investors within the developing context are not as established as those from the West. In that regard, broad national treatment provisions could be detrimental for those domestic investors if they are overshadowed by foreign investors.[112] In Chapter 2, it is argued that developing States have tried to emulate the Western experience for economic growth with limited benefits. Within the IIL framework, developing States should not be too eager to follow the model of Western States when it comes to BIT provisions, such as the national treatment. This is because their industries and investors do not have the same degree of economic influence as their Western equivalents. Instead, it is important that this provision reflects *their* interests as part of freedom of choice.

In drafting a national treatment provision and referring back to the inclusive development framework, developing States should take into account law's regulatory function. That is, the State's role to oversee and constrain the harmful behaviour of private actors in order to ensure

[111] Sornarajah (n 110) 240.
[112] Leïla Choukroune, 'National Treatment in International Investment Law and Arbitration: A Relative Standard for Autonomous Public Regulation and Sovereign Development' in Anselm Kamperman Sanders (ed), *National Treatment in International Economic Law: Trade, Investment and Intellectual Property* (Edward Elgar 2014) 185.

that domestic society benefits. The drafting of this particular provision is also important as a reflection of the host State's interests and the better incorporation of these interests within the BIT. Notably, the national treatment provision is not the only provision that is needed to integrate the host State's interests within the agreement, as general exception provisions are also increasingly important.

3.1.3. The General Exception Provision

In relation to exceptions, the host State's flexibility to regulate also needs to be accommodated. Exceptions are not a new phenomenon within BITs, however, as BITs have become more sophisticated so have these provisions, even though an extensive general exception clause is not generally commonplace within BITs.[113] General exception provisions are useful for the host State, because if applying the good faith principles (referred to in Chapter 3), it is a useful reference point to acknowledge their further commitments under international law and have the ability to derogate from their investment obligations. Although there are an increasing number of IIAs with a general exception clause, there is not agreed upon construction.[114]

The tension here with this provision is about the balancing of a stable business environment for foreign investors and the flexibility of the host State. Arguably, it is worthy that the general exception clause does refer to wider international law but this can be diluted in drafting and ambiguously refer to development goals and socio-economic objectives without really acknowledging the task of safeguarding the public interest and the host State's obligation to protect core rights, such as the right to food. Instead, some States have opted to

[113] Newcome (n 70) 15; Spears (n 74) 1067.
[114] Spears (n 74) 1067.

omit a general exception clause and hollowly refer to the 'Host State's pursuit of its right to regulate'.[115]

The inclusion of the right to regulate is a step in the right direction, which indicates a basic level of receptiveness regarding the public interest, but this is largely of a symbolic nature and is not truly a general exception provision.[116] The contribution of the right to regulate for the public interest lies in the fact that it is a positive recognition of a normative standard, even if it is not legally binding. Giest further argues that 'more teeth' can be found in the Colombia-UK BIT (2010), which is more elaborate in its protection of the host State's regulatory space.[117] Article 8 is such a provision, which states:

> Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure that it considers appropriate… provided that measures are non-discriminatory and proportionate to the objectives sought.[118]

Nonetheless, this provision still falls short of being a general exception provision. General exception provisions contain and arguably should detailed stipulations that allow the host State to regulate or implement measures pertaining to:[119]

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[115] Morocco-Nigeria BIT (n 98) art 23(2). See also: Jesse Coleman, Lisa Johnson, Lisa Sachs, Knaika Gupta, 'International Investment Agreements, 2015-2016: A Review of Trends and New Approaches' in Lisa Sachs, Lise Johnson (eds*), Yearbook on International Investment Law and Policy 2015-2016* (OUP 2018) 85.
[116] Giest (n 99) 337.
[117] Giest (n 99) 338.
[118] This article is in reference to the relationship of investment and the environment. See: Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Colombia (adopted 17 March 2010, entered into force 10 October 2014) art 8.
[119] Levent Sabanogullari, *General Exception Clauses in International Investment Law: The Recalibration of Investment Agreements Via WTO-Based Flexibilities* (Nomos Verlag 2018) 67; Camille Martini, 'Avoiding the Planned Obsolescence of Modern International Investment Agreements: Can General Exception Mechanisms Be Improved and How' (2018) 59 Boston College Law Review 2877, 2880.

> …protect human, animal or plant health… [or] ensure compliance with laws and regulations… [or] for the protection of national treasures of artistic, historic or archaeological value; or relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[120]

As Chapter 3 stated in relation to the conflict of norms within international law between IIL and IHRL, it is generally understood that States should ensure that they approach such conflicts in good faith. Embedding clear general exceptions clause reflects a good faith approach because it is an express acknowledgement of this conflict and that host States have additional pressures and responsibilities outside of IIL. It is useful to have such a provision even if it is more hortatory in nature because it is a reminder that IIL does not operate in a vacuum, which investment tribunals should be mindful of. It also emphasises the public interest which is a foundational pillar of the inclusive development framework and that such measures are necessary and that it is not all about investment. It echoes the approach of the tribunal in the Philip Morris example provided in Chapter 3 (section 3.2). Philip Morris is a useful example where the tribunal was progressively trying to balance the public interest angle and the host State's right to regulate; it is not the only example that we should note, however.

CONCLUSION

Chapter 2 explored the problems conceptualising development; one of the main problems is that current approaches have focussed on the economic perspective. The overemphasis on the economic sphere without meaningful connections to society means that the positive transformation needed for inclusive development will not be achieved. Chapter 3

[120] The Korea-Australia Free Trade Agreement (adopted 8 April 2014, entered into force 12 December 2014) art 22(3).

demonstrated that FDI can enable economic growth, but the host State needs to take action to regulate investment to harness it for positive change. Building on the arguments of Chapter 2, it was argued that the State needed to be the connecting point between the economy, private actors and society. Only by doing so, will inclusive development be achieved.

To operationalise inclusive development, an alternative framework is needed, which is proposed by this chapter. To that end, this chapter constructs a framework that is built on three foundational pillars: freedom of choice, the public interest and law as an enabler and regulator. These three pillars are unified by the State as the central actor, which connects the economic sphere with society using the public interest and law. This is also a salient reminder that the State needs to oversee the activities of foreign investors, so that these private actors can play a positive role within a given society.

The framework highlights that greater flexibility and freedom is needed in relation to the host State. The host State needs to pursue its own public interest goals as duty-bearer, which should be acknowledged within the investment context as part of the good faith approach. That is to say, host States need the freedom of choice to pursue these goals, which should be reflected within BITs.

The public interest needs to play a more prominent role within BITs, for example, in the preamble of the agreement. Bringing the public interest to the forefront is a reminder that the investment should not override the benefit of society because society should benefit from the economic sphere. These two foundational pillars are prompts for the enabling of inclusive development. However, if inclusive development is to be achieved, the regulatory function of law also needs to be accounted for. In that regard, foreign investors need to be regulated, which is why this chapter argues that this should be reflected in the point of admission, national treatment and general exception provisions of BITs. Amending these particular aspects of BITs better reflects the interests of developing host States.

The next two chapters will apply this framework in the context of specific South-South BITs, in order to assess whether the inclusive framework approach is adequately reflected. These case study chapters will assess whether the host State (Ethiopia in Chapter 5 and Tanzania in Chapter 6) has focussed too much on the economic sphere in the pursuit of capital, which comes at the expense of the public interest and the right to food. The analysis within these chapters will build on the analytical framework by also examining whether the host State has adequately managed to preserve its freedom of choice and foster the public interest within its domestic frameworks as a means to offset any overemphasis on economic growth. If not, these gaps will be explored in order to provide suggestions for reform in Chapter 7.

CHAPTER 5 – CASE STUDY OF ETHIOPIA

INTRODUCTION

In Chapter 2, this thesis argued that scholars and developing States have mistakenly focused on the economic growth model for positive change that does not, however, accommodate the experiences and contextual nuances within a developing State.[1] This inflexible model is further reinforced by IIL (examined in Chapter 3), which was conceived as a legal mechanism to protect Western (private) assets.[2] Inadvertently, this has led to the prioritisation of Western interests over the equally important needs of host States, which are predominantly developing States.[3] Accordingly, this problem needs to be navigated by developing States if they are to embark upon more inclusive development.

To overcome this problem, the analytical framework is proposed in Chapter 4. From this perspective, investment can be an enabler for inclusive development but requires a shift in focus – away from private interests and an implicit assumption that the economic growth model will lead to positive change. The aforementioned shift means re-envisaging inclusive development in terms of the foundational principles –

[1] Arnulf Becker Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation' (2010) 51 Harvard International Law Journal 475, 504.
[2] David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Springer 2013) 82; Muthucumaraswamy Sornarajah, 'A Law for Need or a Law for Greed?: Restoring the Law in the International Law of Foreign Investment' (2006) 6 International Environment Agreements 329, 335-336.
[3] Lorenzo Cotula, 'The New Enclosures? Polanyi, International Investment Law and the Global Land Rush' (2013) 34(9) Third World Quarterly 1605, 1614; Jeswald Salacuse, 'The Emerging Global Regime for Investment' (2010) 51 Harvard International Law Journal 427, 434.

freedom of choice, the public interest and the duality of law, which prop up the State as a central actor.

The purpose of this chapter is to test the analytical framework in the context of Ethiopia. This chapter starts by providing the background context in order to establish why Ethiopia is a relevant case study. It is argued (in the next section) that Ethiopia needs to act as a central actor for the betterment of its society, which it can only do it assumes this role and is adequately supported by the foundational principles of the analytical framework.

To that end, freedom of choice is examined from the perspective of diversity within Ethiopia in the third section of this chapter, before assessing the actualisation of the public interest in relation to the right to food. Both these sections evaluate these foundational principles and the extent to which they are reflected in the Ethiopian Constitution.[4] The foundational principle of law's duality completes the application of the analytical framework to the domestic context, by honing in on the Investment Proclamation (2020).[5]

After analysing the domestic context, the chapter widens the line of inquiry by evaluating the China-Ethiopia BIT (1998) as an example of a South-South IIA. Although both parties are Global South States, it is evident that Ethiopia has not sufficiently managed to embed its interests as a host State within this agreement and also, the foundational pillars of the analytical framework are not adequately reflected.

This chapter ends with an evaluation of the China-Ethiopia BIT as an example of of Ethiopia's approach to investment agreements. The BIT is examined to highlight

[4] The Constitution of the Federal Democratic Republic of Ethiopia (1995).
[5] The Investment Proclamation No. 1180/2020 (Ethiopia).

that Ethiopia has not sufficiently managed to capture its interests as a host State within this agreement, as the foundational pillars of the analytical framework are not adequately reflected, which impede its ability to achieve inclusive development. In consideration of the domestic context, inclusive development must be prioritised by Ethiopia.

1. ETHIOPIA AS A CASE STUDY: THE SOUTHERN CONTEXT

As a case study, Ethiopia is geographically comparable to Tanzania (which is examined the next chapter) since both States are located in East Africa but it is acknowledged that, contextually, both States are different. In contrast to Tanzania, Ethiopia is one of the most populated States in Africa (with a population of 112 million individuals) and is also the fastest growing economy in the region.[6] Despite its rapidly expanding economy, Ethiopia remains one of the world's poorest States.[7]

Lack of education and employment opportunities are the main contributing factors to poverty in Ethiopia.[4] Moreover, unemployment of young adults is a real problem in Ethiopia, which has adverse impacts on the access to basic needs, such as adequate food.[5] Political instability is another factor that contributes to Ethiopia's continued poverty rates and development issues (this is an argument which is revisited in sections 3.1 and 4.1).[8] As such, Ethiopia is worthy of further study within the context

[6] The World Bank, 'Ethiopia – Overview' (*The World Bank*, 2020) <https://www.worldbank.org/en/country/ethiopia/overview> accessed 1 April 2021.
[7] The World Bank (n 6).
[8] Assefa Admassie, Degnet Abebaw, 'Rural Poverty and Marginalization in Ethiopia: A Review of Development Interventions' in Joachim von Braun, Franz Gatzweiler (eds), *Marginality: Addressing the Nexus of Poverty, Exclusion and Ecology* (Springer 2014) 269.

of inclusive development, particularly to test the robustness of the analytical framework in identifying the gaps and barriers in the existing legal frameworks.

Furthermore, both Ethiopia and Tanzania are developing States that have concluded BITs with China, in addition to close relationships with China and significant FDI flows from China.[9] Demographically, Ethiopia shares some characteristics with China as both have large, culturally diverse populations. Both Ethiopia and China are rapidly growing economies, which suggest that analogies can be drawn. This helps determine whether China's approach to investment can and should be emulated by Ethiopia. As will be explored within this chapter, Ethiopia lacks China's assurance when it comes to its role as a State and also in its approach to investment. As a result, Ethiopia has not been able to harness investment despite its desires to do so.

One of China's defining features is the central role the State plays in relation to its society, especially when it comes to its economy.[10] Whilst this author is not advocating that Ethiopia adopts the same State-owned approach to its economy as China, the centrality of the State is an important factor to consider. Ethiopia needs to embrace its role as a State actor. This is because the State is the overarching 'seat' within the context of the analytical framework. In that regard, the next section of this chapter analyses Ethiopia's shortcomings in relation to its central role as a State actor.

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[9] Forum on China-Africa Cooperation, 'Interview: Ethiopia-China Relations a Good Example of Cooperation' (*Xinhua*, 23 October 2020) <http://www.focac.org/eng/zfzs_1/t1825933> accessed 10 November 2020; Xinhua, 'China Remains to be Top Foreign Investment Source of Ethiopia in 2019' (*Xinhua*, 29 January 2020) <http://www.xinhuanet.com/english/2020-01/29/c_138741928.htm> accessed 11 November 2020; The World Bank, 'Chinese FDI in Ethiopia' (2012) World Bank Survey 74384/2012, 3 <https://openknowledge.worldbank.org/bitstream/handle/10986/26772/NonAsciiFileName0.pdf?sequence=1&isAllowed=y> accessed 11 November 2020.

[10] Wei-Xiao Jia, 'The Functions and Problems of China's State-Owned Economy' (2020) 49(3) Polish Political Science Yearbook 9, 17; Margaret Pearson, 'State-Owned Business and Party-State Regulation in China's Modern Political Economy' in Barry Naughton, Kellee Tsai (eds), *State Capitalism, Institutional Adaptation, and the Chinese Miracle* (CUP 2015) 27-28.

2. CENTRALITY OF THE STATE

As identified in Chapter 4 (section 1), the State's role is supervisory. At the same time, the State actualises the foundational principles which are necessary for inclusive development.[11] The State is the principal agent for positive change, which lies at the core of inclusive development. In order to realise this positive change, the State must fully embrace its strengths and its role as a central actor.[12] However, Ethiopia does not embrace this role.

Theoretically, Ethiopia is empowered as a central actor because of its long cultural history and its assurance that it is the only State in Africa not to be colonised.[8] In practice though, Ethiopia bears the hallmarks of 'Western interference' due to its Italian occupation during the early 20th century.[9] Ethiopia also did not gain independence until 1941, and so it can be characterised as a newly independent and developing State, similar to Tanzania which was formally colonised.[10] This has adverse implications for Ethiopia and how it fails to assume its role as a State actor.

Rather than embrace its own distinctiveness as a new State and its achievements, Ethiopia subscribes to the (Western) model of economic growth as the mode for development.[13] Even Ethiopia's legal and institutional reforms have been drafted by

[11] Kerry Rittich, 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social' (2004) 26 Michigan Journal of International Law 199, 206.
[12] Julio Faundez, Celine Tan, 'Introduction' in Julio Faundez, Celine Tan (eds), *International Law, Economic Globalization and Developing Countries* (Edward Elgar 2019) 12; Francis Fukuyama, *Identity: Contemporary Identity Politics and the Struggle for Recognition* (Profile Books 2008) 5.
[13] Ethiopia National Planning Commission, 'Growth and Transformation Plan II (GTP II) (2015/15/2019/20) (Ethiopia National Planning Commission, 2016) 5, <https://ethiopia.un.org/sites/default/files/2019-08/GTPII%20%20English%20Translation%20%20Final%20%20June%2021%202016.pdf> accessed 1 April 2021.

Western academics.[14] Ethiopia's adoption of these models reflect that it passively looks to Western practices for positive change. Although Ethiopia has chosen Western concepts as a baseline for its development, which may be considered as a demonstration of the State's autonomy to act, this is not actually the case.[15] Instead, like many developing States, Ethiopia views the West as an ideal model for development and tries to emulate these approaches, which puts it on a pre-determined path that limits its future choices.[16]

In contrast to China (as examined in Chapter 3, section 1.1), Ethiopia has not taken steps to actively shape the economic growth model and institute legal reforms to suit its own context and idiosyncrasies. As a central State actor, it is not enough for Ethiopia to adopt (Western) models or frameworks; Ethiopia needs to shape these frameworks, including the economic growth model, in a way to reflect its experiences and values. Only by doing so, will Ethiopia generate the positive change it so desires.[17]

As the central seat overseeing the analytical framework, Ethiopia needs to ensure that the foundational principles of the analytical framework can, and do, enable inclusive development. In order to further assess whether Ethiopia fulfils this role, this chapter will examine the freedom of choice and whether it has been realised within the Ethiopian context.

[14] Getnet Bekele, 'Food Matters: The Place of Development in Building the Postwar Ethiopian State, 1941-1974' (2009) 42 The International Journal of African Historical Studies 29, 31.
[15] Tsehai Wada Wourji, 'Coexistence Between the Formal and Informal Justice Systems in Ethiopia: Challenges and Prospects' (2012) 5 African Journal of Legal Studies 269.
[16] Walter Rodney, *How Europe Underdeveloped Africa* (Bogle-L'Ouverture Publications 1972) 32; Mariana Prado, Michael Trebilcock, 'Path Dependence, Development, and the Dynamics of Institutional Reform' (2009) 59(3) The University of Toronto Law Journal 341, 354.
[17] Ethiopia National Planning Commission (n 13).

3. FREEDOM OF CHOICE

Freedom of choice is one of the complementary foundational pillars of the analytical framework. It is necessary as a starting-point for inclusive development. This principle refers to the State's ability to determine its own choices and whether it has the opportunity to do so.

Freedom of choice starts from within the given State. Instead of looking externally, first, the State must be internally attuned to reflect on what goals are necessary for its own inclusive development and how it can best achieve these goals within its own context. That is to say, Ethiopia must understand what it (as a State) and its society need, before implementing these goals in alignment with its own resources, institutions and practices. This internal process must be the starting-point for Ethiopia, before it reflects on external relationships with other States and even foreign investors.

Freedom of choice reinforces the centrality of the State, as it is a foundational reminder that the State needs the autonomy to determine what is appropriate for its own needs and interests. These choices need to be informed by the values of that society, this concept is referred to as constitutionalism (as identified in Chapter 4, section 2.3).[18] Arguably, the constitutionalism approach in relation to freedom of choice is better suited to developing States, including Ethiopia, because it is an approach that allows for more heterogeneity and contextual adaptation of respective

[18] Yash Ghai, 'Constitutionalism and the Challenge of Ethnic Diversity' in James Heckman, Robert Nelson, Lee Cabatingan (eds), *Global Perspectives on the Rule of Law* (Routledge 2009) 26.

rules and frameworks.[19] That is to say, as freedom of choice the State needs to customise legal rules and frameworks so that they best fit the domestic conditions.

A State's constitutionalism approach (as an aspect of freedom of choice) is not synonymous with having a constitution but examining the Ethiopian Constitution is a good benchmark to assess the values of that society.[20] This is because constitutions are the principal instrument which underscore the values of that society.[21]

To maintain its relevance as a State actor, diverse values must be adequately represented within the Ethiopian Constitution. This is even more important given the fact that it is one of Africa's most densely populated and ethnically diverse States.[22] From the perspective of inclusive development and freedom of choice, all aspects of Ethiopian society must benefit in order for that change to be meaningful. For this argument to be tested, a closer look at the Ethiopian Constitution is required.

3.1. Testing the Principle in light of 'Unity in Diversity'

In theory, the Constitution recognises that Ethiopia is an ethnically diverse society. This diversity is reflected, for example, in the preamble, which emphasises the State's respect for the rich ethnic diversity and common values.[23] The preamble also emphasises that Ethiopian society has a core goal of ensuring more equitable

[19] Ghai (n 18) 25; Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (Routledge 2016) 152.
[20] Tesfaye Fessha (n 19) 187.
[21] Fallon refers to this as a 'regulative ideal', which sets the tone or aspirations for a given State.
See: Richard Fallon, 'Concept in Constitutional Discourse' (1997) 97 Columbia Law Review 1, 4. See also: Ghai (n 18) 29.
[22] The World Bank, 'Ethiopia – Overview' (*The World Bank*, 2020) <https://www.worldbank.org/en/country/ethiopia/overview> accessed 5 November 2020.
[23] The Constitution of Ethiopia (n 4) preamble.

relationships within society, where the unity among the diverse communities is valued and encouraged by the State.[24] Notably, this unity lacks credibility in practice, particularly when the State's federal system reflects the interests of the major ethnic groupings in the country.

3.1.1. Federal Divisions in Language

Ethiopia's political and legal frameworks that govern it as a State are based on a (Western) federal structure.[25] Article 39 of the Constitution expressly identifies that Ethiopia's society is diverse and that society is made up of 'nations, nationalities and peoples'. These aforementioned (federal) nations represent the respective ethnic composition of the State and need to be equally represented within Ethiopia.[26] Based on this federal approach, the State has an obligation to recognise these nations are formed based on commonalities, such as language, culture and history.[27] Notably, Article 39(5) specifies that diversity in the form of 'nations, nationality or peoples' is based on the majority grouping within a community, which share language, culture and a delineated territory.

This approach to diversity is problematic because it primarily recognises the major ethnic groups and their geographic regions, such as the Amhara, Oromo and Tigray.[28] The Amhara, Oromia and Tigray regions, because of their large ethnic populations as

[24] The Constitution does not provide a definition of unity, or even how this unity will be achieved.
The Constitution of Ethiopia (n 4) preamble.
[25] The Constitution of Ethiopia, art 1. See also: Wondwosen Teshome, Jan Záhořík, 'Federalism in Africa: The Case of Ethnic Federalism in Ethiopia' (2008) 5(2) International Journal of Human Sciences 1, 8.
[26] The Constitution of Ethiopia (n 4) art 39.
[27] The Constitution of Ethiopia (n 4) art 39.
[28] Mackonen Michael, 'Who is Amhara?' (2008) 6(4) African Identities 393.

well as large geographic areas, enjoy a more prominent position within Ethiopian society.[29] The Constitution's clear recognition of Amharic as the official national language of Ethiopia is a prime example of this.[30] Conspicuously, Amharic is the language of the Amhara ethnic group and region, and as *the* national language of the State serves as an example of how a dominant ethnic group is prioritised in practice.[31]

The prioritisation of the dominant ethnic groups is further locked-in through language. Language is a key factor for the legal and State recognition of ethnic diversity within Ethiopia and the composition of federal states. This is evident from the fact that federal states are organised around the main languages within that region, for example, Oromo is the main language of Oromia and Tigrinya is the primary language in the Tigray region.[32]

Language is a defining feature of diversity within the Ethiopian context, which is evident from the text of the Constitution. According to Article 5(1) of the Constitution, the State recognises all ethnic languages.[33] Furthermore, all individuals are considered equal as the Constitution guarantees 'equal and effective protection' of ethnic diversity and freedom of discrimination.[34] On that note, discrimination based on based on racial background, 'social origin, colour… *language*… or other status'

[29] Michael (n 28) 395; Anwar Hassen Tsega, 'The Tigray Identity and the Paradox in the Securitization of the Oromo and Amhara Identities in Ethiopia' (2018) 5(1) International Journal of African Development 5, 8.
[30] The Constitution of Ethiopia (n 4) art 5(2).
[31] Lovise Aalen, 'Ethnic Federalism and Self-Determination for Nationalities in Semi-Authoritarian State: The Case of Ethiopia' (2006) 13(2) International Journal on Minority and Group Rights 243, 244.
[32] Getachew Anteneh, Derib Ado, 'Language Policy in Ethiopia: History and Current Trends' (2006) 2 Ethiopian Journal of Education & Science 37, 47.
[33] The Constitution of Ethiopia (n 4) art 5(1).
[34] The Constitution of Ethiopia (n 4) art 25.

(emphasis added) is prohibited.[35] This focus on language is further reinforced by Article 25.[36]

Since the State is divided into federal groupings that are based on language, this structure does not account for ethnic minority groups that exist within these states. In particular, some ethnic minority groups are assimilated within these federal states, for example, if they reside in the Amhara region.[37] This means that these ethnic minority groups are expected to speak the main language, for example, Amharic. These ethnic minority groups are overshadowed and under-represented within these federal states, so that their interests do not 'trickle-upwards' to the federal or even, State-level.[38]

In turn, this under-representation further manifests in fewer opportunities in life. An example of this can be seen in relation to education and inadequate economic resources. Limited economic resources mean that some ethnic minorities are unable to attend school. Consequently, these individuals do not speak Amharic or one of the aforementioned more dominant languages.[39] Due to this domestic language barrier, ethnic minorities are unable to access higher education (for example, attending university where lessons are in Amharic or English) or even, obtain employment.[40] This wrongly excludes these individuals from society and the higher state of being associated with inclusive development.

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[35] The Constitution of Ethiopia (n 4) art 25.
[36] Article 25 affirms the right to equality, where equality is based on language, sex, religion, political opinion, birth and property.
The Constitution of Ethiopia (n 4) art 25.
[37] Lahra Smith, 'Voting for an Ethnic Identity: Procedural and Institutional Responses to Ethnic Conflict in Ethiopia' (2007) 45(4) The Journal of Modern African Studies 565, 566.
[38] Keynes argues that economic policies that empower the lower to middle-classes will enhance society as a whole. For further details, see: John Maynard Keynes, *The General Theory of Employment, Interest and Money* (Wordsworth 2017) 32.
[39] Logan Cochrane, Yeshtila Bekele, 'Politics and Power in Southern Ethiopia: Imposing, Opposing and Calling for Linguistic Unity' (2019) 50(3) Language Matters 26, 41.
[40] Cochrane, Bekele (n 39) 41.

Ethnic groups should not be distilled by language nor federal boundaries.[41] The physical and regional boundaries of federal states within Ethiopia have further contributed to divides between ethnic groups.[42] Ethnic tensions have become so bad in the Afar, Oromo and Somali regions that physical bureaus are needed to police the borders between these federal states or regions.[43] Arguably, the federal system does not reflect the rich diversity that exists within Ethiopia. Lack of diversity undermines freedom of choice because it fails to recognise Ethiopian society is multi-layered in relation to the complex values and the variety of people that exist within it. It is also a shortcoming because lack of diversity means that ethnic minorities are unable to benefit from development, which means the process is not inclusive – going against the grain and very ethos of the analytical framework.

3.1.2. Federal Divisions in Politics

Politically, the federal demarcation of states within Ethiopia has been a further source of ethnic tension and the State's inadequate implementation of legal measures protecting diversity. These ethnic tensions have reignited in 2020-2021. In the name of State and ethnic equality, Prime Minister Abiy Ahmed claimed that the regional ruling party, the Tigray People's Liberation Front (TPLF) in Tigray had too much political power and also was amassing weapons, which would lead to internal

[41] Smith (n 37) 576.
[42] Jon Abbink (a), 'Ethnicity and Conflict Generation in Ethiopia: Some Problems and Prospects of Federalism' (2006) 24(3) Journal of Contemporary African Studies 389, 396; Jon Abbink (b), 'Ethnic-Based Federalism and Ethnicity in Ethiopia: Reassessing the Experiment After 20 Years' (2011) 5(4) Journal of Eastern African Studies 596, 605.
[43] Aalen (n 31) 249.

conflict.[44] Previous to Abiy's appointment, the TPLF were the ruling political party within Ethiopia for over thirty years.[45] Hailing from the Oromo community, Abiy has proposed for more equity among Ethiopia's ethnic communities and wanted to limit the power of the TPLF.[46] This is not the first instance of anti-Tigray sentiments, since the Tigray people and the TPLF are said to overly benefit from political power within Ethiopian society.[47]

Although Abiy's initiatives are aimed at redistributing influence from the Tigray region, these initiatives actually play into these anti-Tigray sentiments and have failed to unite the ethnic groups within Ethiopia. Indeed, there are concerns that Abiy will replace the TPLF with 'Oromo domination'.[48] In response to Abiy's reforms, protests urging for more autonomy in the Tigray region (where the TPLF are located) were held.[49] In turn, the TPLF's opposition to Abiy's changes have fuelled ongoing violence and political instability. The tension has also become so extensive that it is estimated that 1,900 people have died as a result of clashes between Tigray and the Federal Government.[50]

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[44] Declan Walsh, Abdi Latif Dahir, 'Why is Ethiopia at War with Itself?' (5 November 2020, *The New York Times*) <https://www.nytimes.com/2020/11/05/world/africa/ethiopia-tigray-conflict-explained.html> accessed 1 April 2021.

[45] Abiy established the 'Prosperity' political party, which includes previously marginalised ethnic groups, such as Oromo communities, but excluded the TPLF.
For further details, see: Walsh, Latif Dahir (n 44).

[46] Walsh, Latif Dahir (n 44).

[47] Markus Roos Breines, 'Ethnicity Across Regional Boundaries: Migration and the Politics of Inequality in Ethiopia' (2020) 46(15) Journal of Ethnic and Migration Studies 3335, 3339.

[48] John Ishiyama, 'Is Ethnonationalism Growing in Ethiopia and Will it Lead to the Dissolution of the Country? Evidence from the World Value Survey 2007-2020' (2021) 56(5) Journal of Asian & African Studies 1024, 1025.

[49] Ishiyama (n 48) 1028.

[50] Jason Burke, 'Ethiopia: 1,900 People Killed in Massacres in Tigray Identified' (2 April 2021, *The Guardian*) <https://www.theguardian.com/world/2021/apr/02/ethiopia-1900-people-killed-in-massacres-in-tigray-identified> accessed 2 April 2021.

These deaths are unacceptable and a prime example of how unity between the diffuse groups in Ethiopia has not been achieved. With these tensions in mind, Ethiopia is faced with insurmountable task of reconciling these two leading ethnic groups but it also needs to give due attention to ethnic minority groups that exist within the federal system.

To better accommodate all aspects of Ethiopian society, a wider array of values needs to be acknowledged, *inter alia*, self-identification, culture, beliefs, religion, knowledge and modes of behaviour.[51] Identification of a given ethnic group based on language and territory is flawed; it reflects a broad-brush approach adopted by Ethiopia, which is not compatible with the freedom of choice.[52] For freedom of choice to be internally-attuned in the Ethiopian context, the conceptualisation of diversity needs to be fluid.[53] Accordingly, diversity is the unifying factor for Ethiopian society; this needs to be fully acknowledged and embraced, which means also accepting that there are majority ethnic groups but also fully recognising and supporting minority ethnic groups.[54]

This is not only necessary to progress for ethnic unity but also as a better reflection of the diverse values that feed into Ethiopian society. If done equitably and adequately, it provides these communities with the recognition they need and adds value to their lives, which is an important aspect of inclusive development. As a central actor, Ethiopia is tasked with integrating these communities within its society to establish a base for the foundational principle of freedom of choice. Freedom of choice is further complemented by the public interest which will be examined in the next section.

[51] Fukuyama (n 12) 10, 22; Smith (n 37) 577.
[52] Aalen (n 31) 244; Abbink (b) (n 42) 600.
[53] Aalen (n 31) 244; Abbink (b) (n 42) 607.
[54] Smith (n 37) 576.

4. THE PUBLIC INTEREST

The public interest is a broad concept. As explained in Chapter 4, the public interest is concerned with the progressive improvement of a given society as both a means and ends to preserving its overall integrity. It is the second and complementary foundational pillar of the analytical framework for inclusive development.

Given that Ethiopia has prioritised economic growth as a strategy for positive change, it is even more important that the public interest provides a crucial counterbalance to the private economic sphere. This foundational pillar provides a checkpoint for States, such as Ethiopia.

It is a reminder that all States have a public-facing role to take steps to positively advance their respective societies. Simply put, the society in question needs to obtain positive benefit from the actions of that State. Based on that rationale, Ethiopia needs to adequately embed the right to food as an aspect of the public interest within the Constitution in order to protect and realise this right. Moreover, fulfilling basic needs through an IHRL approach is an important aspect of the public interest. The right to food has been used as an exemplar of this argument within this thesis. After all, in terms of basic needs, food is essential requirement for human life and well-being.[55]

Within the Ethiopian context, realising the right to food is paramount given its history of repeated famines where approximately 1 million people have died.[56] In that regard, realising the right to food as an aspect of the public interest must be a priority

[55] Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (OUP 1981) 12.

[56] Amelia Butterly, 'Third Years of Talking About Famine in Ethiopia – Why's Nothing Changed?' (*Newsbeat BBC News*, 11 November 2015) <http://www.bbc.co.uk/newsbeat/article/34776109/thirty-years-of-talking-about-famine-in-ethiopia---whys-nothing-changed> accessed 14 November 2020.

of the State. With that in mind, the next section focuses on examining to what extent the domestic legal frameworks protect the right to food as a facet of the public interest, particularly in the context of the Constitution.

4.2. Testing the Principle

Within the Constitution (Article 10), all human rights including the right to food are subject to protection by the State and these rights are inviolable.[57] Notably, all rights within the Constitution shall be interpreted widely in accordance to IHRL instruments that have been ratified by the State.[58] This includes the International Covenant on Economic, Social and Cultural Rights, from which the right to food stems.[59] From a reading of Article 10, it can be inferred that the Constitution does have a public interest angle as reflected by its indirect references to the right to food, which have been framed within the IHRL context.

Beyond these IHRL references, Article 43 specifies that as part of the State's development, all Ethiopians are entitled to an adequate standard of living. Furthermore, the State shall undertake activities to fulfil basic needs, which includes the right to food as it is essential to human life.[60] However, the Constitution does not specifically or expressly protect the right to food. This is a shortcoming of this instrument because the right to food needs to be concretely protected in order to

[57] The Constitution of Ethiopia (n 4) art 10 (1).
[58] The Constitution of Ethiopia (n 4) art 10 (1).
[59] UNCHR, 'Status of Ratification: Ratification of 18 Human Rights Treaties' (*UN Human Rights Indicators Work*, 2014) <https://indicators.ohchr.org/> accessed 3 June 2021; UNCHR, 'Report of the Special Rapporteur on the right to food: Mission to Ethiopia' (8 February 2005) UN Doc E/CN.4/2005/47/Add.1, para, 20.
[60] UNCHR, 'General Comment No. 12: The Right to Adequate Food (Art. 11)' (12 May 1999) UN Doc E/C.12/1999/5, para 9.

delineate the public interest role of the State when it comes to the basic needs of its society.[61]

On further reading of the Constitution, under Article 90, there is a weak reference to the right to food in relation to the basic needs approach. The State 'shall aim to provide' for basic needs but this is subject to the State's resource constraints, which may limit its capability of doing so.[62] This qualifier to this article, arguably, is a 'get out' clause for the State to justify inaction and this is not an adequate, as it does not definitively protect the right to food. To protect of the right to food, the State is pro-actively required to provide guidance, rather than half-hearted attempts or acknowledgements that this right simply exists.

While it is acknowledged by this author that Ethiopia may not have the necessary resources to provide food for all of its society but, at the same time, Article 90 is hollow, due to the qualifying language but also because it is worded conditionally. This means that the right to food lacks the clear and definitive language needed in order to ensure that it is adequately protected. It also provides too much leeway for the State to neglect the right to food as an aspect of the public interest. In relation to this foundational pillar of the analytical framework, this wording fails to recognise the public-facing role of Ethiopia as a State. This reduces the accountability of the State to its own society, but it also means that the foundations (based on freedom of choice and the public interest) for inclusive development in the Ethiopian context are weak.

As a minimum standard under IHRL and as an aspect of the public interest, Ethiopia must ensure freedom from hunger. In that regard, law is an enabling

[61] UNCHR (n 60) paras 14-15.
[62] The Constitution of Ethiopia (n 4) art 90.

instrument to do so but this is not sufficiently articulated within the Constitution.[63] This lack of concrete protection for the right to food within the Constitution means that Ethiopia could (wrongly) use this as an excuse not to fully actualise this and other rights, further devaluing the public interest. Additionally, there is a potential to mis-use this legal gap because States need a reminder of their public-facing role within the context of the public interest, and Ethiopia is no different.

Having clear legal rules for the protection of the right to food is even more pressing within the Ethiopian context, given the aforementioned rising ethnic tensions between the Federal Government and the northern Tigray State. These tensions have not only led to internal instability but there are also reports of prolonged hunger and malnutrition occurring in Ethiopia.[64] Despite its history with famines, reports of food shortages in Ethiopia have continued even into 2021, which highlight ongoing deficiencies in respect to the right to food and the public interest.[65]

Taking into account Ethiopia's experiences with famines and the recent reports of food shortages, the State has fallen short of its duty-bearer role within IHRL, in the context of the right to food.[66] As a State actor, Ethiopia has a primary duty to respect

[63] UNCHR (n 60) paras 1, 6.
[64] UN Security Council, 'Already Up 20 Per Cent, Acute Hunger Driven by Conflict, Instability Risks Increasing Further Due to Climate Change, COVID-19, Secretary-General Warns Security Council' (Security Council Press Release 11 March 2021) <https://www.un.org/press/en/2021/sc14463.doc.htm> accessed 1 February 2021.
[65] Mark Lowcock (UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator), 'Remarks to the Security Council on the Protection of Civilians in Armed Conflict' (*UN Office for the Coordination of Humanitarian Affairs,* 25 May 2021) <https://reliefweb.int/sites/reliefweb.int/files/resources/20210525_USG%20Remarks%20to%20Security%20Council%20on%20Protection%20of%20Civilians.pdf> accessed 3 June 2021; Alex de Waal, 'Ethiopia Tigray Crisis: Warnings of Genocide and Famine' (*BBC News*, 30 May 2021) <https://www.bbc.co.uk/news/world-africa-57226551> accessed 3 June 2021.
[66] Mark Lowcock (UN Under-Secretary General for Humanitarian Affairs), 'Responding to the Humanitarian Situation in Ethiopia's Tigray Region' (Chatham House Research Event, London, 10 February 2021) <https://www.chathamhouse.org/events/all/research-event/responding-humanitarian-situation-ethiopias-tigray-region> 10 February 2021.

rights, including the right to food. [67] In that regard, Ethiopia cannot prevent access to food during the current tensions and must take action to prevent itself and other actors from violating this key right.[68] Yet, the United Nations has reported that not only has food aid been blocked but also identified that crops have been destroyed and looted (although it has not been identified by whom).[69] Furthermore, Ethiopia has a central duty to alleviate hunger even during this current period of political instability.[70] However, it is reported that not only has Ethiopia side-stepped this duty but also is obstructing access to food.[71] Based on these recent examples, not only has Ethiopia failed in its legal responsibilities under IHRL, but also in its moral obligation to do so in accordance to the foundational pillar of the public interest in relation the analytical framework.

Prolonged hunger and obstructions to the right to food are not only objectionable because it denies society of a basic need; it also clearly ignores the right to food as an integral aspect of the public interest since this basic need is required to ensure the well-being of society. As a central actor, there is no value for Ethiopia to prolong hunger. The fact that the State is not taking positive action to remedy this situation also highlights that the centrality of the State is missing within this context. Accordingly, in application of the metaphor of the 'three-legged stool' mentioned in the previous chapter, the stool in the Ethiopian context is lopsided due to insufficient

[67] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3 (ICESCR), art 11(1).
See also: UNCHR (a), 'General Comment No. 12: The Right to Adequate Food (Art. 11)' UN Doc E/C.12/1999/5, para 6; UNCHR (b), 'General Comment No. 3: The Nature of State Parties' Obligations (Art. 2, Para. 1, of the Covenant)' UN Doc E/1991/23, paras 2-3.
[68] UNCHR (a) (n 67) para 19.
[69] Lowcock (n 65).
[70] UNCHR (a) (n 67) para 6.
[71] Lowcock (n 65); Rich Gladstone, 'Famine Looms in Ethiopia's War-Ravaged Tigray Region, U.N. Says' (*New York Times*, 26 May 2021) <https://www.nytimes.com/2021/05/26/world/africa/ethiopia-tigray-famine.html> accessed 3 June 2021.

support from the foundational pillars of freedom of choice and the public interest. Arguably, the analytical framework is not only lopsided within this context but the overarching 'seat' of the State is also noticeably missing too.

As a State actor, Ethiopia is obligated to ensure its people have sufficient food, which is an integral aspect of its public-facing role in light of the public interest.[72] A first step that Ethiopia can and should take, is to develop legal safeguards to ensure that as a minimum standard individuals do not suffer from hunger.[73] This also means that, as a State, it needs to take action and refrain from violating this right.

4.1.2. The Next Step for Ethiopia: The Public Interest

From the above analysis, it is clear that the public interest has not been sufficiently met within the Ethiopian context. The right to food is a noticeable example, where the State has not undertaken sufficient steps to safeguard this right. The right to food is inherent to the well-being of society and so it is integral to the public interest. Ethiopia needs to ensure that it provides adequate legal protection of this right because clear legal protection is currently missing from its Constitution. Food is essential for human life. Therefore, as a first step, the right to food as an exemplar of the public interest needs to be protected through law.

As such, this is a salient reminder of the role of law in relation to the analytical framework. That is, law has an enabling role for the public interest, which means it is an instrumental tool for the betterment of society.

[72] Jean Drèze, 'Democracy and the Right to Food' (2004) 39(17) Economic and Political Weekly 1723, 1726.
[73] UNCHR (n 67) para 3.

By clearly demarcating this right within the Constitution, this will act as a prompt for Ethiopia in relation to its duties as a State actor. This refers to its duty to respect and ensure respect for this right, which is a key obligation under IHRL.[74] In other words, a 'legal sign' that Ethiopia must not engage in activities that contravene this right. Arguably, this 'sign' is much-needed in the current context, since the Tigray conflict indicates that Ethiopia, as a State actor, is neglecting its duty-bearer role under IHRL and the public interest.

The first two foundational pillars of the analytical framework are concerned with law's enabling role and have raised some questions about the adequacy of the Ethiopian context. Additionally, it must not be forgotten that law also has a regulatory purpose. Law in its regulatory role is also needed in order to mitigate the adverse impacts that private actors may have on society, but also to ensure that these actors act in a manner that benefits society. This will be examined further in the next section.

5. The DUALITY OF LAW: LAW AS AN ENABLER BUT ALSO AS A REGULATORY TOOL

As identified in Chapter 4, the third complementary and foundational pillar of the analytical framework concerns law's dual nature. As referred to in the previous section, law is necessary in its enabling role to safeguard society's well-being. In the Ethiopian context, the previous two sections of this chapter have tested law's enabling role in the context of the freedom of choice and the public interest and identified failings in

[74] UNCHR (n 60) para 19.

relation to diversity and inadequate access to food. This section shifts the focus of inquiry to law's other function – that is, its regulatory role.

In section 2 of this chapter, in relation to the centrality of the State, this thesis argued that Ethiopia needs to be more self-aware in its strategy for development and economic growth. This does not require a radical shift or outright rejection of the economic growth model, but as a central actor, Ethiopia must shape this model to serve its own interests and ensure that in its pursuit of economic growth is done in a manner that adequately aligns with the freedom of choice and public interest. This requires the State to shape the (Western) economic growth model to align with its interests and its internal values, so that it contributes to society's overall improvement.

One way to shape this model is through law as an instrument for regulation. Law, in this form, is needed to translate the activities of private actors into meaningful benefits for society. This is an essential step that the State, as a central actor, must take so that its private sector in relation to its economy does not overshadow the public interest.

Article 52(2)(a) of the Constitution emphasises that the State needs 'accelerated economic growth', which reflects the dominant (Western) model that developing States tend to accept (as identified in Chapter 2, section 2.2). There is an attempt to temper this reference to economic growth, as this article specifies that it is the State's responsibility to develop 'economic [and] *social* policies' for development.[75] Whilst this is a laudable inclusion, it does not provide any detail as to the nature of the State's responsibility or whether these policies will have a regulatory function.

[75] The Constitution of Ethiopia (n 4) art 52(a).

Clear regulation is important to establish clear demands about the role of the State in relation to society.[76] Law in this form provides a vehicle to achieve goals. That is to ensure that the best interests of society are catered for and ensuring that the activities of private actors align with these goals.[77] To this end, how Ethiopia has used law as a tool for regulation needs to be further examined.

5.1. Testing the Principle: Evidence of Regulation within the Investment Proclamation (2020)?

The previous sections of this chapter tested the freedom of choice and the public interest principles of the analytical framework. These foundational principles are concerned with law's enabling role within Ethiopia. Accordingly, whether domestic law in Ethiopia has enabled inclusive development does not need repeating in detail in this section. Instead, we must turn our attention to whether Ethiopia uses law as a regulatory tool and whether that regulation suitably contributes to inclusive development.

For that purpose, Ethiopia's Investment Proclamation[78] needs further analysis, not only because it is a new instrument (enacted in 2020) but also because it is the main legal instrument that Ethiopia uses as a host State to regulate foreign investors. This regulation is even more important given that Ethiopia focuses on economic growth as a mechanism for positive change. As argued for in Chapter 3 (section 1.1), the private sphere, particularly investment, can be enablers for inclusive development. This requires the State to harness investment through regulation. In other words, Ethiopia

[76] Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What It Cannot* (Edward Elgar 2011) 2.
[77] Haines (n 76) 3.
[78] The Investment Proclamation 2020 (n 5).

needs to regulate in order to prevent the harmful effects of private actors and also to enable development by translating private activities into benefits to society. In that regard, an examination of the extent of regulation provided for within the new Investment Proclamation is noteworthy.

5.1.1. The State's Central Role for Regulation

On reading the 2020 Investment Proclamation, Ethiopia's emphasis on the (private) economic growth is evident throughout the text, even within its preamble, which sets the tone of the overall instrument. The preamble highlights that economic development is necessary as a catalyst for 'improved living standards'.[79]

Following this (economic) approach, the preamble further provides that any improvements to society ought to be fuelled by foreign investment – a flawed but dominant approach adopted by developing States (as examined in Chapter 2, section 2). This approach is problematic on two-fronts. Firstly, it fails to acknowledge that positive change comes from within (a necessary aspect of the complementary freedom of choice) and not from external actors. Secondly, it suggests that passively admitting foreign investment will lead to positive change within society, but this will only be possible through regulation. Regulation is needed in order to harness the private sector. Otherwise, the desired benefits Ethiopia wants, in terms of improved living standards, will not filter through to its society. Therefore, Ethiopia needs to establish clear regulatory boundaries within this instrument and assume its role as a State actor and designer of regulation.

[79] The Investment Proclamation 2020 (n 5) preamble.

The regulatory role of the State is briefly alluded to in the preamble, as the Investment Proclamation identifies that it establishes a framework for supervision although this raises the question as to whether this supervisory or regulatory function is actually achieved within this instrument. Additionally, it is worth noting that Article 5(5) specifically provides that economic development underpins the State's approach to change and that this change hinges on the private sector. This is a clear reflection of Ethiopia's prioritisation of the private sphere but this article lacks regulatory element, which is needed to ensure that the State is not overshadowed by private actors.

It is argued that the regulatory role of the State is not prominent enough, which is further explored in relation to additional provisions within this Proclamation. Ethiopia needs to delineate its supervisory role over investment in order to harness investment positively. As part of this role, the State needs to clearly reflect on its society's needs for inclusive development, so that it can harness investment for development.

5.1.2. The Investment-Development Nexus: Establishing a Clear Connection

In order for investment to enable inclusive development, Ethiopia cannot remain passive and expect to reap the positive benefits. As part of its regulatory role, Ethiopia needs to establish concrete steps to channel investment for positive change, for example, in specific sectors or geographic areas. There are indications that this is attempted within the Investment Proclamation but these steps do not go far enough to establish the investment-development nexus.

In contrast to China (examined in Chapter 3, section 1.1), the Investment Proclamation does not specify any particular sectors that Ethiopia wishes to target.

Unlike China's Joint Ventures Using Chinese and Foreign Investment Law (2007),[80] Ethiopia's Investment Proclamation does not contain any specifications regarding the transfer of technology or provide incentives to foreign investors to ensure that transfers in relation to equipment and skills actually take place. Ethiopia needs to adopt a more pro-active stance in channeling foreign investment; this requires it to identify its internal strengths and what it needs from foreign investors.

Instead, Article 5 merely outlines the objectives of the instrument, specifically in relation to Ethiopia's overarching development objectives in relation to investment. Notably, Article 5 refers to inclusive development but does not specify what is meant by this concept. No definition of inclusive development is provided within Article 5 and no definition provided within the overall instrument. This is a missed opportunity for Ethiopia to clearly define how it envisages using investment for inclusive development and how it seeks to harness investment.

In such a new instrument, Ethiopia could have provided a more definitive explanation of inclusive development, which needs to be based on internal values – a key feature of freedom of choice. Ethiopia could have drafted Article 5 more clearly. Such a draft would shed light on the State's supervisory role, which would help it establish the intersectionality between investment and development. By understanding the nexus between investment and development, this would allow Ethiopia to better balance the public interest against the private sphere (in relation to investment), which would provide a bridging point for the public-private dichotomy mentioned in Chapter 4, section 1. As a central actor, Ethiopia needs to acknowledge that this balance is needed, so law enables positive change by enhancing the public

[80] Joint Ventures Using Chinese and Foreign Investment Law 2007, arts 24, 25.

interest, and also using law to regulate economic activity, such as investment, sufficiently.

In Chapter 3, it is asserted that in order for investment to benefit society, the private or economic activity needs to be translated into benefits to society, for example, in relation to transfer of skills, knowledge and technology. This point is reflected, to an extent, within Article 5 of the Investment Proclamation. Article 5(7) states that a transfer of skills and knowledge needs to take place but this transfer is premised on the integration of foreign and domestic investors.[81] Article 5 does not provide any further detail on how these transfers are to be achieved or what Ethiopia, as a State actor, expects of foreign investors. In that regard, this article is not a good example of regulation because it does not establish a clear goal in relation to societal well-being or parameters for behaviour in relation to private actors, which are necessary components for regulation.[82] Therefore, it does not provide the 'connecting-point' between investment and development, which is needed.

Nevertheless, this step for regulation will prove challenging for Ethiopia but it is necessary. It is challenging, not least because Ethiopia's ongoing political instability means the State's priority and focus are diverted, for example on the current Tigray tension. It is clear that Ethiopia is occupied with other issues, since its attention is elsewhere. In practice, this means that Ethiopia is unable to strategically plan or implement regulation for inclusive development but this is necessary if Ethiopia wants to use the economic growth model.

[81] The Investment Proclamation 2020 (n 5) art 5(7).
[82] Haines (n 76) 23.

Beyond establishing the intersectionality between investment and development, the State also needs to design regulation to remind foreign investors that they are 'guests' within its territory. This form of regulation is important, not least to set parameters for expected behaviour in relation to private actors but also, as a form of 'command' from the State so that conflicts between investment and IHRL (as an aspect of inclusive development) do not occur.[83]

5.1.3. Setting Parameters for Behaviour

On further reading of the Investment Proclamation, some half-hearted attempts to regulate the behaviour of foreign investors are included. Article 9 outlines the minimum capital that foreign investors must invest, for example, US$200,000 for a single investment project,[84] and US$150,000 if it is a joint venture with a domestic investor.[85] If the project involves infrastructure, then the minimum capital is US$100,000 if the investor acts alone.[86] If it is a joint venture, then the minimum capital amount is set at US$50,000.[87] Although establishing a minimum investment amount is useful for Ethiopia, in order to ensure that investment projects are of a suitable size to enable potential skills, technology and knowledge transfers take place, there is no legal requirement that specifies that these transfers will definitively take place.

[83] Haines (n 76) 6; Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Hart 2004) 51; Eric Windholz, *Governing Through Regulation: Public Policy, Regulation and the Law* (Routledge 2017) 172.
[84] The Investment Proclamation 2020 (n 5) art 9(1).
[85] The Investment Proclamation 2020 (n 5) art 9(2).
[86] The Investment Proclamation 2020 (n 5) art 9(3)(a).
[87] The Investment Proclamation 2020 (n 5) art 9(3)(b).

Under Article 13 of the Investment Proclamation, foreign investors must obtain a permit to operate in Ethiopia,[88] the permit will be revoked or suspended if the investor violates the Investment Proclamation 'or other pertinent laws'.[89] This provision, however, does not specify what the other pertinent laws are, or whether this also refers to the Constitution. As such, although a permit is a useful step to regulate investors entering Ethiopia, it is not evident how this provision will be implemented in terms of the ongoing operation or regulation of foreign investors. It also does not clearly state the State's expectations for foreign investors. This needs to be undertaken not only from the perspective of regulatory controls that establish clear boundaries for investors to operate within, but it is also an important aspect of the State regaining and retaining its central role as per the analytical framework. This regulatory ambiguity regarding the State's expectations of foreign investors continues within the Investment Proclamation, for example, in Article 54.

Article 54(1) provides that all investments must comply with domestic laws.[90] Investors must give due attention to 'social and environmental sustainability values', which include 'social inclusion objectives'.[91] Frustratingly, the Investment Proclamation does not identify what domestic laws need to be complied with. This could mean that all domestic laws need to be complied with, but it requires commitment from the State to enforce. Given the current state of affairs in relation to the ethnic tension in Ethiopia, it is disappointingly unlikely to have the capacity to focus on these external actors, when its internal situation is in such disarray. Indeed, this indicates that there is a gap between the regulatory ambition of this instrument and

[88] The Investment Proclamation 2020 (n 5) art 10(1)(a).
[89] The Investment Proclamation (n 5) art 13(f).
[90] The Investment Proclamation (n 5) art 54(1).
[91] The Investment Proclamation (n 5) art 54(2).

the practice. In turn, this means that regulation for inclusive development lacks meaning in this context.

Article 54 does not define to what values or social inclusion objectives foreign investors need to give due attention. These objectives could have been more clearly connected to Article 5 and the transfer of technology and skills. By doing so, law as a regulation has transformational value, providing a stepping stone for converting private activities into the benefit for the public sphere.[92]

Furthermore, it is not apparent in what circumstances an investment licence will be revoked under Article 54; it also does not state whether there will be a penalty for non-compliance with domestic law. For regulation to have an instrumental value to society, there needs to be an element of command and control in order to shape the activities of private actors for the good of society.[93] A common mistake made by States is to amend laws that regulate without constructing more comprehensive legislation.[94] This can be said of this instrument because although it replaces the 2012 Investment Proclamation,[95] it has not clarified the standards of behaviour expected of investors.

It is also difficult to gauge whether Article 54 has been utilised by the State. There is currently no data on the steps as to whether Ethiopia has revoked any investment licences for violation of this article under the 2020 version of the Investment Proclamation. However, under the previous 2012 Investment Proclamation, it is

[92] Weber refers to this process as a process of 'rationalisation'. See: Tony Waters, Dagmar Waters (eds), *Weber's Rationalism and Modern Society: New Translations on Politics, Bureaucracy, and Social Stratification* (Palgrave Macmillan 2015) 9; Stephen Kalberg, 'Max Weber's Types of Rationality: Cornerstones of Analysis of Rationalization Processes in History' (1980) 85(5) American Journal of Sociology 1145, 1146.
[93] Haines (n 76) 10; Bronwen Morgan, Karen Yeung, *An Introduction to Law and Regulation*: *Text and Materials* (CUP 2007) 80-81.
[94] Haines (n 76) 14.
[95] The Investment Proclamation No. 769/2012 (Ethiopia).

estimated that from 2014 to 2015, 216 investment licences were revoked.[96] Notably, these revocations were not based on non-compliance with domestic law, but due to failure to start the investment activities within the designated timeframe or misuse of investment incentives.[97] Yet, this is not enough for regulation.

Law in its regulatory capacity needs to be better reflected within the 2020 Investment Proclamation. In this capacity, law needs to avoid being perfunctory and needs to generate positive change in alignment with law's enabling role – that is, enabling the public interest and freedom of choice. [98] Understandably, this is not an easy task for Ethiopia as a State to undertake, but inclusive development will not be achieved unless the foundational principles of the analytical framework are progressively embedded in its approach to development.

5.1.4. The Next Step for Ethiopia: Law's Dual Purpose

From an analysis of the 2020 Investment Proclamation, it is evident that law's dual purpose has not been fully achieved. There are some tentative efforts reflected in this Proclamation to regulate foreign investors, but these efforts do not go far enough to control the behaviour of foreign investors. This control is necessary as a form of regulation, if Ethiopian society is to benefit. Going forward, if Ethiopia continues to follow the economic growth model for development, there needs to be concrete

[96] Fikadu Asfaw and Associate Law Office, 'Ethiopian Investment Commission (EIC) Revokes 216 Investment Licenses' (*Fikadu Asfaw and Associate Law Office*, 27 April 2015) <https://ethiopianlaw.com/ethiopian-investment-commission-eic-revokes-216-investment-licenses/> accessed 7 April 2021.
[97] Fikadu Asfaw and Associate Law Office (n 96).
[98] Morgan, Yeung (n 93) 85.

regulation in order to ensure the beneficial transfers of knowledge, skills and technology take place. Otherwise, positive change will not be generated.

The analytical framework highlights the flaws in the domestic context within Ethiopia but the framework can also be applied within an international context. By applying the analytical framework to the IIA context, it is argued (in section 6) that Ethiopia is unable to use these agreements to enable inclusive development, even in a South-South context. For that purpose, the China-Ethiopia BIT will be examined using the lens of inclusive development within the next section.

6. THE INVESTMENT FRAMEWORK: THE CHINA-ETHIOPIA BIT

The design of domestic frameworks is an important first step towards inclusive development. This argument about the significance of domestic law with regards to the public interest has even been raised in investment arbitration.[99] The previous sections of this chapter have tested the robustness the analytical framework against relevant Ethiopian domestic legislation. The framework provides a prism to analyse these laws and helps identify Ethiopia's shortcomings regarding the foundational principles. The framework demonstrates that inclusive development and Ethiopia's interests as a developing host State not reflected within BIT.

The applicability of the analytical framework does not end there, and neither does the need for the conceptualisation of inclusive development. The analytical framework

[99] *Bear Creek Mining Corporation v Republic of Peru* (30 November 2017) ICSID No. ARB/14/21, Award, para 468; *S.D. Myers Inc. v Government of Canada* (15 January 2001) 40 ILM 1408, Partial Award, para 263.

is also applicable to international investment agreements and will be applied to the China-Ethiopia BIT.

The China-Ethiopia BIT is worthy of further study because it is an older investment agreement as it was concluded in 1998.[100] During this period, both China and Ethiopia were developing economies. Based on that rationale, both States were newcomers to the existing IIL rules when concluding this agreement. In theory, this means that the negotiation of this BIT should reflect more political and economic parity between the two parties. During this period, as developing States, both parties will not have had the time or experience to reflect on the existing IIL framework or develop innovative drafts.

Given the age of this BIT, it is not surprising that it bears hallmarks of a traditional investment agreement with little to no adaptations proposed by the State parties. As identified in Chapter 3, traditional investment agreements are not designed to account for the idiosyncrasies of developing States. This is because traditional investment agreements were enacted by (Western) home States as a mechanism to legally protect their assets abroad.[101] Therefore, by adopting such a traditional model without appropriate changes means that Ethiopia's needs and interests inevitably are not incorporated within the text. In other words, freedom of choice will be lacking within this instrument. This argument will be further explored below.

[100] UNCTAD, 'Investment Policy Hub: China-Ethiopia BIT' (UNCTAD, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/897/china---ethiopia-bit-1998-> accessed 8 April 2021.

[101] Kate Miles, *The Origins of International Investment Law* (CUP 2013) 22-23; Ibironke Odumosu-Ayanu, 'Local Communities, Environment and Development: The Case of Oil and Gas Investment in Africa' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar 2019) 484.

Freedom of choice, however, requires a conscious effort on the part of the State. At this point, the analytical framework is a useful reference point because Ethiopia as a State must advance the foundational principles. In other words, Ethiopia needs to assume a more central role as a State actor so that its needs are more adequately reflected in investment agreements, including this one. In order to assume this central role, the State, – in this case Ethiopia, needs to ensure that the three foundational and complementary pillars are reflected in its investment agreements.

6.1. Testing the Foundational Principles

As mentioned above and in Chapter 4, freedom of choice means that Ethiopia does not blindly follow the status quo, which has been constructed in accordance with Western ideals and by Western States. Instead, Ethiopia must ensure that it determines its own path through its own experiences, and by doing so, constructs legal instruments, such as investment agreements, to its own advantage.

One key way for Ethiopia to demonstrate its freedom of choice is to expressly carve-out space for itself within investment agreements by expressly providing for the public interest. This is a necessary step for Ethiopia to undertake, so that it retains its autonomy to regulate for the public interest but also the extent to which it can regulate foreign investors. In that regard, how the public interest is articulated will be an important factor as to how much space Ethiopia can carve-out. This is not only a reflection of law's enabling purpose but also its regulatory role in relation to inclusive development. To that end, the next section will examine the preamble, pre-admission, national treatment and general exception provisions of the China-Ethiopia BIT to test

these foundational principles. An examination of these provisions will help ascertain whether this instrument can be utilised for inclusive development.

6.1.1. The Preamble

The preamble establishes the overall context and objective of the BIT.[102] The preamble of the China-Ethiopia BIT is brief, in comparison with newer agreements. In contrast to Ethiopia's more recently concluded investment agreements,[103] the preamble of the China-Ethiopia BIT does not provide for the public interest – implicitly or expressly.[104] This preamble rhetorically refers to reciprocity and the 'mutual benefit' between the Ethiopia and China.

The likelihood of mutual benefit between the parties, during this period (and after, because this BIT remains in force today) is questionable. This is because since 2000, which is when this BIT entered into force, the flow of FDI was and remains one-

[102] Peter Muchlinski, 'The Framework of Investment Protection: The Content of BITs' in Karl Sauvant, Lisa Sachs (eds), *The Effect of Treaties on Foreign Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP 2009) 38.

[103] The preamble to the Brazil-Ethiopia BIT expressly states: 'Recognizing the essential role of investment in promoting sustainable development, economic growth, poverty reduction, job creation… and human development...' and alludes to the public interest 'Reassuring… [both States'] regulatory autonomy and policy space'.
See: Agreement Between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment and Facilitation (signed 11 April 2018, not yet in force).
The preamble to the Ethiopia-United Arab Emirates BIT specifically provides for sustainable development and that the domestic laws of the host State should be complied with by foreign investors. It also recognises that the State has a regulatory role, which is needed in order to realise 'national policy objectives'.
See: Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the United Arab Emirates Concerning the Promotion and Reciprocal Protection of Investment (signed 3 December 2016, not yet in force).

[104] Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Peoples' Republic of China Concerning the Encouragement and Reciprocal Protection of Investments (signed 11 May 1998, entry into force 1 May 2000), preamble.

sided.[105] That is, from China to Ethiopia, which is evident from the disparities between the economic worth of the two States. At this time, Ethiopia's GDP was approximately worth US$8.242 billion, whereas China's GDP was significantly worth more at US$1.2 trillion.[106] According to World Bank figures, China's economy still eclipses Ethiopia's, meaning that the flow of capital continues to be from China to Ethiopia.[107] This means that it is China and its investors that are likely to derive benefit from the legal protection provided for under the BIT, rather than it reflecting a mutually beneficial relationship.

In that regard, this preamble is a poor reflection of freedom of choice. The basic text of the preamble echoes the traditional content of older BITs, as there is little diversification from the usual statement of economic benefits or cooperation between the State parties.[108] In other words, Ethiopia has not sought to expressly recognise the public interest, which is an important feature that is missing from this preamble. Whilst the preamble is not binding, it provides an important reference point and tool for interpretation, especially in relation to the public interest goals of the developing host State.[109] This is why it is important that the preamble clearly articulates the public interest, so that it establishes Ethiopia's intentions towards inclusive development as a reflection of freedom of choice.[110]

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[105] Amy Man, 'Old Players, New Rules: A Critique of the China-Ethiopia and China-Tanzania Bilateral Investment Treaties' in Clair Gammage, Tonia Novitz (eds), *Sustainable Trade, Investment and Finance: Toward Responsible and Coherent Regulatory Frameworks* (Edward Elgar 2019) 153.

[106] The World Bank (a), 'World Bank Open Data: Ethiopia' (The World Bank, 2021) <https://data.worldbank.org/country/ethiopia?view=chart> accessed 7 April 2021; The World Bank (b), 'World Bank Open Data: China' (The World Bank, 2021) <https://data.worldbank.org/country/china?view=chart> accessed 7 April 2021.

[107] According to 2019 statistics, China's economy was valued at US$14.28 trillion and Ethiopia's economy was valued at US$95.913.
The World Bank (a) (n 106); The World Bank (b) (n 106).

[108] Muchlinski (n 102) 38.

[109] Muchlinski (n 102) 38-39.

[110] Catherine Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 26(3) The European Journal of

In other words, the preamble is a signal, through the foundational principle of the public interest, that law can and should be an enabler for inclusive development. This is not the only part of an investment agreement that has the potential to reflect law's enabling function. The general exception provision also provides such an opportunity (see section 6.1.4). Before analysing the general exception provision, which applies after investment has been admitted, it is easier for a host State to regulate investment before it enters the economy. This makes the pre-admission provision a useful tool.

6.1.2. The Pre-Admission Provision

The China-Ethiopia BIT lacks a comprehensive pre-admission provision. Article 2 merely stipulates that investments will be admitted in line with domestic laws.[111] Article 2(2) also specifies that work permits will be granted to foreign investors.[112] This is a basic and common formulation of this provision in existing investment agreements.

As identified in Chapter 4, the host State (Ethiopia) is, in theory, not prevented from amending its national laws following the agreement's entry into force. Nonetheless, the host State will need to tread carefully when enacting domestic laws, so that it does not incur liability under FET provisions of respective IIAs. Here, it is useful for the host State to stipulate a timeframe in relation to when this provision is applicable. This allows the host State to retain an element of control over foreign investors and demarcate the boundaries within which those investors operate. On that

International Law 639, 655; Alison Giest, 'Interpreting Public Interest Provisions in International Investment Treaties' (2017) 18 Chicago Journal of International Law 321, 351.

[111] The China-Ethiopia BIT (n 104) art 2(1).

[112] The China-Ethiopia BIT (n 104) art 2(2).

note, if there are subsequent changes to domestic law within the host State, even if these changes are for the well-being of society, it is not clear whether or to what extent these will apply to foreign investors – for example, on admittance or during their existing operation.

Article 2 could have referred to the public interest in order to specify whether investments need to adhere to subsequent changes in domestic law when the host enacts such legislation for the public interest. Such an approach helps crystallise Ethiopia's intentions (as a State) vis-à-vis foreign investors. This provides a greater degree of clarity, which helps Ethiopia to regulate these private actors, by establishing clear expectations. Such a reference to the public interest further benefits Ethiopia by highlighting law's enabling role for inclusive development and its freedom of choice to shift away from the traditional (Western) model of BITs.

Although Article 2(2) obliges the host State to provide work permits for foreign investors to be able to operate with Ethiopia but this provision does not provide any corresponding expectations on the foreign investor. This does not reflect the regulatory aspect of law, which is a necessary and complementary foundational pillar of the analytical framework. This provision needs to be constructed in a manner so that it has a regulatory function by clearly delineating the parameters for the pre-admission of investment.

A more definitive pre-admission provision would facilitate Ethiopia, as a host State, to determine the types of investor activities it wishes to promote, so that these activities are beneficial to its society. Additionally, this serves as a reminder that Ethiopia as a host State is an important figure relative to its own society and is an indication of its position as a central actor.

This provision lacks the detail to reflect Ethiopia's voice or freedom of choice. Accordingly, Ethiopia fails to assert its authority as a host State vis-à-vis foreign (Chinese) investors, which are guests within Ethiopia. As a host State needs to be willing to regulate these guests using the pre-admission provision, which also needs to be complemented by the national treatment principle. Ethiopia needs to carefully negotiate and draft the pre-admission provision in order to clearly establish at what stage of the investment differentiated treatment is permitted (if at all).

6.1.3. The National Treatment Provision

The national treatment provision is frequently included within investment agreements. Under this provision, foreign investors can expect similar treatment to domestic investors (see Chapter 4, section 3.4). With careful wording under this provision, Ethiopia as host State can support its own industries without exposing these industries to external competition from foreign investors that may swamp local businesses. A careful construction of this provision would also mean that Ethiopia is proactively wielding its freedom of choice, so that this provision enables inclusive development by giving local industries space to develop.

Owing to their stronger economic position, foreign investors arguably do not need more favourable treatment. It provides a prompt that domestic industries and society are important to the host State and part of the fabric of its well-being as part of the public interest principle. By protecting domestic industries, this is also a good indicator of law's dual function and whether a balance has been achieved in relation to these functions.

Within the China-Ethiopia BIT, there is no national treatment provision. Consequently, this means that Ethiopian industries are not insulated from Chinese businesses. In the absence of this provision, the Ethiopian experience or context is not well-reflected. This is problematic because it undermines Ethiopia's ability to tailor the economic growth model that it subscribes to, and thereby limits its opportunities to use investment as an enabler for inclusive development. Without this provision, there

is a strong chance that Chinese investors will overshadow their Ethiopian 'counterparts'.[113]

In reference to China, it is notable that many of China's early investment agreements do not include a national treatment provision.[114] This reflects China's freedom of choice, as it sought to protect its investors, during a period where it was predominantly importing capital and did not want to afford 'like treatment' to foreign investors operating within China. In other words, the absence of this provision is not a reflection of Ethiopia's freedom of choice, but rather China's. As an example of the South-South context, this is disappointing, given that Ethiopia needs this provision more but has been unable to carve-out freedom of choice in the formulation of the national treatment provision.

6.1.4. The General Exception Provision

In accordance with the analytical framework, the centrality of the State and its freedom of choice refer to its ability to retain flexibility to manage its own affairs. States need this flexibility to actualise the public interest as part of its public-facing role.[115] A general exception provision is when parties agree that the host State can adopt *bona fide* regulatory measures designed to protect the public interest without violating investment protection standards within the BIT.[116] In essence, this provision is a good

[113] Klaver and Trebilcock identify that this was a problem in relation to the shoe market, where Chinese businesses captured over 80% of the domestic market.
Mark Klaver, Michael Trebilcock, 'Chinese Investment in Africa' (2011) 1(4) Law and Development Review 168, 185.
[114] Norah Gallagher, Wenhua Shan*, Chinese Investment Treaties: Policies and Practice* (OUP 2009) 6.
[115] Giest (n 110) 333.
[116] Aikaterini Titi, *The Right to Regulate in International Investment Law* (Hart 2014) 101.

reflection of law's duality, as it has both an enabling and regulatory function. A general exception provision gives Ethiopia an opportunity to adopt regulatory measures to enable the public interest without falling foul of its investment obligations.

In the China-Ethiopia BIT, there is a distinct lack of a general exception provision. Its absence is noticeable, since wide general exception provisions are uncommon in older investment agreements. On that note, the omission of such a provision is a reflection that Ethiopia is following in the footsteps of the traditional content within investment agreements. Notably, this circles back to the earlier argument that investment agreements are based on a Western model, which does not reflect Ethiopia's domestic context or its experiences. This is not in alignment with the freedom of choice. It also suggests that Ethiopia does not fully understand the IIL framework and has accepted an agreement, which does not best reflect its interests.

Due to the reasons already cited, it is in Ethiopia's interest to include a general exception provision. Its inclusion, if appropriately constructed, would be a strong demonstration of Ethiopia's freedom of choice as it would reflect its needs and the needs of its society. Moreover, the inclusion of such a provision would allow Ethiopia to retain greater control over its public interest, and its public-facing role that would help it balance its IIL obligations with its wider IHRL obligations. This balance is necessary in the name of inclusive development.

6.2. The Next Step for Ethiopia: The China-Ethiopia BIT

The application of the analytical framework within the IIA context highlights that in this older BIT, Ethiopia has not primed itself as a central actor to negotiate for this

instrument to reflect its needs. In this bilateral and South-South context, it would be expected that Ethiopia would demonstrate greater freedom of choice and take a more assertive stance as a State actor. Instead, from the aforementioned provisions, it is clear that this BIT bears the hallmark characteristics of a traditional (Western) agreement with a 'Chinese twist' to it, in relation to the absence of a national treatment provision.

If Ethiopia is to benefit from the IIL regime, it needs to rethink its passive strategy to IIAs. Its voice needs to be more assertive and prominent within these agreements. As a State actor, Ethiopia needs to negotiate for more comprehensive provisions that reflect its interests. As such, the preamble and pre-admission clause need to be worded more definitively, so that it can ensure that it has the space to regulate in the public interest and regulate the activities of foreign investors. Additionally, it is advised that Ethiopia negotiates to include national treatment and general exception provisions in future BITs.

In relation to the China-Ethiopia BIT, considering that neither party has given notice to terminate this agreement, it remains in force.[117] Since China is a leading investor in Ethiopia, Ethiopia needs to reconsider the terms of its relationship. It is suggested that Ethiopia terminates the existing IIA and negotiates an agreement that better reflects the foundational pillars of the analytical framework, if it and its society are to derive meaningful benefit from any investment relationship.

[117] China-Ethiopia BIT (n 104) art 13.

CONCLUSION

To give effect to inclusive development, an alternative framework was proposed in the previous chapter. This chapter uses this framework and tests its robustness within the Ethiopian context. In application of the framework and its three foundational principles, gaps regarding freedom of choice, the public interest and law as an enabler and regulator were evident within the Constitution and the Investment Proclamation. The State needs to take a central role in unifying these foundational principles so that it provides a bridge between its economy and its society. It is argued that Ethiopia fails to fulfil this role.

As identified in Chapter 4, as a developing host State, Ethiopia needs more flexibility to pursue its own public interest goals to improve well-being within its society. This is not only important for advancing its society but also as a State actor Ethiopia is the primary duty-bearer for IHRL obligations, which include the right to food. As analysed in this chapter, Ethiopia's legal frameworks lack the clarity that is needed to ensure that it is provided with the flexibility to secure the public interest and law's dual function – to enable inclusive development and regulate the economy adequately. Moreover, it is noticeable that Ethiopia lacks true freedom of choice, as it does not have a clear identity as a State actor. Without a clear identity, Ethiopia has not recognised the merits of its own values and experiences. Instead, Ethiopia adopts Western models for change, which includes the economic growth model. Similarly, the China-Ethiopia BIT also bears the hallmarks of a traditional (Western) BIT, even though this IIA has been concluded between two Global South States. As examined in Chapter 2 (section 4.4), these Western models are rigid and are not appropriate for

Ethiopia. This is because these models do not account for Ethiopia's experiences or contextual nuances.

At this juncture, giving the rising ethnic tensions within Ethiopia, it fundamentally needs to position itself to be the central State actor and take pride in its identity. In particular, Ethiopia needs to truly embrace its ethnic diversity and find unity in its society's plurality. Rather than trying to remove influence from major ethnic groups, for example the current issues with the Tigray communities, the State needs to rethink its strategy. Instead, Ethiopia needs to adequately protect minority ethnic groups and ensure that these communities are brought into the fold, so that they equally benefit within society.

This chapter has tested the analytical framework for inclusive development within the Ethiopian context. To further test the analytical framework, the next chapter applies the framework to the Tanzanian context. This assessment identifies whether Tanzania has focussed too much on economic growth at the expense of its freedom of choice and the public interest. The chapter will also analyse whether Tanzania's legal frameworks adequately reflect law's dual purpose. Tanzania provides a contrasting case study because, unlike Ethiopia, it politically has been more stable than the latter.

CHAPTER 6 – CASE STUDY OF TANZANIA

INTRODUCTION

In previous chapters, it is argued (in Chapter 2) that there is an over-emphasis on the economic growth model as a model for societal change. Within this model, there is an implicit assumption that welcoming FDI will yield the desired results. This assumption is further entrenched by the IIL framework (examined in Chapter 3), as developing States incorrectly sign IIAs in the hopes of more FDI, as it supposedly serves as an accelerant to economic growth. Both Chapters 2 and 3 emphasise that these approaches are based on Western experiences, which do not appropriately reflect the experiences nor interests of developing States.

Chapter 4 advocated for an alternative way-forward for inclusive development through the analytical framework. To test the analytical framework, Chapter 5 applied it in the context of Ethiopia. To further evaluate the robustness of this framework, this chapter applies it to the Tanzanian context.

Within the Tanzanian context, this chapter argues that there are fewer impediments to inclusive development in the Tanzanian context when compared to Ethiopia. This is because there is better recognition of freedom of choice and the public interest. However, as will be further examined, Tanzania half-heartedly enacts legislation. As a result, there are still areas for improvement because these rules lack the precision and implementation to make them meaningful to society.

In order to identify the areas that need change, this chapter starts with a review of the Tanzanian context and why Tanzania is worthy of further study. The second

section of this chapter uses the analytical framework – starting with the centrality of the State. This provides a way to assess whether the State has the autonomy and willingness to act, before considering each of the foundational pillars of the analytical framework in more detail. The third section of this chapter tests the pillar of freedom of choice while the fifth part examines the public interest principle. The duality of law as the third foundational pillar of the analytical framework, particularly in relation to the regulatory function of law, is considered in the sixth part of this chapter.

After considering the domestic context, the applicability of the analytical framework does not end there. It is also relevant in relation to IIAs. For that purpose, the analytical framework is further tested against the China-Tanzania BIT.[1] This BIT reflects a marked improvement for the host State (in this case, Tanzania) with better incorporation of freedom of choice and the public interest. However, as will be demonstrated through this chapter, law in its regulatory function needs to be more evident in this BIT and also within the general Tanzanian context.

1. TANZANIA AS A CASE STUDY: THE SOUTHERN CONTEXT

While the historic and domestic background in relation to Tanzania and Ethiopia are not the same, as an East African State, Tanzania is similar to Ethiopia, which makes it as a point of geographic comparison and worthy of further study. This provides stimulating case studies to which to apply the analytical framework.

[1] Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments (adopted 24 March 2013, entry into force 17 April 2015) (hereinafter referred to as the China-Tanzania BIT).

Similarly to Ethiopia, Tanzania is an emerging economy and a developing State that also receives substantial FDI flows from China.[2] Yet, in contrast to Ethiopia and other African States, Tanzania is viewed as politically stable, which makes it an attractive destination for foreign investment from China and other capital-exporting States.[3] In terms of its political stance, Tanzania also shares further South-South connections with China in relation to its socialist roots that underpin its approach as a State.[4]

From this perspective, Tanzania is a notable case study for two main reasons. Firstly, due to Tanzania's political stability, the question arises as to whether it is better equipped to achieve inclusive development and design relevant legal frameworks that reflect this approach. This point is further explored within this chapter. Secondly, have its socialist ideologies have led it to pro-actively manage its economy, like China? This second point is particularly important given that, as a developing State similar to Ethiopia, Tanzania has identified that its main strategy for development is based on economic growth and foreign investment.[5] The emphasis on economic growth is evident from the State's Five-Year Development Plan.[6] As a State strategy, Tanzania's

[2] The statistics on FDI flows to Tanzania are sparse, so accurate data is not widely available. In 2011, FDI inflows to Tanzania from China were estimated by UNCTAD at US$6 million but Chinese (FDI) stock amounting to US$49 million. In comparison, FDI inflows to Ethiopia US$72 million with Chinese (FDI) stock worth US$427 million.
For further statistics, see: UNCTAD, 'Global Investment Trends Monitor' (UNCTAD, 2021) <https://unctad.org/topic/investment/investment-statistics-and-trends> accessed 30 April 2021.

[3] Nuhu Sansa, 'Is Tanzania's Logistics Influence China's Investment?: A Quantitative Appraisal' (2020) International Journal of Accounting and Management Research 15, 16; Ruth Haug, Joseph Hella, 'The Art of Balancing Food Security: Securing Availability and Affordability of Food in Tanzania' (2013) 5 Food Security 415, 416.

[4] Priya Lal, 'Maoism in Tanzania: Material Connections and Shared Imaginaries' in Alexander Cook, *Mao's Little Red Book: A Global History* (CUP 2014) 97.

[5] Julius Nyerere, *Freedom and Socialism: Uhuru na Ujamaa* (OUP 1968) 35.

[6] The World Bank, 'Raising the Bar: Achieving Tanzania's Development Vision' (2021) (*The World Bank*, 2021) <http://documents1.worldbank.org/curated/en/803171614697018449/pdf/Tanzania-

current Five-Year Development Plan focuses on investment and driven by the private sector and private actors.[7]

Despite Tanzania's attempts to chase economic growth, and similar to Ethiopia, it has not achieved the desired results, as almost half of Tanzania's population live below the poverty line and struggle to access basic necessities, such as food.[8] Approximately 49% of Tanzania's population live below the poverty line but it is economically more advanced than Ethiopia.[9] Although Tanzania is a developing State, it is categorised by the World Bank as a 'middle-income' economy whereas Ethiopia is considered to be a 'lower-middle income' economy.[10] In that regard, not only is Tanzania politically more stable than Ethiopia, it is also economically more stable than Ethiopia, even though it is not experiencing the same rapid economic growth as the latter.[11]

Seemingly, Tanzania has achieved some aspects of the higher state of 'being'.[12] Tanzania has not experienced famines on the same level as Ethiopia. Despite being a developing State, Tanzania is more stable (economically and politically) than

Economic-Update-Raising-the-Bar-Achieving-Tnzania-s-Development-Vision.pdf> accessed 3 May 2021.

[7] The World Bank (n 6) 147.

[8] The World Bank identifies that more than 49% of the population live below the poverty line – where the poverty line, which is equivalent to each person living on US$1.90 per day. See: The World Bank, 'Tanzania: Overview' (The World Bank, 2021) <https://www.worldbank.org/en/country/tanzania/overview> accessed 30 April 2021.

[9] The World Bank, 'GDP (Current US$) – Tanzania' (The World Bank, 2021) <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=TZ> accessed 30 April 2021.

[10] The World Bank (n 9).

[11] For example, in 2018, the GNI per capita in Tanzania was US$1,020 which rose to US$1,080 in 2019, which represents a 5.8% growth. In contrast, in 2018, the GNI per capita in Ethiopia was lower and estimated at US$800 which rose to US$850 in 2019 but this represents a 6.25% growth.
See: The World Bank (n 8); The World Bank, 'Ethiopia: Overview' (The World Bank, 2021) <https://www.worldbank.org/en/country/ethiopia/overview> accessed 30 April 2021.

[12] Haug, Hella (n 3) 416.

Ethiopia, even though Tanzania also bases its approach to development on the economic growth model. In that regard, is Tanzania more empowered as a State actor than Ethiopia? This is where the analytical framework is a useful point of reference as it assesses whether Tanzania as a State actor has the assurance to act and whether its actions are adequately supported by the foundational pillars.

2. CENTRALITY OF THE STATE

The State is a central actor in relation to the analytical framework because it needs to oversee and actualise the foundational pillars. As identified in Chapters 2 and 3, the economic growth model relegates the State to the background, when it is needed to proactively realise inclusive development. The State needs to enable positive change to society through the use of law but law in this context needs to protect and give effect to the public interest.[13] At the same time, the State needs to regulate the actions of the private actors, so that it can convert their activities into tangible benefits for its society. However, this is only possible if the State has the willingness and agency to do so.

The centrality of the State means that Tanzania must be assured in its own identity. This identity needs to be based on its own experiences and internal values, so that it is an adequate embodiment and representative of its society.[14] As a State, Tanzania needs to be informed by its own experiences and values, so that this is also reflected

[13] Daniel Aguirre, *The Human Right to Development in a Globalized World* (Ashgate 2008) 7.
[14] Francis Fukuyama*, Identity: Contemporary Identity Politics and the Struggle for Recognition* (Profile Books 2018) 15.

in its actions.[15] This approach will better place Tanzania in relation to its society, so that it can protect its society and so that it retains the ability to instil positive change.[16]

This level of self-confidence is particularly tricky due to the imprint of colonialism on many developing States and Tanzania is good example of this. In contrast to Ethiopia, Tanzania was formally colonised. Firstly, by Germany (1885-1918),[17] and then by the British (1919-1961).[18] Owing to this Western colonisation, Tanzania as State has not evolved organically. This is because it has been exposed to and shaped in accordance to the Western ideals of its colonisers.[19] In that regard, Tanzania has been exposed to Western ideals, which place an emphasis on capitalist theories of economic growth and classic Statehood (Westphalian modelling).[20]

However, colonisation disrupts the natural evolution of a developing State, especially in relation its relationship with law and its own society.[21] This also chisels away at the way developing States carry themselves, as they have not had the time to reflect and grow as States.[22] Tanzania is an example of such a State, particularly as a newly-independent State.[23] Within this context, it is even more important that

[15] Yash Ghai, Jill Cottrell, 'The State and Constitutionalism in Postcolonial Societies in Africa' in Upendra Baxi, Christopher McCrudden, Abdul Paliwala (eds), *Law's Ethical, Global and Theoretical Contexts: Essays in Honour of William Twining* (CUP 2015) 166.
[16] Ghai, Cottrell (n 15) 167, 177, 184.
[17] Bertram Mapunda, 'Encounter with an "Injured Buffalo:" Slavery and Colonial Emancipation in Tanzania' (2017) 6 Journal of Africa Diaspora Archaeology and Heritage 1.
[18] Thorvald Gran, 'Looking Bank: Government Politics and Trust in Rural Developments in Tanzania and Zimbabwe 1980-1990' (2018) 35(4) Development Southern Africa 450.
[19] Ronald Aminzade, 'The Dialectic of Nation Building in Postcolonial Tanzania' (2013) 54(3) The Sociological Quarterly 335, 338.
[20] William Twining, 'A Post-Westphalian Conception of Law' (2003) 37 Law & Society Review 199.
[21] William Twining, 'Normative and Legal Pluralism' (2010) 20 Duke Journal of Comparative and International Law 473, 566-567.
[22] Twining (n 21) 566-567; Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) 104-5.
[23] Brian Tamanaha, 'Glimmers of an Awakening Within Analytical Jurisprudence' in Upendra Baxi, Christopher McCrudden, Abdul Paliwala (eds), *Law's Ethical, Global and Theoretical Contexts: Essays in Honour of William Twining* (CUP 2015) 354.

change comes from within Tanzania and that it has the assurance to act. This assurance is necessary for freedom of choice.

3. FREEDOM OF CHOICE

As argued in Chapter 4, freedom of choice is one of the complementary and foundational pillars of the proposed analytical framework for inclusive development. Freedom of choice refers to the autonomy of the State to make its own decisions and carve out its own path for its future. This path needs to be based on choices or decision that emanate naturally from within the State, rather than be pre-determined by external factors or actors.

Within the Tanzanian context, it needs to be particularly attuned to its internal values as part of freedom of choice, rather than be guided by the remnants of colonial rule. Doing so will ensure that the choices adopted will be more compatible with its own domestic context and the needs of its society. In turn, this will enable more meaningful change in the long-run. As a central actor, introspection is a key starting-point for Tanzania, so it can make proactively suitable decisions for inclusive development.

In reference to the values in the Tanzanian context, *ujamaa* provides a notable reference point. As a political ideology, *ujamaa* was proposed by Julius Nyerere (the first president of Tanzania) as a way-forward for the State to progress within the context of development.[24] *Ujamaa* was Nyerere's vision of (African) socialism based on 'freedom, equality and unity', where these factors are rooted in Tanzanian family

[24] Nyerere (n 5); Julius Nyerere, *Man and Development* (OUP 1974) 37.

and communal values.[25] These values represent an internal strategy for freedom of choice to guide Tanzania as a representative entity and State to act for its society.[26]

Under *ujamaa* (which is based on socialist principles), Tanzanian society is united through its common purpose, for example through work, which contributes to the betterment of the State.[27] In theory, *ujamaa* is a holistic reflection of Tanzanian society, in which that society has a reciprocal relationship to the State.[28] According to this way of thinking, the State is empowered to act when that society contributes to the State in a meaningful manner.[29] On that note, *ujamaa* provides a unifying strand, where Tanzanian society is connected through a sense of national identity and its contribution towards the State.[30]

As part of the self-reflection required for freedom of choice, the State needs to be informed by the values of the diffuse groups within its society. Within a diverse society like Tanzania, all ethnic groups need to be adequately recognised and protected through law.[31] In that sense, the diverse constitution of Tanzanian society needs to be incorporated in the State's approach.

Diversity is not static, the State must acknowledge its fluidity as an aspect of inclusive development, which is also an ever-shifting concept. Otherwise, it will repeat

[25] Bonny Ibhawoh, J.I. Dibua, 'Deconstructing Ujamaa: The Legacy of Julius Nyerere in the Quest for Social and Economic Development in Africa' (2003) 8 African Journal of Political Science 59, 62.
[26] Ibhawoh, Dibua (n 25) 62; Marie-Aude Fouéré, 'Julius Nyerere, Ujamaa, and Political Morality in Contemporary Tanzania' (2014) 57 African Studies Review 1, 3.
[27] Ibhawoh, Dibua (n 25) 62.
[28] Jan Blommaert, *State Ideology and Language in Tanzania* (Edinburgh University Press 2014) 50.
[29] Blommaert (n 28) 50; Jean-Jacques Rousseau, *The Social Contract* (Christopher Betts tr, OUP 2008) 63.
[30] Ibhawoh, Dibua (n 25) 71; Daniel Osabu-Kle, *Cultural Democracy: The Key to Development in Africa* (Broadview Press 2000) 171.
[31] Rousseau refers to this as a unifying force among men. In this regard, the State is pivotal because power is vested in the State to adequately protect and implement societal rights. For further details, see: Rousseau (n 29) 54.

the mistake of the past, where ethnic groups were wrongly seen by colonial powers as being the 'same'.[32] That is, having common languages, customs and social rules within clearly delineated geographic boundaries.[33] In this colonial context, law and even the Constitution were vehicles for colonial powers to solidify these tangible boundaries, for example, through the legal titles of property, which secured the economic interests of Western thought.[34] As previously examined, these Western interests are incongruent with Tanzania's interests as a developing State, because Western models do not account for its experiences and history.

The next section assesses whether a true sense of diversity is adequately integrated within the Tanzanian Constitution.[35] To that end, whether the Constitution reflects *ujamaa* in the context of unity as an aspect of diversity within Tanzanian society is also analysed.

3.1. Testing the Principle: Evidence of *Ujamaa*

Under Nyerere's vision of *ujamaa*, positive change was supposed to be internally-driven and based on Tanzania's own context and experiences, which is arguably the essence of freedom of choice.[36] Arguably, this is an inclusive process, where unity and equality are key aspects of *ujamaa*. The question is whether this unity or inclusivity is adequately reflected in the Constitution.

[32] Aili Mari Tripp, 'The Political Mediation of Ethnic and Religious Diversity in Tanzania' in Crawford Young (ed), *The Accommodation of Cultural Diversity: Case Studies* (Palgrave Macmillan 1999) 38.
[33] Tripp (n 32) 38.
[34] Ghai, Cottrell (n 15) 181.
[35] The Constitution of the United Republic of Tanzania (1995).
[36] Nyerere (n 5) 319.

The preamble of the Constitution is a good starting-point, since it emphasises that the composition of Tanzania is based on harmony and freedom in line with *ujamaa*.[37] The preamble underlines that this harmony is based upon democratic and socialist ideals, which is reaffirmed in Article 3(1) of the Constitution.[38]

The Constitution places an emphasis on freedom and equality as a unifying strand for its society, for example, all Tanzanians are equal and free.[39] In that vein, individuals are to be treated equally, regardless of their colour, tribe, religion or social status;[40] this ethos in relation to equality forms the core objective of the Constitution.[41] Articles 12(1) and 13(1) reaffirm that all individuals are considered equal within Tanzania. Article 13(5) contextualises this equality in relation to discrimination, which is prohibited. This section defines discrimination broadly. Discrimination is prohibited on grounds of nationality, tribal differences, place of origin, religion, colour and social status, which leads to these categories of people being viewed as weak or inferior.[42]

In spite of this legal guarantee to be free from discrimination, there is evidence to suggest that the Muslim population are not afforded equal treatment within society when compared to Christians within Tanzania.[43] In that regard, Muslims have identified that within Tanzanian politics, there are fewer Muslim ministers.[44] Accordingly, there

[37] The Constitution of Tanzania (n 35) preamble.
[38] This article specifies that the State is a 'democratic, secular and socialist state'. The Constitution of Tanzania (n 35) art 3(1).
[39] The Constitution of Tanzani (n 35) art 12.
[40] The Constitution of Tanzania (n 35) art 9(g).
[41] The Constitution of Tanzania (n 35) art 9.
[42] The Constitution of Tanzania (n 35) art 13(5).
[43] Frans Wijsen, 'Managing Diversity in Tanzania: Islamic Revivalism and Modes of Governance' in Elias Kifon Bongmba (ed), Religion and Social Reconstruction (Routledge 2018) 298.
[44] Wijsen (n 43) 298-230; Dmitri Bondarenko, 'The 'Fruit of Enlightenment': Education, Politics and Muslim-Christian Relations in Contemporary Tanzania' (2004) 15(4) Islam and Christian-Muslim Relations 444.

is a valid argument that the interests of Muslim communities are insufficiently represented in relation to the actions of the State.[45]

This is a shortcoming within the Tanzanian context; however, it has achieved a degree of unity where its Ethiopian counterpart has not.[46] In particular, no ethnic group is overtly prioritised within the Tanzanian context, for example the choice of the State's official language (Kiswahili) is not linked to a majority ethnic group within Tanzania.[47] However, it is not a good measure of freedom of choice. This is because the adoption of Swahili as a national language is based on an ideological resistance to English as a dominant language (the language of British colonisers).[48] Kiswahili is also the official language of neighbouring Kenya but Kenya has not enjoyed the same unity or stability as Tanzania.[49] Freedom of choice, in this context, is borne out of a reaction to colonial rule rather than the State proactively embracing its diversity and experiences to devise a stance for positive change.[50] For freedom of choice to be truly meaningful, it needs to reflect the full spectrum of societal groups.[51]

Currently, Kiswahili and English are the official languages of this State but it is estimated that there are over 112 languages used by individuals.[52] In that respect, there is an expectation of conformity when it comes to adopting Kiswahili as a unifying

[45] Wijsen (n 43) 298-230.
[46] Elliott Green, 'The Political Economy of Nation Formation in Modern Tanzania: Explaining Stability in the Face of Diversity' (2011) 49(2) Commonwealth & Comparative Politics 223, 236.
[47] Green (n 46) 235; Bruce Heilman, Paul Kaiser, 'Religion, Identify and Politics in Tanzania' (2002) 23(4) Third World Quarterly 691, 694.
[48] Lyndon Harries, 'Language Policy in Tanzania' (1969) 39(3) Africa: Journal of the International African Institute 275.
[49] Harries (n 48) 275.
[50] Green (n 46) 235.
[51] Anna Kishe, 'Kiswahili as a Vehicle of Unity and Development in the Great Lakes Region' (2003) 16(2) Language, Culture & Curriculum 218, 219.
[52] Deo Ngonyani, 'Language Shift and National Identity in Tanzania' (1995) 23(2) Ufahmu: A Journal of African Studies 69.

language that ignores the rich ethnic heritage that exists within this context.[53] Through the continued emphasis on Kiswahili or the English language, there is also a further risk of losing smaller ethnic languages, which undermines diversity.[54]

Interestingly, Kiswahili was a form of resistance to the English language as the latter was viewed as an instrument of colonialism. This is ironic because Tanzania eventually adopted English as one of its official languages, so a colonial imprint remains evident. That is to say, with the adoption of English as one of the working languages of this State, there is no 'clean' or independent break from its colonial history.[55] Owing to this imprint, Tanzania does not have a sense of freedom of choice, which adversely affects the future path that it treads and veers it towards the Western experience rather than being based on its own competencies. An example of this, can be seen in the Tanzanian perception that as a Western language associated with modernisation, English will yield better opportunities for education and employment.[56] As a result, English is prioritised over Kiswahili and other ethnic languages in Tanzania.[57]

Article 20(2)(a)(ii) of the Constitution seemingly attempts to recognise this within the context of the freedom of association among tribal or ethnic groups. It specifies that all Tanzanians are free to collectivise in tribal groups.[58] In practice, it is unclear

[53] Farouk Topan, 'Tanzania: The Development of Swahili as a National and Official Language' in Andrew Simpson (ed), *Language and National Identity in Africa* (OUP 2008) 258.
[54] Topan (n 53) 312; Karsten Legère, 'Language Shift in Tanzania' in Matthias Brenzinger (ed*), Language Death: Factual and Theoretical Explorations with Special Reference to East Africa* (De Gruyter 1992) 57.
[55] Legère (n 54) 72.
[56] Rubagumya (n 57) 44; Imani Swilla, 'Languages of Instruction in Tanzania: Contractions Between Ideology, Policy and Implementation' (2009) 30 African Study Monographs 1, 10.
[57] Legère (n 54) 70; Casmir Rubagumya, 'English-Medium Primary Schools in Tanzania' in Birgit Brock-Utne, Z. Desai, Martha Qorro, Allan Pitman (eds), *Language of Instruction in Tanzania and South Africa – Highlights from a Project* (Brill 2010) 44.
[58] The Constitution of Tanzania (n 35) art 20(2)(a)(ii).

how or to what extent these tribal groups have been integrated within Tanzanian society, especially in relation to politics or even in relation to the data collected about these groups.

Additionally, no information is collected or permitted to be collected about ethnic groups or identity within the national census.[59] It is not the reason for the lack of data but Collin argues that the collection of such information is considered 'taboo' in Tanzania and no statistics on ethnic groups have been collected since 1957.[60] As a result, there are no accurate statistics about the diverse composition of Tanzanian society, and arguably, this absence highlights that diversity has not truly been acknowledged or achieved as part of freedom of choice. Without clear indications of the composition of Tanzanian society, it is unlikely that the voices of these groups will be heard or even identified.

On that note, although the Constitution emphasises that maintaining unity is the responsibility of the State,[61] it is a broad-brush approach. It does not establish what steps the State will adopt in order to promote unity through diversity. This is a necessary element if diversity is to contribute to freedom of choice.

Freedom of choice is a foundational pillar of the analytical framework but it is built upon the domestic experiences and values of the given society. However, that is not

[59] Matthew Collin, 'Tribe or Title? Ethnic Enclaves and the Demand for Formal Land Tenure in a Tanzanian Slum' (2013) Oxford Centre for the Study of African Economies Working Paper WPS/2013-12, 7 <https://www.csae.ox.ac.uk/materials/papers/csae-wps-2013-12.pdf> accessed 6 May 2021. See also: Green (n 46) 236; Elliott Green, 'Explaining African Ethnic Diversity' (2011) LSE Working Paper Series No. 122-11, 7 <http://eprints.lse.ac.uk/41246/1/WP122.pdf> accessed 6 May 2021.
[60] Collin (n 59) 7.
[61] The Constitution of Tanzania (n 35) art 28(1).

possible if aspects of that society are marginalised or unaccounted for, since there is no official record of these groups existing, let alone their respective interests or needs.

It is not true freedom of choice if the State is not accounting for sections of its own society. Tanzania needs to embrace and represent all aspects of its society. In that regard, there are steps that Tanzania can adopt in order to improve freedom of choice.

3.2. The Next Steps for Tanzania: Freedom of Choice

As an ethos for positive change, *ujamaa* has the potential to be a good reflection of freedom of choice. As an underlying principle or form of constitutionalism, *ujamaa* is even well-integrated within the text of the Constitution. *Ujamaa* reflects that equality and harmony are key values within Tanzanian society that need to respected by the State. In practice, Tanzania can still take further pro-active steps to better recognise and promote diversity within its society, for example, enhancing Muslim representation within Government.

Additionally, Tanzania will need to be cautious when it comes to the use of *ujamaa* as freedom of choice. Freedom of choice can only work for inclusive development if it is complemented by the public interest pillar, but if that second pillar is missing, the benefits to society will be questionable. This is evident from the short-lived approach of John Magufuli.

In 2015, John Magufuli became President of Tanzania.[62] He used Nyerere's rhetoric to instil change in Tanzania, for example, Magufuli used the term '*unyonyaji*'.[63] Unyonyaji means exploitation; he claimed that foreign investors were no longer welcome and that Tanzania needed to return to socialist ideals, echoing Nyerere's rhetoric of the past.[64] In radical moves, Magufuli even claimed that foreign investors had wrongly acquired permits through bribery when there was no clear evidence of such activity having taken place[65]. Magufuli also repossessed farms and factories where he thought they were unproductive.[66] Magufuli's approach lacked social utility and undermined positive change within Tanzania because his proposed change was so radical and not attuned to societal values.[67]

Fortunately, this change was short-lived. In March 2021, Samia Suluhu replaced Magfuli as President of Tanzania.[68] The appointment of Suluhu is a positive development not only because Suluhu is the third Muslim president but also the first female president in the State's history.[69] This appointment is a good development of improved representation and inclusion of Muslims within Tanzanian Government;

[62] Ruth Nesoba, 'Tanzania Poll: John Magufuli of CCM Defeats Edward Lowassa' (*BBC News*, 29 October 2015) < https://www.bbc.co.uk/news/world-africa-34669468> accessed 2 June 2021.
[63] Dan Paget, 'Mistaken for Populism: Magufuli, Ambiguity and Elitest Plebeianism in Tanzania' (2020) 26(2) Journal of Political Ideologies 1, 9.
[64] Dan Paget, 'Again, Making Tanzania Great: Magufuli's Restorationist Developmental Nationalism' (2020) 27(7) Democratization 1240, 1248.
[65] Tom Wilson, 'Tanzania's President Cracks Down on Critics' (*The Financial Times*, 2 September 2019) <https://www.ft.com/content/61e0716e-ca4b-11e9-a1f4-3669401ba76f> accessed 18 August 2021.
[66] Paget (n 64) 1248.
[67] Paget (n 64) 1248.
[68] BBC News, 'Samia Suluhu Hassan – Tanzania's New President' (*BBC News*, 19 March 2021) <https://www.bbc.co.uk/news/world-africa-56444575> accessed 10 May 2021.
[69] Reuters, 'Tanzania's First Female Leader Urges Unity After Covid Sceptic Magufuli Dies' (*The Guardian*, 19 March 2021) <https://www.theguardian.com/world/2021/mar/19/tanzania-swears-in-samia-suluhu-hassan-as-first-female-president> accessed 1 June 2021.

whether this progresses further to also include other ethnic individuals, only time will tell.

As such, Suluhu's policy in relation to freedom of choice and unity are untested. Whether Tanzania will truly embrace its identity and internal values as a way-forward in the process for inclusive development will need further study, especially in order to see what changes will be enacted under Suluhu. Although Suluhu needs to be mindful that change needs to come from within and give due attention to the public interest, if inclusive development is to be progressed successfully.

4. THE PUBLIC INTEREST

The public interest is a difficult concept to pinpoint, but at its core, it is concerned with the overall integrity and well-being of society. The public interest is important as a normative approach that the State must adopt in order to ensure that its society's needs are advanced. As a foundational pillar, the public interest is a key reminder that the State needs to act in order to improve the welfare of society. The public interest as a form of societal well-being is complementary to freedom of choice because both foundational pillars need to evolve in relation to the experiences and context of the State in question.[70] This requires Tanzania to be aware of its public-facing role and to be proactive, so that its society derives benefits from its actions.

Within the context of investment, it is not enough that Tanzania (as a developing host State) admits investment in the hopes that it will invigorate its economy. As a

[70] This is sometimes referred to as the constitutionalism approach. For further details, see: Ghai, Cottrell (n 15) 166.

State, Tanzania needs to take steps to ensure that technological and skill transfers take place following this investment. Tanzanian society will only benefit if the State intervenes for the public interest.

As argued in Chapters 2 and 3, developing States, including Tanzania, subscribe to the (Western) economic growth model for development. For that reason, it is even more important that the public interest is embedded as a foundational pillar for inclusive development. This is because the State needs to remember that its success is dependent on the overall well-being of its society and to act as a counterweight to the private aspects of the economic growth model.

For that reason, the right to food is a good exemplar to use in relation to the public interest. This is because food is a basic human need, which is needed to sustain life within society. Furthermore, it gives the public interest more of a tangible applicability in relation to the law. In that regard, Tanzania has a primary duty under this principle and within IHRL to protect and actualise the right to food within its domestic context.[71]. As such, Tanzania must prioritise the public interest, including the right to food, as an internal mechanism before it addresses external relationships in respect to IIL. The next section focuses on the Constitution. The public interest pillar is tested further using the right to food as an exemplar in order to assess to what extent the well-being of society is reflected within this instrument.

[71] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3 (ICESCR), art 11(1).
See also: UNCHR (a), 'General Comment No. 12: The Right to Adequate Food (Art. 11)' UN Doc E/C.12/1999/5, para 6; UNCHR (b), 'General Comment No. 3: The Nature of State Parties' Obligations (Art. 2, Para. 1, of the Covenant)' UN Doc E/1991/23, paras 2-3.

4.1 Testing the Principle

Within regards to the public interest, the Constitution does contain specific references to this concept. Article 30(1) of the Constitution even goes as far as to stipulate that the public interest is paramount but no definition of the public interest is provided. This is disappointing because such a definition would provide much-needed normative guidance on intentions of the State in relation to the betterment of its society. Without distinct guidance with respect to this broad concept, the meaning of the public interest is not clear and does not establish how or why it is important. In effect, this renders this provision meaningless or a form of 'lip service', as it is not evident what the State considers to be paramount.

Notably, Article 25 of the Constitution frames the public interest in terms of society's contribution to the State rather than the importance of achieving a higher state of being. This higher state of being is not only at the core of the public interest but also for inclusive development (as examined in Chapter 4, section 2.2). In relation to Article 25 and Tanzania's conceptualisation of the public interest, everyone is expected to work in order to contribute to society's well-being, which is measured in terms of material wealth.[72] The fact that there is an expectation of work echoes Nyerere's socialist principles, who considered work to be a uniting force within Tanzanian society, which would solve the problem of the country's underdevelopment.[73]

The framing the public interest within the context of work and material wealth is counter-intuitive to what this concept actually means. It is counter-intuitive because society's interests for betterment are at the heart of this concept; the public interest is

[72] The Constitution of Tanzania (n 35) art 25.
[73] Lal (n 4) 100.

not about the productivity of society. Yet, by framing the public interest in terms of work and material wealth wrongly places this concept within the economic sphere. This is problematic because the public interest is necessary counter-weight to offset the prioritisation of the private interests associated with the economic growth model. As identified in Chapter 4 (section 2.1), the foundational principle of the public interest provides a way for developing States to chart the public-private divide that exists between the State's (public) interests for its society and ensuring that the respective society benefits from the activities of (private) actors within its economy. After all, individuals are not parts of a machine but rather as humans with basic rights.

In that regard, the actualisation of human rights is a vital aspect of the public interest. The nexus between the public interest and human rights is not clearly articulated within the Constitution as this instrument refers to human rights broadly. An example can be found in the preamble of the Constitution, which generally refers to the preservation and protection of human rights.[74] Article 9 of the Constitution generally provides that all human rights must be respected and implemented by the State.[75] In referring to the respect accorded to human rights, there is a notable absence of the basic needs approach or further reference to what these rights or extent of these rights are. Instead, Article 9(i) and (j) merely states that Tanzania has a duty to ameliorate poverty and ensure equitable distribution of wealth among all aspects of Tanzanian society.[76] Nevertheless, it is not clear how the State intends to provide a solution to poverty and also how wealth will be equitably distributed within the State.

[74] The Constitution of Tanzania (n 35) preamble.
[75] The Constitution of Tanzania (n 35) art 9(a).
These rights and policies must also align with the Universal Declaration of Human Rights. See: The Constitution of Tanzania (n 35) art 9(f)).
[76] The Constitution of Tanzania (n 35) art 9(i) and (j).

The Constitution does refer to the other duties of the State though. According to Article 8(1), the State has a duty to ensure the public interest or improve societal welfare. This provision is reminiscent of the analytical framework and the centrality of the State, as the State is required to act in order to advance its society. Notably, the Constitution does not identify what the public interest or what societal welfare are. Arguably, the public interest and societal welfare do and can encompass a wide array of human rights, including the right to food. This provision needs to be more precise so that the responsibility of the State can be definitely delineated. Notably, there is no express codification of the right to food within the Constitution, instead it has to be inferred through the aforementioned references to human rights or the public interest within this instrument.

Tanzania has acknowledged that the right to food is important and lacks implementation, so it is a shame that this right is not enshrined within the Constitution. On that note, Tanzania has enacted the Zanzibar Food Security Act,[77] which expressly recognises the right to food in Article 4. Although it is important that Zanzibar has its own separate legislation to address localised issues, this is not enough. The fact that Zanzibar Food Security Act codifies the right to food within the regional context highlights that Tanzania has taken steps to recognise the right to food, but the geographic application of this piece of legislation is limited. Given that poverty and lack of adequate food are problems in Mainland Tanzania, it is worthwhile that the right to food is legally protected within this context and not just in Zanzibar.

Lack of food and poverty are key challenges in the Longido in the Arusha region of Tanzania, which suggests that this equitable distribution of wealth has not been

[77] The Zanzibar Food Security and Nutrition Act 2011 (Act No. 5 of 2011).

sufficient.[78] As previously mentioned, in 2018, nearly half of Tanzania's population (approximately 26 million people) survived on less than the international poverty line.[79] That is equivalent to less than US$1.90 per day.[80] This means that there are a substantial number of people within Tanzania are struggling to access adequate food owing to high poverty rates.

Moreover, 34% of individuals residing in Mainland Tanzania are unable to secure enough food for their basic needs.[81] Indeed, some households do not even obtain an average of one meal per day,[82] and undernutrition among children remains high within Tanzania.[83] In other words, the right to food is not adequately fulfilled, which is an indication that inclusive development has not been achieved within this context.[84]

Lack of education and skills contribute to ongoing poverty rates, which limit the economic opportunities available to individuals.[85] This is because without relevant education and skills, individuals are unable obtain or retain stable employment

[78] Robertus Swinkels, 'Tanzania: Mainland Poverty Assessment' (*The World Bank*, 8 December 2019) 37 <https://documents1.worldbank.org/curated/en/431111575939381087/pdf/Executive-Summary.pdf> accessed 1 June 2021.
[79] Swinkels (n 78) 3.
[80] Swinkels (n 78) 3.
[81] Haug, Hella (n 12) 416; Roselyne Alphonce, 'Addressing the Mismatch Between Food and Nutrition Policies and Needs in Tanzania' (2016) Brookings Institute Policy Briefing, 1 <https://www.brookings.edu/wp-content/uploads/2017/10/erh-tanzania-policy-brief.pdf> accessed 6 May 2021.
[82] Youngwan Kim, Hyuk-Sang Sohn, Bokyeong Park, 'Make the Village Better: An Evaluation of the Saemaul Communities Project in Tanzania and Bangladesh' (2019) 124 World Development 1, 7.
[83] Ministry of Health and Social Welfare (Tanzania), 'National Nutrition Strategy: July 2011/12 – June 2015/16' (*Ministry of Health and Social Welfare*, 2016), 2 <http://extwprlegs1.fao.org/docs/pdf/tan152519.pdf> accessed 7 May 2021.
[84] Olivia Howland, Christine Noe, Dan Brockington, 'The Multiple Meanings of Prosperity and Poverty: A Cross-Site Comparison from Tanzania' (2021) 48 The Journal of Peasant Studies 180, 188.
[85] Abel Kinyondo, Riccardo Pelizzo, 'Growth, Employment, Poverty and Inequality in Tanzania' (2018) African Governance and Development Institute Working Paper No. WP/18/001, 15 <https://www.econstor.eu/bitstream/10419/191324/1/agdi-wp-18-001.pdf> accessed 20 August 2021.

necessary for a steady source of income.[86] Poverty further impedes the (economic) access a given individual has in relation to food.[87] Food is essential for human life and is a basic necessity. Without satisfying basic needs, such as food, individuals will lack the energy and capability to advance, for example, in relation to education, skills or employment.[88] Accordingly, these individuals are 'locked' into a vicious poverty cycle, which does not allow them to progress or achieve a higher state of being. Instead of thriving or having the ability to enjoy life, these individuals are simply trying to survive.[89]

In 2011-2012, it was estimated that 28.2% of Tanzania's population was unable to satisfy basic needs due to ongoing poverty and lack of economic opportunities.[90] This means that during this period, over a quarter of Tanzania's population was unable to satisfy their basic requirements for everyday functioning in relation to food. The percentage of the population being unable to satisfy basic needs is a concern, which highlights that poverty is an issue within Tanzania but this issue is not given any weight within the Constitution. This is a shortcoming of the Constitution because since poverty affects basic needs, then the State must take steps for the legal protection as a means to help realise adequate access to food. The legal protection of food is necessary, especially so that Tanzania identifies that this is a priority for its society. Legally protecting the right to food is also important for Tanzania as part of its role as a central State actor and its wider duty-bearer role within IHRL.[91]

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[86] Amartya Sen, *Development as Freedom* (OUP 1999) 72-73; John Rawls, *A Theory of Justice* (Harvard University Press 1971) 36.
[87] Sen (n 86) 72; Rawls (n 86) 36.
[88] Sen (n 86) 72; United Nations, 'The Millennium Development Goals Report 2005' (*United Nations*, March 2005) 10 <https://unstats.un.org/unsd/mi/pdf/MDG%20Book.pdf> accessed 21 August 2021.
[89] United Nations (n 88) 10; Geeta Gandhi Kingdon, John Knight, 'Subjective Well-Being Poverty vs. Income Poverty and Capabilities Poverty?' (2006) 42(7) The Journal of Development Studies 1199, 1205.
[90] Kinyondo, Pelizzo (n 85) 15.
[91] UNCHR (a) (n 71) para 6.

As an exemplar of the public interest, there is still work for Tanzania to undertake, particularly in light of the ongoing issues with poverty which inhibit access to basic food. As a foundational pillar of the analytical framework, it is vital that the public interest is given due attention by Tanzania as a State. Tanzania cannot afford to addressing this half-heartedly, otherwise meaningful change will not take root.

4.2. The Next Steps for Tanzania: The Public Interest

Tanzania needs to be more proactive as a State. After all, as a State actor, it is best placed to act. The State's actions are particularly important in relation to convert (private) economic activities into advantages for Tanzanian society, such as further employment opportunities. These employment opportunities are necessary if investment is to overcome the barriers that poverty creates in relation to inclusive development, for example, the individual inability to access adequate food through financial means.

As a matter of policy, Tanzania needs to identify burgeoning sectors where employment can be expanded so that it incentivises the corporations operating in these areas to enhance skills and the education of the respective employees. Although Tanzania currently identifies the main sectors of strategic importance for employment creation within its 'Five-Year Development Plan',[92] it needs to do this with more precision.

[92] Ministry of Finance and Planning (Tanzania), 'National Five-Year Development Plan 2021/22' (*Ministry of Finance and Planning*, June 2021) 28 <https://mof.go.tz/docs/news/FYDP%20III%20English.pdf> accessed 21 August 2021.

In the aforementioned Plan, Tanzania merely identifies that employment in the private sector is important in the context of poverty reduction.[93] Tanzania does not identify clearly what aspects of the private it is referring to. To plan for change, the State needs to concretely identify target areas rather than simply allowing private actors and the private sector to continue without clear guidance. To that end, not only does Tanzania need to clearly specify which parts of the private sector that need to contribute to its society, it also needs to provide further guidance to the relevant actors in this sector. In that regard, Tanzania needs to identify: the types of jobs that need to be created, the skills needed for these jobs and how the employers can support employees to obtain these skills. This will strengthen the employment opportunities and the ability of individuals to purchase adequate food. Additionally, Tanzania will also need to ensure that food is affordable in the first place.

One way to ensure that food is affordable or enable access to adequate food is through legal protection. In that regard, enshrining the right to food within the Constitution or even through a separate piece of legislation would benefit Tanzania so that the right is grounded within the domestic legal framework. Ultimately, Tanzania has a legal duty to take steps to protect and also fulfil this crucial right.[94] Although Tanzania does not have the same history as Ethiopia with famines, this does mean affirmative action is not required, neither does it mean that the right to food is fulfilled within the Tanzanian context.

Tanzania needs to give greater attention to the right to food as an aspect of the public interest. The public interest complements the other foundational principles of the analytical framework, such as the freedom of choice which was examined earlier

[93] Ministry of Finance and Planning (Tanzania) (n 92) 28.
[94] UNCHR (a) (n 71) para 15.

in this chapter. To establish a solid base for inclusive development, Tanzania needs to design law so that there is clearer protection for the public interest, especially in relation to the right to food. With the public interest in mind, this foundational principle provides a salient reminder that the State needs to act on the behalf of its society, particularly in order to ensure that its private sector adequately enables inclusive development through job creation.

3. THE DUALITY OF LAW: LAW AS AN ENABLER BUT ALSO AS A REGULATORY TOOL

In Chapter 4, it was highlighted that law has a dual nature and function, which serves as the third complementary and foundational principle of the analytical framework. As identified in the previous sections of this chapter, law is necessary to enable the public interest and freedom of choice, which are important steps towards enhancing well-being within Tanzanian society. The previous two sections of this chapter have examined how law can enable freedom of choice and the public interest; so far, this chapter has also identified shortcomings in relation to language as a representation of freedom of choice and stronger legal protection needed for the right to food. This section focuses on the third foundational principle and law's regulatory function.

Regulation is needed so that the State to complement law's enabling role and ensure that the behaviour of private actors actually benefits Tanzanian society.[95] It would be unrealistic for the State to simply reject private actors within the economy; it

[95] Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What It Cannot* (Edward Elgar 2011) 10.

would also be impractical to ignore FDI and IIL.[96] To evaluate whether Tanzania has adequately regulated these private actors in relation to FDI and foreign investors, the Investment Act of 1997 needs to be assessed.

The original 1990 Investment Act[97] was the first instrument in Tanzania to regulate FDI following the liberalisation of Tanzania's economy and a change in president in 1985.[98] The Investment Act of 1997 replaced the 1990 version.[99] Accordingly, the 1997 Act warrants further study because it is the main instrument that Tanzania uses as a developing host State to regulate foreign investors. Notably, the 1990 Act was enacted during a period of change for Tanzania, where its strategy for development shifted from self-reliance to economic growth.[100] Arguably, the 1997 Investment Act should be an improvement on the 1990 version, since Tanzania would have time to reflect on areas for change in its strategy for positive change.

As asserted in Chapter 3 (section 1.1), investment has the potential to enable inclusive development to enable inclusive development, investment needs to be regulated. The next section tests the foundational principle of law as a regulatory tool in the context of the 1997 Investment Act and argues that this instrument needs to be more detailed in the context of regulation.

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[96] Although the Republic of Korea (North Korea) is renowned for excluding foreign actors within its territory, even North Korea admits some FDI and has even signed investment agreements, even as recent as 2019. For further details, see: UNCTAD, 'International Investment Agreements Navigator: Republic of Korea' (*UNCTAD*, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/111/korea-republic-of> accessed 8 May 2021.

[97] The National Investment (Promotion and Protection) Act No. 10 of 1990 (Tanzania).

[98] Brian Van Arkadie, 'Economic Strategy and Structural Adjustment in Tanzania' (1995) PSD Occasional Paper No. 18, 16 <https://documents1.worldbank.org/curated/en/649601468765032908/pdf/multi0page.pdf> accessed 21 August 2021; Chris Maina Peter, 'Promotion and Protection of Foreign Investments in Tanzania: A New Investment Code' (1991) 6 ICSID Review 42.

[99] The Investment Act No. 26 of 1997 (Tanzania), art 30.

[100] Arkadie (n 98) 16; Maina Peter (n 98) 42.

3.1. Testing the Principle

3.1.1. The 1997 Investment Act Imitating IIAs

The 1997 Investment Act repeals the National Investment (Promotion and Protection) Act 1990, which is also thirty years after the independence of Tanzania as a State. In theory, this instrument should reflect Tanzania's experiences since independence and the 1990 Act, so that it can improve upon the previous instrument.

Within the 1990 Act, it is noticeable that there is an extended preamble which highlights that the objective of the Act is to promote economic growth and economic development.[101] It is also noticeable in this preamble that it specifies that this instrument as a regulatory purpose to provide parameters for the operation of foreign investors. The preamble of the 1990 Act is more detailed than the 1997 Investment Act, which simply provides that the aim of the instrument is to 'provide favourable conditions for foreign investors.[102] This is a notable aspect of the 1997 Investment Act.

The preamble of the 1997 Act is basic. The preamble fails to acknowledge Tanzania's own needs and interests as a State or even the instrument's implications for its society. Although the preamble refers to other 'related matters' but it is not clear what these matters are, as no further guidance has been provided by the State, nor is there evidence that it has been interpreted widely.

In that sense, the preamble does not identify the regulatory context in which this instrument operates. Additionally, in relation to the analytical framework, the connection between the complementary principles – freedom of choice and the public interest, are missing from this preamble. The brevity of the preamble means that it

[101] The Investment Act 1997 (n 99) preamble.
[102] The Investment Act 1997 (n 99) preamble.

does not contextualise the overarching objective of this instrument. It also does not articulate the extent of the relationship between the Tanzanian State, society and foreign investors.

Equally, since *ujamaa* (as a vision of freedom of choice) is based on unity through a common purpose, this is missing from this preamble; as is the enabling aspect of law. This is a contrast to Ethiopia's Investment Proclamation of 2020 (as examined in the previous chapter), which at least rhetorically refers to the fact that investment needs to be wielded in a manner that benefits society.

As will be further examined in the context of this instrument, Tanzania seems to have been over-eager to encourage the presence of foreign investors within its territory without reflecting on its own needs and interests.[103] Whilst the 1997 Investment should be an improvement to the 1990 one that it repealed, the text of the 1997 Act does not clearly reflect Tanzania's strategy for inclusive development nor approach for regulation.

Regulation is a necessary and complementary element in order to build the State's awareness of its economy and so that it acts to embed the public interest, which would help provide an impetus for regulation. This is because regulation needs to effect positive change but this change must be adequate for the Tanzanian context. With this objective in mind, it is vital that the 1997 Investment Act reflects Tanzania's interests as a host State. Moreover, this Act needs to provide a regulatory bridge that not only connects foreign investment to Tanzania's intended societal goals but also

[103] There is salient evidence to suggest that this eagerness was driven by IFIs, rather than domestic interests. For further analysis, see:
Tarald Laudal Berge, Helge Hveem, 'The International Regime for Investment: A History of Failed Multilateralism' in Andreas Nölke, Christian May (eds), *Handbook of the International Political Economy of the Corporation* (Edward Elgar 2018) 316; Taylor St. John, *The Rise of Investor-State Arbitration: Politics, Law and Unintended Consequences* (OUP 2018) 123.

specifies what these goals are. This not only signals law's regulatory purpose to foreign investors but also is a significant reminder that they are a guest within the Tanzania, and that Tanzania is a central State actor.

Instead, the text of the 1997 Investment Act is generic and echoes the traditional (Western) content of IIAs. The following provisions do not reflect an investment strategy that enables Tanzania to clearly derive benefit or harness investment to enable its inclusive development.

Section 3 is similar to the existing content within IIAs with its definitions of foreign investor, investment and capital. The definition of investment refers to the '… creation or acquisition of new business assets and includes the expansion, restructuring or rehabilitation of an existing business enterprise'.[104] Additionally, within this section, a foreign investor is defined as a person who is not a Tanzanian citizen or a company incorporated outside of Tanzania.[105] Similar definitions are provided in Article 1 of the China-Tanzania BIT (examined in more detail in section 6 of this chapter). Article 1(1) of the China-Tanzania BIT specifies that assets are investments and Article 1(2) equally refers to a person that has a nationality of the home State (that is, not a Tanzanian citizen) or a company incorporated outside of Tanzania.[106]

Article 21 of the 1997 Investment Act outlines the permitted transfers in relation to investment, for example, profits or dividends,[107] payments in relation to loans undertaken by the investor,[108] and remittances.[109] This section is again similar to the

[104] The Investment Act 1997 (n 99) art 3.
[105] The Investment Act 1997 (n 99) art 3.
[106] See respectively: art 2(a) and 2(b).
The Investment Act 1997 (n 99) art 2.
[107] The Investment Act 1997 (n 99) art 21(a).
[108] The Investment Act 1997 (n 99) art 21(b).
[109] The Investment Act 1997 (n 99) art 21(d).

content within IIAs, for example, Article 8 of the China-Tanzania BIT. Article 8 also refers to profits or dividends,[110] payments of loans,[111] and remittances, as permissible transfers.[112] The formulation of the aforementioned provisions within the Investment Act are reminiscent of an investment agreement, so much so that it seems that Tanzania has used IIAs as a template for this instrument. Using IIAs as templates for regulation is not suitable for Tanzania because as argued in Chapter 3 (section 2.1), these agreements do not reflect the idiosyncrasies of developing host States since IIAs are modelled around the interests of (Western) developed home States. For positive change to be meaningful and long-lasting, legal instruments such as the Investment Act, need to be tailored in accordance to Tanzania's interests and needs rather than built on a Western model.

On that note, Article 22(2)(a) again reflects the content within IIAs because it refers to fair, adequate and prompt compensation when it comes to expropriation of foreign property. This is a very classical formula within BITs and in reference to the standards expected in relation to the compensation owed to foreign investors when the host State has taken the property of the investor.[113] Tanzania has relied on IIAs in its formulation of this provision and more generally, this instrument. In the previous 1990 Act, it did not refer to fair, adequate prompt compensation for the expropriation of property.[114]

[110] China-Tanzania BIT (n 1) art 8(1)(a).
[111] China-Tanzania BIT (n 1) art 8(1)(b).
[112] China-Tanzania BIT (n 1) art 8(1)(d).
[113] Kenneth Vandevelde, 'A Brief History of International Investment Agreements' in Lisa Sachs, Karl Sauvant (eds), *Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP 2009) 16; Peter Muchlinski, 'The Framework of Investment Protection: The Content of BITs' in Lisa Sachs, Karl Sauvant (eds), *Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP 2009) 61.
[114] The Investment Act 1997 (n 99) art 28(2) and (3) states that compensation will be made in full, fairly and promptly but does not refer to adequacy as a criterion for compensation.

Instead, Article 28 of the 1990 Act specifies that property may be acquired by the State in the name of the public interest but in accordance to the due processes of the law.[115]

Arguably, the previous Act better reflects the interests of Tanzania since it provides this host State with the possibility to take property but for a legitimate and important reason – the public interest. The current (1997) version of Act does not include such a provision and instead, adopts wording which is similar to the content of IIAs. In that regard, Tanzania has adopted text that does not demonstrate a regulatory approach with its own interests in mind but rather text that it believes will encourage FDI flows from foreign investors. As examined in Chapter 3 (section 1.2), developing host States often mistakenly believe that concluding IIAs will encourage inward-FDI flows, which they can use to fuel their (economic) development. Notably, as previously argued (in Chapter 3, section 2), a passive approach to FDI is not satisfactory for inclusive development; it requires the host State to harness FDI and regulate FDI in order to secure the associated benefits. This proactive stance is not only needed in terms of enable freedom of choice and the public interest but also to regulate foreign investors to ensure that their activity aligns with Tanzania's interests. Yet, this is not the case with the 1997 Investment Act.

Even the settlement of disputes Tanzania and investors must be in accordance to the International Centre for Settlement of Investment Disputes (ICSID),[116] after 'negotiations for an amicable settlement' have taken place.[117] The phrasing of this provision within this Act is, again, very similar to the classical text found within an IIA. An analogous provision can be found in the China-Tanzania BIT, which also provides

[115] The National Investment (Promotion and Protection) Act 1990 (n 97) art 28(1).
[116] The Investment Act 1997 (n 99) art 23(2)(b).
[117] The Investment Act 1997 (n 99) art 23(1).

that the parties should aim for an amicable settlement through negotiation. If an amicable settlement is not possible in relation to the BIT,[118] then the parties can submit a claim to the ICSID.[119]

Article 22 of the 1997 Investment Act does not specify the nature of these disputes, nor does it provide any detail on whether the State can derogate from its investment commitments under this Act. As a legal instrument, the Investment Act, needs to reflect law's duality, which means both its enabling role and its regulatory role. However, both are not evident from the existing text.

3.1.2. The 1997 Investment Act Attempting to Regulate

There are some attempts to regulate investors in this Investment Act but they are perfunctory. According to Article 22(a), the Act is applicable to investment projects where the minimum amount or value of investment is US$300,000 if the project is wholly-owned by a foreign investor or if it is a joint venture. This amount is higher than that articulated within a similar provision in Ethiopia's Investment Proclamation (as examined in Chapter 5). However, the wording of the provisions is distinct. In Tanzania's case, it refers to the rights of the investor under this Act. Article 22(a) of the Investment Act provides that investors in relation the Act and its rights will be applicable if that minimum threshold of investment is met. In contrast, the provision within the Ethiopian context specifies that this is the minimum capital that a foreign investor must provide. In other words, although a weak provision, Ethiopia's Investment Proclamation has a more regulatory nature by specifying what is expected

[118] China-Tanzania BIT (n 1) art 13(1).
[119] China-Tanzania BIT (n 1) art 13(1)(b).

of a foreign investor. In Tanzania's case, this Article is more about specifying rights for the investor based upon the minimum capital provided. Additionally, even if the capital amount is greater, it lacks meaning if it is not tied to a regulatory purpose and objective within the Tanzanian context. The lack of clear regulation is evident from this Act, which highlights that as the main legal instrument for investment, the dual nature of law has not been achieved.

Under Article 4(1), the Tanzanian Investment Centre is given legal personality. In theory, the Tanzanian Investment Centre as an agent of the State[120] should be able to establish standards of behaviour in relation to foreign investors. In this regulatory capacity, the Investment Centre must be able to ensure that the activities of foreign investors are advantageous to the State hosting them and be able to resolve any negative impacts that these private actors might have on its society.

The regulatory purpose of this Centre is not clear. An example of this lack of purpose can be seen in Article 4(3)(b), which identifies that the Centre has the power to sue but does not specify how or when it can sue. This is an important power to have in the context of regulation because it will determine whether the Tanzanian Investment Centre can sue foreign investors for non-compliance with the Act. Clearer delineation of the Centre's power to sue for non-compliance is necessary to ensure that the behaviour of foreign investors aligns with its interests and needs, which is a necessary element of regulation.

The functions of the Centre are further outlined in Article 6 of this Act.[121] The Centre will encourage and facilitate investment, and also have a supervisory role. This role is

[120] The Investment Act 1997 (n 99) art 4(2).
[121] The purpose of the Centre is to encourage, facilitate and supervise investment.
The Investment Act 1997 (n 99) art 6(e) and (g).

not clear, as Article 4(3)(c) cryptically states that the Centre has the rights and obligations to act and 'suffer' the 'acts and things' in performance its functions under the Act. The problem is that the responsibilities and powers of this Centre have not been clearly established within the Act. Without clearly defining the parameters of the Centre's powers, the extent to which it can act in the name of regulation is unclear. This ambiguity neither provides certainty for foreign investors nor does it establish how the Centre will supervise or regulate investment, which is a necessary element of the analytical framework. As a branch of the State, the regulatory role of the Centre needs to be more clearly articulated so that it has the capacity to act and ensure that investment activities benefit society. This can only be achieved through the legal regulation.

There are is a vague attempt of regulation of this type within this Act. In Article 26, Tanzania has attempted to draft a provision that recognises the importance of these transfers to its society. Arguably, these benefits are geared towards benefiting the foreign investor rather than Tanzania as a host State, since Article 19(2) outlines that a 'predictable investment climate' is vital and benefits accrued by investors 'shall not be amended or modified to' the detriment of these investors.

The regulatory aspect of these provisions is sub-standard because these provisions do not provide any detail as to how foreign investors ought to comply with in order to harness their activities. Article 26 merely states that the foreign investor may enter into technological transfers as may be appropriate. Article 3(iv) specifies that for a technology transfer agreement to be valid in relation to the Act, there must be a minimum period of eighteen months. Beyond this cryptic reference to eighteen months, there is no further detail or legal requirement on the foreign investor to ensure such transfers take place and so, the regulatory content is missing. After all, regulation

is concerned with changing the behaviour of (private) actors, and within the perspective of the analytical framework, for the overall improvement to society.

Overall, the Act does not truly reflect law's dual nature. It neither reflects law's enabling role when it comes to inclusive development, nor does it seek to regulate foreign investors as private actors. Instead, it reflects Tanzania's passive approach towards FDI. Nevertheless, as examined in Chapters 3 and 4, the State cannot be a passive actor in relation to FDI.

Tanzania is State actor and it needs to acknowledge its power and position. This is because, it is best placed to regulate foreign investors in its territory. Foreign investors are 'guests' within its territory, so Tanzania needs to remind them of this fact through regulatory measures. In its eagerness to welcome FDI for economic growth, Tanzania has 'opened its doors' without establishing boundaries for foreign investors. Without setting these boundaries, Tanzania will struggle to attain the positive change or inclusive development that it needs as developing State. By regulating foreign investors more carefully, not only is Tanzania reminding these private actors of its position as a central actor but it is also ensuring that FDI enables inclusive development.

3.1.3. The Next Steps for Tanzania: Law's Dual Purpose

Considering the generic text of the 1997 Investment Act, which means it is more akin to an IIA rather than a domestic form of regulation, it needs reform and updating. In particular, the Investment Act needs to have more of a regulatory purpose to it, for example, clearer articulation of the duties of foreign investors. As part of this regulatory

aspect, this Act also needs to clearly identify the benefits that Tanzania expects to attain from foreign investors and FDI. That is to say, clearer instructions for regulating the behaviour of investors, so that this behaviour benefits society in Tanzania. This particularly refers to the technological and skill transfers that need to take place if investment is to truly be an enabler for inclusive development as argued for in Chapter 4.

In April 2021, the Prime Minister of Tanzania identified that the existing Act is no longer adequate due to domestic corruption and also, not enough job opportunities being created within Tanzania.[122] It was announced that the Investment Act would be redrafted. While an update to the Act has been in the planning since September 2020, there has not been much progress or further details about the proposed changes to the text[123]. Arguably, proposed changes to this Act and for inclusive development need to come from within Tanzania.

Based on this argument, it is even more imperative that any proposed changes shift away from this traditional content and reflect Tanzania's interests. In that regard, clear provisions that specify that technological and skill transfers are essential need to be included within the upcoming draft. This will provide clearer regulatory guidance for private actors as to what is expected of them in relation to Tanzanian society. It will also establish clearer boundaries within which the State can and will act, in relation to regulation.

[122] Tanzania Daily News, 'Tanzania: Kudos to Government for Boosting Foreign Investment' (*All Africa*, 18 April 2021) <https://allafrica.com/stories/202104190622.html> accessed 24 May 2021.
[123] The Citizen, 'Laws Under Review in Move to Boost Trade Investment' (*The Citizen*, 23 May 2021) <https://www.thecitizen.co.tz/tanzania/news/laws-under-review-in-move-to-boost-trade-investmemnt-3410866> 24 May 2021.

Further complementing this regulatory aspect of law, the new draft will also need to reflect law's other purpose. That is, provisions that are designed to ensure that investment can and does enable inclusive development. As such, as an aspect of freedom of choice, Tanzania needs to embed the public interest into this instrument. By embedding these foundational principles into this instrument, Tanzania will be better placed to orchestrate inclusive development from its own internal perspective rather than relying on Western models.

The analytical framework highlights the shortcomings in the national (Tanzanian) context but the framework can also be applied within an international context. By applying the analytical framework to the IIA context, it is argued (in section 6) that Tanzania has managed to show that it can and will negotiate actively when it comes to BITs. This is an important step towards enabling inclusive development within a South-South context but there is still room for improvement. For that reason, the China-Tanzania BIT will be examined using the analytical framework within the next section.

4. THE INVESTMENT FRAMEWORK: THE CHINA-TANZANIA BIT

As identified in Chapter 3, within the context of investment, concrete domestic frameworks are vital for developing host States to translate economic activities into benefits to society as part of the inclusive development approach. The previous sections of this chapter have tested and applied the analytical framework against

relevant Tanzanian legislation. The framework is useful because it has identified areas of improvement for Tanzania.

The analytical framework has wider applicability than just the domestic frameworks. It can also be applied further in the context of international investment agreements. The analytical framework in the following sections will be applied to the China-Tanzania BIT.

The China-Tanzania BIT is valuable point of further study, because it is a more recently concluded investment agreement, as it was concluded in 2013.[124] During this period, Tanzania remains a developing economy, whereas China has transitioned into a newly-industrialised economy with one of the strongest economies in the world.[125] In contrast to Ethiopia, Tanzania has less experience concluding investment agreements as Tanzania has only concluded 20 BITs, whereas Ethiopia has concluded 35 BITs.[126] China has far more experienced than both these States combined; China has concluded 145 BITs.[127]

As such, it is important to examine whether Tanzania has allowed itself to be marginalised in the context of its IIA relationship with China (who is more experienced in this area) and the negotiation of the China-Tanzania BIT. If so, the question is

[124] UNCTAD, 'International Investment Agreement Navigator: China' (UNCTAD, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> accessed 20 August 2021.
[125] The World Bank, 'China: Overview' (The World Bank, 2021) <worldbank.org/en/country/china/overview> accessed 24 May 2021.
[126] See respectively: UNCTAD, 'International Investment Agreement Navigator: Ethiopia' (*UNCTAD*, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia> accessed 20 August 2021; UNCTAD, 'International Investment Agreement Navigator: The United Republic of Tanzania' (*UNCTAD*, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/222/united-republic-of-tanzania> accessed 20 August 2021.
[127] UNCTAD (n 124).

whether or what extent has Tanzania managed to influence how provisions of the China-Tanzania BIT are drafted as a reflection of Tanzania's freedom of choice.

4.1. Testing the Foundational Principles

Tanzania must embrace its experiences, so that it adopts legislation that align with its values and interests. This is also important in the context of investment agreements. The next section will further test the analytical framework against specific sections of the China-Tanzania BIT – namely the preamble, pre-admission, national treatment and general exception provisions.

4.1.1. The Preamble

The preamble of the China-Tanzania BIT sets out the objectives of the agreement and sets the tone for the provisions and interpretation of the agreement. As an example of the South-South context, this preamble is comparable to previous Sino-African BITs which include similar references to 'favourable conditions for investment by investors'. Furthermore, the preamble of the China-Tanzania BIT is reminiscent of Chinese ideology, which emphasises 'mutual benefit', reciprocity and equal development of both parties. On that note, the preamble of the China-Tanzania BIT is similar to the China-Ethiopia BIT examined in the previous chapter.

Whether Tanzania has benefited as a recipient of Chinese FDI is difficult to gauge. On one hand, Tanzania has benefited in terms of concrete projects such as

the Tanzania-Zambia railway.[128] Nonetheless, whether China's investment has increased its levels of FDI to Tanzania and whether the FDI has led to benefit in the context of Tanzanian society remains inconclusive.[129] It is particularly inconclusive due to the inaccurate and lax reporting of defunct investment projects in both Tanzania and China.[130] There are further discrepancies between the parties as to the levels of Chinese FDI inflows to Tanzania, which makes it difficult to gauge whether there is mutual benefit. According to official Chinese figures, Chinese FDI inflows to Tanzania were estimated at US$151 million, whereas Tanzanian official data placed these inflows at US$3 million.[131]

The preamble of this agreement reflects China's approach and ideology, but there is nothing distinctly 'Tanzanian' about it. As part of the analytical framework, Tanzania as a State actor needs to come out of the shadows in order to assert its freedom of choice if it is truly to derive mutual benefit as alluded to by this preamble. Markedly, the preamble of the China-Tanzania BIT reflects a different approach to include reference to non-investment norms. This is an approach that is not usually reflected in Sino-African BITs, as was seen in the China Ethiopia BIT (analysed in Chapter 5, section 6).

[128] Muhudin Shangwe, 'China's Soft Power in Tanzania: Opportunities and Challenges' (2017) 3 China Quarterly of International Strategic Studies 79, 82.
[129] Ying Xia, 'Chinese Manufacturing and Agricultural Investment in Tanzania: A Scoping Study' (2019) China-Africa Research Initiative No. 31 2019, 9 <https://static1.squarespace.com/static/5652847de4b033f56d2bdc29/t/5d657cc26b13b8000119fe39/1566932162523/WP+31+Xia+Chinese+Investment+Tanzania.pdf> accessed 8 May 2021.
[130] Xia (n 129) 9.
[131] Xia (n 129) 8.

The more expansive text of the preamble suggests that Tanzania has attempted to use its freedom of choice within the China-Tanzania BIT. The preamble states that:

> Recognizing reciprocal encouragement, promotion and protection of such investment on the basis of equality and mutual benefit will be conducive to stimulate the business initiative of investors and will increase economic prosperity in both States;
>
> Respecting the economic sovereignty of both States;
>
> Encouraging investors to respect corporate social responsibilities; and
>
> Desiring to intensify the cooperation between both States, to promote healthy, stable and sustainable economic development, and to improve the standard of living of nationals…[132]

The preamble of the China-Tanzania BIT is notable because from the outset, as there is a strong emphasis on mutual benefit and reciprocity, which suggests that there is parity between the South-South parties. Although the preamble typically refers to the business environment for foreign investors, it also recognises the sovereignty of the host State and the interest of the host State. To that end, the preamble acknowledges that foreign investors should respect corporate social responsibility and that the desired outcome of the relationship between the two States should lead to sustainable economic development and an improved living standard.

The incorporation that foreign investors should respect corporate social responsibility in the preamble is notable. It is notable because reference to non-

[132] China-Tanzania BIT (n 1) preamble.

investment norms are not a common feature within BITs and even more uncommon within Chinese BITs.[133] The preamble further contextualises that the reciprocity of the relationship between the South-South States needs to be based on sustainable *economic* development, which places an economic emphasis on the concept of development rather than highlighting that development needs to be inclusive. Accordingly, from the phrasing of this preamble, there is an implicit assumption that economic growth will be stimulated through investment and this will lead to improvements to the standard of living in the host State. Nonetheless, as previously argued (in Chapters 2, section 5.1), development is not simply an outcome but it is a continuous process with a shifting goalpost. Furthermore, as demonstrated in Chapters 2 and 3, the nexus between IIAs, FDI and development is not an automatic step-by-step process because the host State needs to intervene, which should be acknowledged by the preamble.

The incorporation of corporate social responsibility, sustainable (economic) development and improved living standards in the preamble are positive steps in the right direction. These references are notable because they reflect a degree of freedom of choice on the part of Tanzania, where it has managed to embed its interests within the text and negotiate for a wider preamble within the BIT.

[133] For example, there is no such reference in the following BITs:
Agreement Between the Government of the Republic of Turkey and the Government of the People's Republic of China Concerning the Reciprocal Promotion and Protection of Investments (adopted 27 July 2015, entered into force 11 November 2020) preamble; Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments (adopted 19 April 2011, entered into force 1 September 2011) preamble; Agreement for the Reciprocal Promotion and the Protection of Investments between the Government of the Republic of Mali and the People's Republic of China (adopted 12 February 2009, entered into force 16 July 2009) preamble.

Although these references are welcome and admirable sentiments, especially in the South-South context, these references are tentative in relation to the public interest. Improved living standards are necessary as an aspect of the public interest or societal well-being, but a more explicit and express reference to the public interest would be beneficial to the preamble. Such a reference would be beneficial to the preamble because it establishes the context or objectives in which the agreement was created.[134] By expressly recognising the public interest, Tanzania is exercising its freedom of choice to enable it to better act in the name of its society and its society's needs.

As examined in Chapter 3, the State needs a degree of oversight in order to ensure that investment can be an enabler for inclusive development. As previously argued, developing States such as Tanzania have not had time to adjust in order to truly regulate and engage with FDI. The existing investment frameworks are built on Western experiences and understandings of capital, so they do not reflect the non-Western experiences of Tanzania. To adjust to this shortcoming in the legal frameworks, Tanzania needs to utilise law so that it not only has an enabling role but law also needs to regulate. This is particularly important in the context of investment agreement and private actors. For that reason, it is important to assess the degree to which law as a regulatory tool is reflected in the pre-admission and national provision provisions. The next section will firstly focus on the pre-admission provision.

[134] Won Kidane, 'China's Bilateral Investment Treaties with African States in Comparative Context' (2016) 49 Cornell International Law Journal 141, 164.

4.1.2. The Pre-Admission Provision

As highlighted in Chapter 4, pre-admission provisions need to be carefully worded in order to regulate and manage investment before that capital enters the State. This particular provision is important as a regulatory tool, because it establishes how much flexibility the host State has when revising its domestic laws, especially after the treaty is ratified. Article 2(1) merely states that the parties must accept and protect investments in alignment with laws and regulations. This is a very classical formulation of this provision and identical to existing Chinese BITs, for example, the China-Uzbekistan BIT.[135]

This formulation of this provision means that Tanzania, as the host State, is not obliged to amend existing laws relating to the admission of investment, for example, the Investment Act. This provision could be expanded by providing a specific time period in which this provision is applicable, for example, that it does not apply to disputes before the entry into force of this agreement. There is no such inclusion in Article 2(1) of the China-Tanzania BIT.

Instead, Article 2(2) provides that subject to domestic laws and regulations, the host State will help foreign investors with obtainment of visas and work permits. Incidentally, this phrasing is aligned closely to the 1997 Investment Act (previously analysed in section 5).[136] Given that the flow of capital is largely one-sided, from China to Tanzania, the second paragraph places an onus on Tanzania to assist and facilitate ease of access to its economy. That is to say, Tanzania must aid Chinese investors when obtaining visas or work permits. Rather than reflect Tanzania's freedom of

[135] China-Uzbekistan BIT (n 133) art 2(1).
[136] The Investment Act 1997 (n 99) arts 2(5) and 6(d).

choice, Article 2(2) reflects China's interests, because it assists Chinese investors when operating in Tanzania. A similar provision can be found in Articles 2(5) and 6(d) of Tanzania's 1997 Investment Act, which suggests that the Act served as point of reference or template for negotiating the China-Tanzania BIT.

Given the shortcomings of the 1997 Act, it is a missed opportunity for Tanzania because it has not sought to bolster law's regulatory purpose within this provision of the BIT. Accordingly, Tanzania has not managed to clearly establish established to what laws and regulations the foreign investor is subject to within this provision. Even though foreign investors will be subject to the Investment Act of 1997, considering it is the main instrument dealing with foreign investment, it is not a strong regulatory instrument. As de Schutter appropriately argues, developing host States need to first start with their national legal frameworks before signing investment agreements.[137] This argument is particularly relevant here because the Investment Act of 1997 is not a strong regulatory instrument. Therefore, reference to the Investment Act as part of the relevant 'domestic laws' is not especially insightful.

The pre-admission provision needs to be read in relation to other parts of the BIT, most notably the national treatment provision. Depending on the wording of this provision and in the context of the national treatment provision, Tanzania may have greater or more limited flexibility to act in the public interest. Therefore, as a developing host State, it is in Tanzania's interest to carefully word these provisions. In turn, the national treatment provision needs to be analysed in more detail.

[137] Olivier de Schutter, 'Transnational Corporations as Instruments of Human Development' in Philip Alston, Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (OUP 2005) 403.

4.1.3. The National Treatment Provision

The inclusion of a national treatment provision is commonplace within investment agreements. Whether Tanzania can offer more favourable treatment to its domestic investors over foreign investors will depend on the wording of this provision. Additionally, whether this provision applies in the context of the pre-admission provision will also be subject to how it is phrased. In such circumstances, the provision needs to be precisely articulated, in order for Tanzania to preserve flexibility to enable the public interest and also as a reflection of its interests as part of freedom of choice.

Article 3 provides that there must be like treatment between foreign investors and domestic investors. Article 3(2) demonstrates a noteworthy departure and evolution of the national treatment provision, which arguably reflects the steps that Tanzania has taken in exercising its freedom of choice. It permits parties to 'grant incentives or preferences to' Tanzanian nationals, on the basis of promoting and enhancing entrepreneurship on a local level. This differentiation in treatment, however, must have not an adverse impact on investment or relevant investors.

As such, this second paragraph is Tanzania's way of retaining scope to adopt measures in support of local industries, but also it limits the operation of the national treatment principle within its territory. It is remarkable that China has agreed to include such a concession to Tanzania and demonstrates that it is possible for a developing host State to ensure that its interests are reflected within a BIT. This demonstrates that Tanzania can and will negotiate actively within the investment context. The wording of this provision is a good example of freedom of choice, but it also represents an attempt by Tanzania to enable the betterment of its society (that is, the public

interest) by insulating its own investors and investments. There is no such provision in the China-Ethiopia BIT.

Whilst this provision is laudable in the fact that it reflects the three foundational principles of the analytical framework – freedom of choice, the public interest and also law's enabling role, it does not mean it cannot be improved. The first paragraph of Article 3 establishes that the provision applies in accordance to 'applicable laws and regulation'. The wording of this article does not specify whether it applies to the pre-admission stage. In other words, the scope of the two provisions is not entirely clear. Furthermore, although Tanzania may grant preferential treatment to domestic investors, this treatment must be linked to enhancing local entrepreneurship and must not adversely affect foreign investors.[138] This formulation is tentative, it acknowledges Tanzania's autonomy to regulate. Yet, at the same time, takes a step backwards by establishing that this is only tied to entrepreneurship, which is not defined. Additionally, any steps taken must not be at the expense of the foreign investor. Thereby placing a *caveat* on the regulatory actions of Tanzania. This qualification also prioritises the (private) interests of the foreign investor over Tanzania, which is a problem identified in Chapter 3.

In reference to the analytical framework, Tanzania should consider its regulatory function in the context of this provision. In its central seat, Tanzania as a State has a supervisory role to play; this role requires it to limit the harmful impacts of private actors and convert any economic activities into benefits for its society. There is some attempt to do so, which is evident from this provision. In that regard, Tanzania

[138] Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments (adopted 24 March 2013, entry into force 17 April 2014) art 3(2).

as a host State has attempted to integrate its interests within the BIT, as freedom of choice, but it is still not enough. For this reason, the general exception provision also has a part to play in regards to the analytical framework and inclusive development.

4.1.4. The General Exception Provision

To accommodate Tanzania's ability to regulate, the general exception provision is important. As previously identified in Chapter 4, these are not a new inclusion, but the lengthy provisions with sophisticated language are, still, not commonplace within investment agreements. The inclusion of a general exception provision provides Tanzania with added flexibility for the public interest, in recognition of its wider international law and IHRL duties, such as the right to food. Such a provision is not just of hortatory value but actually are legally binding, which would give the host State (Tanzania) the flexibility to act in the public interest. Additionally, such an inclusion provides a reminder that the State is still a relevant actor and has additional pressures and responsibilities in relation to its own society. By acknowledging these additional pressures, the general exception provision is also a reflection of the good faith approach with regards to the States' duties and the fact that the State is expected to act in the best interests of its society.

Article 10 of the China-Tanzania BIT reflects an attempt to include a general exception provision but actually is a hortatory right to regulate provision. Whilst this reflects a departure from the traditional content of investment agreements and refers to non-investment matters, such as, 'health, safety and environmental measures', it

still does not go far enough.[139] This article does not oblige the parties to abide by these important non-investment measures or even require that these norms are legally protected.[140] Article 10 also does not establish that there must be a balance between the rights, obligations and interests of the parties involved.[141]

Instead, Article 10(1) conditionally provides that in relation to health, safety and environmental matters, measures *should not* be relaxed in order to attract investment. In other words, in pursuit of FDI, State parties should not derogate or relax measures relating to human health, safety or the environment.

This is a positive step in the right direction. It is a formal recognition of the existence of important norms outside of the investment relationship in which the promotion of investment may have an adverse impact. Article 10(1) is a tacit recognition between China and Tanzania that there are some human rights considerations that need to be considered in the context of investment. It also implies that the parties recognise the wider public interest issue and that States have a wider IHRL duty to respect these rights when undertaking economic activities.

This provision is not a universal solution and is not strictly binding on the parties to the Agreement. Noticeably, the text does not specifically use the language or rights

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[139] Won Kidane, Weidong Zhu, 'China-Africa Investment Treaties: Old Rules, New Challenges' (2014) 37(4) Fordham International Law Journal 1035, 1079.

[140] In contrast, the Morocco-Nigeria BIT stipulates that parties 'shall ensure that… laws and regulations provide for high levels of labour and human rights protection… and shall strive to continue to improve these laws and regulations'.
Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (adopted 3 December 2016, not yet in force) art 15(5).

[141] In contrast, the Morocco-Nigeria BIT expressly states that:

> Except where the rights of the Host State are expressly stated as an exception to the obligation of this Agreement, a Host State's pursuit of its right to regulate shall be understood as embodied within a balance of the rights and obligations

See: Morocco-Nigeria BIT (n 140) art 23(2).

or legal entitlements. The provision solely refers to the health and safety of humans or the environment. It is undeniable that the lack of adequate food adversely affects human health, so the right to food can be extrapolated from Article 10. However, this general exception provision is only a minimal or piecemeal attempt to confer flexibility on the host State. Moreover, the conditional language of this article means that it is of a persuasive nature rather than a legal obligation imposed on State parties.[142] The wording of this article is a weak reflection of freedom of choice on the part of Tanzania because it does not truly embrace the public interest from the host's perspective. Additionally, it also does not clearly establish the scope in which Tanzania as a host State can adopt regulatory measures. This is an important but missing element within this provision and BIT. After all, as per the analytical framework, it is a complementary principle, which helps prop up the other foundational principles and the central role of the State.

Whilst there are glimpses of Tanzania's freedom of choice from analysing this provision, the omission of a specific reference to human rights is likely to be due to the sensitivity of the topic with China. This is a shame because, within the aforementioned provisions of this BIT, there are echoes of Tanzania's assurance in its identity to negotiate for its own interests. Nonetheless, these are mere echoes. Tanzania's appears to be hesitant in its approach to negotiating these provisions, which not only reflect its inexperience. As a developing State, the IIL regime has established rules based on Western interests. If Tanzania is to benefit, it must embrace its interests with greater certainty. This needs to come through in its external relationships with other States in the context of IIL and investment agreements.

[142] Kidane (n 134) 167.

In that regard, the analytical framework and the foundational principles can be used to achieve this goal. The analytical framework provides a lens for viewing investment agreements in terms of balancing the interests of home and host States. Where the host State has been side-lined or overshadowed within investment agreements, the analytical framework highlights that it needs a more prominent role. In order to give greater prominence to the centrality of the host State, the foundational principles provide a point of assessment. By examining whether freedom of choice, the public interest and also law's dual nature are adequately reflected, areas for reform can be identified within a given investment agreement. This has been undertaken in relation to specific provisions of the China-Tanzania BIT. This section of this chapter has identified the shortcomings of this investment agreement and that the BIT, in question, falls short of its potential for being an instrument that could enable inclusive development.

Nonetheless, positive change must start with its domestic frameworks. This is particularly important given the number of references to domestic laws and regulations within the pre-admission and national treatment provisions. In order to negotiate better provisions, as a developing host State, Tanzania needs assurance in its own ability, which is pivotal as this is the overarching seat to the foundational principles of the analytical framework. This assurance starts with Tanzania's self-reflection on its own strengths and values, rather than depending on Western models for positive change.

4.2. The Next Steps for Tanzania: The China-Tanzania BIT

The application of the analytical framework within the IIA context highlights that within this newer BIT, Tanzania has managed to carve out aspects that reflect its

interests. In this bilateral and South-South context, it is notable that Tanzania has managed to do so and for China to have made these concessions within this agreement. In that regard, this BIT is valuable particularly in relation to the national treatment and general exception provision. These inclusions denote a shift away from the traditional content usually found in IIAs and present a promising start. However, the lack of detail within the general exception provision still indicates that Tanzania is 'finding its feet' in relation to these agreements.

Tanzania needs to build on this experience, so that it negotiates future agreements and provisions that reflect its interests. The preamble and pre-admission provision could benefit from more precise detail, so that it can build upon its freedom of choice and further embed the public interest in future BITs.

CONCLUSION

To actualise inclusive development, an analytical framework was proposed in Chapter 4. This chapter tests this framework within the context of Tanzania. Using this framework and the foundational principles, gaps in relation to freedom of choice, the public interest and law as an enabler and regulator were evident within the domestic frameworks. Tanzania has attempted to draft legislation to achieve positive change but it lacks precision within this legislation, which is needed in order to adequately connect its economy to Tanzanian society. As a result, it is difficult for Tanzania to achieve inclusive development. Its domestic legislation attempts to reflect its values through freedom of choice and to some extent, the public interest. At first glance, it may seem that Tanzania is more assured in its own identity than Ethiopia, but on

further analysis of the 1997 Investment Act, Tanzania has forgotten its own needs and identity in order to provide a gateway into its economy for foreign investors.

In contrast to Ethiopia, Tanzania has greater political stability. Arguably, Tanzania will have greater capacity to pay heed to the public interest and devising law that regulates for inclusive development. As such, Tanzania needs to pay greater attention to drafting a clearer and more articulate Investment Act. This is useful for Tanzania, as it will allow it to progress the process of inclusive development and facilitate positive change within its society. At the moment, Tanzania's legal frameworks lack precision that is needed in order to be sufficient within the context of the analytical framework. This is particularly evident in the context of the lack of clarity regarding law's regulatory role, as seen in the Investment Act.

The value of the analytical framework will be further expanded upon in the next chapter, by using the framework and examples from other NICs to provide further recommendations for developing host States in their aim for more inclusive development. In reference to the case study chapters – Ethiopia (in Chapter 5) and Tanzania (in this chapter), the next point of assessment will consider recommendations for positive change or inclusive development. The next chapter will return to how other States have managed to achieve the positive change that they have desired and what role the analytical framework can play in identifying further areas for change.

CHAPTER 7 – RECOMMENDATIONS

INTRODUCTION

The ability of developing States to achieve inclusive development is a key challenge for them. As identified in Chapter 1 (section 2), the key concern for these States is how to design legal frameworks that are robust enough that they have longevity (to regulate private actors), but also flexible enough to evolve alongside changes within their societies (to enable inclusive development).

Chapter 4 identified that an analytical framework was needed in order to approach inclusive development in a more robust manner. To test the robustness of this framework, it was applied to case studies in Chapter 5 (Ethiopia) and Chapter 6 (Tanzania) in order to demonstrate the gaps that the respective States need to address in order to progress inclusive development. The case study chapters reaffirmed the need for the analytical framework as a way forward for developing States.

Based on the observations of the previous chapters, this chapter further applies and affirms the use of the analytical framework. By using the analytical framework, this chapter highlights that the framework is a necessary lens to explore further recommendations for developing States in relation to inclusive development. It is argued that it is unfeasible to overhaul the status quo when it comes to existing Western models of development and even the IIL framework. Accordingly, developing States must adapt and take a more proactive stance on shaping investment for inclusive development by furthering the foundational pillars of the analytical framework.

To that end, this chapter identifies the central role of the host State as a central actor, before considering the three foundational principles of the analytical framework in turn. These foundational principles are reflected on within the context of the case study chapters, in order to highlight areas of improvement, first in relation to the domestic context, before applying it to the BIT context. In order to further identify areas of improvement, for each of the foundational principles of the analytical framework, this chapter draws on examples from NICs (including China) to illustrate alternative practices in relation to development and investment.

1. THE ROLE OF THE (HOST) STATE AS A CENTRAL ACTOR

The conceptualisation of development and even investment have been based upon Western experiences, which have become the paradigm for change. Despite this (Western) approach being advocated by developed States, developing host States have not seen the associated benefits, such as an improved standard of living, that they want and need.

There are isolated examples of success with this model, for example, China (for example, Chapter 3, section 1.1; Chapter 4, sections 1 and 2.3). However, China's success is not built on the strict adherence to the Western model of economic growth, or Western templates for IIAs. Instead, China has prudently and selectively chosen aspects of the models that best suits its needs and interests – it has incrementally adapted the rules and itself for development and investment. In other words, China has proactively shaped the existing rules to reflect its own experiences. As a State

actor, this ability and willingness to shape the rules is an important step towards inclusive development.

China's empowerment to act actually stems from its rejection of Western ideals, which it identifies as inappropriately foisted upon it.[1] Instead, China actively pursues its own interests by incrementally 'picking and choosing' factors that it commits to and gives effect to.[2] This is evident as China strategically selects factors linked to the economic growth model to focus on in order to suit its own needs, for example by improving literacy to bolster employment opportunities within its economy.[3] This selective approach is an example of how China demonstrates its competence as a State actor.[4]

It is not an easy process for developing States to carve-out a true sense of self or share China's assurance in its own identity. [5] It is not easy for these developing actors to be pioneers of their own identity because of their colonial histories, in addition to the policies associated with the Washington Consensus (referred to in Chapter 2, section 4.1) that have been imposed by international financial institutions.[6] These contextual

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[1] Dong Wang, 'The Discourse of Unequal Treaties in Modern China' (2003) 76(3) Pacific Affairs 399, 402; Wang Dong, *China's Unequal Treaties: Narrating National History* (Lexington Books 2005) 170; Matthew Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74 Nordic Journal of International Law 335, 345.

[2] Amartya Sen, *Development as Freedom* (OUP 1999) 42; Bradley Klein, 'Democracy Optional: China and the Developing World's Challenge to the Washington Consensus' (2004) 22 Pacific Basic Law Journal 89, 90.

[3] Sen (n 2) 42.

[4] Klein (n 2) 90.

[5] A clear identity provides a way to embed social change through 'systematic thought'. A. Burcu Bayram, 'Due Deference: Cosmopolitan Social Identify and the Psychology of Legal Obligation in International Politics' (2017) 71 International Organization 137, 142.
Igesias also argues that transnational identities need to be embraced in order for societal transformation to be beneficial. Although Iglesias argues this from an individual perspective, this argument also is valid for developing States. For further details, see: Elizabeth Iglesias, 'International Law, Human Rights, and LatCrit Theory' (1997) 28(2) Inter-American Law Review 177, 192.

[6] Thomas Kelley, 'Beyond the Washington Consensus and New Institutionalism: What is the Future of Law and Development' (2010) 35(3) North Carolina Journal of International Law 539, 542; Charles Gore, 'The Rise and Fall of the Washington Consensus as a Paradigm for

factors mean that the identity of many developing States has not evolved organically but rather has been expected to conform to the Western economic growth. In other words, developing States have not had the sufficient space or time to configure their identities, which are still emerging. Due to the emerging nature of these identities, developing States do not have the perspective to question the economic growth model or the Westphalian approach to Statehood but accept it as the existing status quo. Instead, developing States overlook their own experiences; they turn to Western modes of practice because they view their own practices as inferior or even as non-existent.[7] This subordinates the existing and internal values within the developing State, which distorts their understanding of their own State identity.

State identity is even more paramount in relation to the Westphalian approach to Statehood as the State is expected to exercise authority over its society and act in the best interests of that society.[8] In that regard, developing States need to consider tailoring these models to their experiences and the needs of their respective societies. Otherwise, if developing States continue to passively accept the aforementioned (Western) models as modes of best practice, they will be unable to make the strides towards the positive change that they so desire.

Chapters 5 and 6 (the case study chapters) highlight that clearer self-identity is needed in relation to both Ethiopia and Tanzania. In Ethiopia's case, it has misguidedly applied the economic growth model without shaping the model to its needs, which has

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Developing Countries' (2000) 28(5) World Development 789, 793; Julio Faundez, 'International Economic Law and Development: Before and After Neo-Liberalism' in Julio Faundez, Celine Tan (eds), *International Economic Law, Globalization and Developing Countries* (Edward Elgar 2010) 11.

[7] Francis Fukuyama*, Identity: Contemporary Identity Politics and the Struggle for Recognition* (Profile Books 2018) 79-80, 125.

[8] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007) 57.

not led to the improved 'state of being' it so desires.[9] As identified in Chapter 5 (section 2), Ethiopia has further relied on Western academics to design its domestic legal frameworks and policies.[10] By relying on the Western approach, Ethiopia is neglecting its own experiences, which means that change cannot take place in a meaningful or longstanding manner. Accordingly, Ethiopia remains one of the world's poorest States, where inadequate access to food continues to be a real and present issue within its society.[11]

In contrast, Tanzania seems to be more assured in its own identity because of its ideological resistance to its colonial past, for example, using Kiswahili as an official language to resist the use of English (see, Chapter 6, section 3.1 for further analysis). In practice, this resistance is not implemented well, as Tanzania still looks to the West as a mode of best practice.[12] The preference given to English-language in education by Tanzanian society is an example of how Western practices are superseding existing traditions, such as the Kiswahili language. This reflects a shift in societal thinking. Rather than building on Tanzania's own core values, there is a creeping assimilation of Western values which are difficult to reconcile with the experiences and context within this State. As demonstrated using the 1997 Investment Act (in Chapter 2, section 5), Tanzania's desire to provide and entry-point for FDI further contributes

[9] Toni Weis, 'Vanguard Capitalism: Party, State, and Market in the EPRDF's Ethiopia' (DPhil thesis, University of Oxford 2016) 166.
[10] Paul Brietzke, 'Law, Development and the Ethiopian Revolution' (DPhil thesis, School of Oriental and African Studies of the University of London 1979) 25-26.
[11] Fikre Lemessa Ocho, Gezahegn Berecha Yadessa, Fikadu Mitiku Abdissa, Adugna Eneyew Bekele, 'Why Does Food Insecurity Persist in Ethiopia? Trends, Challenges and Prospects of Food Security in Ethiopia' 9(2) Journal of Development and Agricultural Economics 341, 345.
[12] Tanzania remains a developing country based on *inter alia*: GNI per capita, life expectancy at birth, years of schooling, gender equality. For further details, see: UNDP, 'Human Development Report 2020 – The Next Frontier: Human Development and the Anthropocene – Tanzania' (2020) UNDP Briefing, 3-5 <http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/TZA.pdf> accessed 7 July 2021.

to this issue. Tanzania neglects its own position, as an important actor and also its needs as a State. As a result, Tanzania is not centrally positioned as a State actor to act for the betterment of its society, for example in relation to the right to food. Although inadequate access to food in Tanzania is not as extensive as it is in Ethiopia, the State still needs protect this right in Mainland Tanzania through appropriate legislation. This is particularly important given that more than a quarter of Mainland Tanzania's population do not have adequate access to food to satisfy their basic needs (for further analysis, see: Chapter 6, section 4.1).

As a first step in accordance with the analytical framework, the developing host State needs to recognise that it is in the best position and has the power to actualise inclusive development. This requires the State to holistically ascertain its core competences, in addition to the needs of its society. Doing so will give the State a better understanding of the existing gaps within the legal frameworks and the measures that need to be adopted to meet these needs. This internalisation is a lengthy but necessary process if developing States are to take charge of their future trajectories for development.[13] In that regard, the question is what steps are needed by the State if it is to take steps towards inclusive development.

At first this may seem counter-intuitive to the economic growth model but the State needs action if its society is to benefit.[14] Private actors cannot be left to self-regulate, as deregulation and liberalisation within developing State economies do not work for

[13] Sattorova argues that this is particularly important in relation to investment and the host State's good governance approach. For further details, see: Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance* (Bloomsbury 2018) 65.
[14] Ngugi argues that this is necessary in terms of the rule of law and good governance approaches. See: Joel Ngugi, 'Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse' (2005) 26(3) University of Pennsylvania Journal of International Economic Law 513,528.

inclusive development and this needs to be acknowledged by these very States.[15] This is because the State must take on the carpenter role so that it willingly constructs a 'stable stool' for the analytical framework for inclusive development. By addressing the three foundational principles, the State can bridge (through law) the public interests of society with the private interests of economic actors. Otherwise, the State risks the detachment of the economy from society, which problematically contributes to and deepens the artificial public-private divide analysed in Chapter 3 (section 2.2) and Chapter 4 (section 1).

From the perspective of basis needs, it is even more important that the State acts, particularly to ensure that individuals within its territory have adequate access to food.[16] These States not only have a moral duty but also a legal one to take affirmative action for their societies.[17] To that end, the State needs to enshrine basic rights, such as the right to food, so that these rights are afforded legal protection. The enshrinement of these rights needs to be underpinned by the State's own experiences, so that the construction of legal frameworks and strategies suit the domestic conditions.[18] This contextualisation of law is important in order to meaningfully create opportunities for the improvement to the lives of individuals within its respective society.[19]

Developing States have valuable insights to offer but do not recognise this as, arguably, they do not take ownership of their own identity.[20] As the overarching seat

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[15] Julio Faundez, 'International Economic Law and Development: Before and After Neoliberalism' in Julio Faundez, Celine Tan, *International Law, Economic Globalization and Developing Countries* (Edward Elgar 2010) 12.
[16] UNCHR, 'General Comment No. 3: The Nature of State Parties (Art. 2, Para. 1 of the Covenant)' (14 December 1990) UN Doc E/1991/23 para 10.
[17] UNCHR (n 16) para 2.
[18] Fukuyama (n 7) 126.
[19] Sen (n 2) 41.
[20] Fukuyama (n 7) 10; Seth Kaplan, 'Identity in Fragile States: Social Cohesion and State Building' (2009) 52(4) Development 466, 467.

of the analytical framework, the State is the figurehead and is bound to its society through core values.[21] This only works if the State is in the position where it comprehends and is able to act on these values. Rather than questioning their own ability and looking for external solutions, developing States should reflect inwardly for inclusive development. After all, in accordance to the analytical framework, the State is the overarching seat that oversees the complementary and foundational pillars. Freedom of choice is a natural starting-point for the State and needs to be revisited.

1.1. Freedom of Choice

Freedom of choice is concerned with the autonomy and ability of the State to make decisions for inclusive development. As highlighted in earlier chapters, developing States do not exercise their freedom of choice, even though they have this freedom in a limited form.[22] The routes of developing States have been pre-determined, so they are limited in their ability to instil positive change. Both Ethiopia and Tanzania, for example, have subscribed to the economic growth model as the main strategy for their development without admitting that this curtails their ability to act and the available choices to act.

Since these States (which include Ethiopia and Tanzania) have already embarked on this road, it is not feasible for them to turn back because the economic growth

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This issue of identity and the offerings from developing States is not just isolated to investment and development. Murray saliently argues that the subversion of the perspectives from developing States is also evident within the IHRL, which prioritises Western norms and experiences. For further analysis, see: Rachel Murray, 'International Human Rights: Neglect of Perspectives from African Institutions' (2006) 55 International Comparative Law Quarterly 193, 196-197.

[21] Fukuyama (n 7) 127; Arturo Escobar, *Pluriversal Politics: The Real and the Possible* (Duke University Press 2020) 15.

[22] For example, see: Chapter 4, section 2.1; Chapter 5, section 3; Chapter 6, section 3.

model is so entrenched within the wider international setting. As part of freedom of choice, developing States need to identify the flaws of this model, for example, its rigidity and emphasis on the non-interference of the State. That way, developing States can adopt change incrementally by 'chipping away' at these models from their own perspectives, so that they can open up possibilities in relation to their future choices.[23]

China's freedom of choice is evident from its rejection of Western ideals and its discerning approach to its own identity as a State. China does not attempt to imitate other States but is very clear that it is a socialist State, which is fuelled by its workers.[24] It is clear from its Constitution that the State willingly intervenes in relation to its economy, as Article 7 enshrines the fact that it is a State-owned economy. From this perspective, China is navigating its own route which is an indication of its freedom of choice.

Similar to Ethiopia and Tanzania, China's own population is ethnically diverse.[25] In accordance to the analytical framework, this means these diffuse values belonging to these ethnic groups need to feed into the State's decisions to further the public interest, and also as part of freedom of choice. In theory, this ethnic diversity is recognised within China's Constitution, as Article 4 provides that discrimination based on nationality is prohibited. Article 4 also specifies that the State has a duty to protect the interests of ethnic minorities, and in regions where there are ethnic communities, regional autonomy is permitted.[26] The regional autonomy in China is particularly

[23] Roberts argues (from an investment arbitration angle) that perspective can be 'revolutionary' for some States as a form of change. For further details, see: Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112(3) American Journal of International Law 410, 412.
[24] The Constitution of the People's Republic of China (14 March 2004), art 1.
[25] Oguzhan Dincer, Fan Wang, 'Ethnic Diversity and Economic Growth in China' (2011) 14 Journal of Economic Policy Reform 1.
[26] The Constitution of the People's Republic of China (n 24) art 4.

noteworthy considering that the Western regions (where there are large concentrations of ethnic minorities) of China has been granted autonomy.[27]

There are fewer resources in these autonomous areas in the West of China, so to better integrate these areas and address the disparity of wealth, China launched the Western Development Strategy in 2000.[28] The Strategy includes region-specific economic strategies to improve the standard of living in these areas.[29] Under this Strategy, China took further steps to construct infrastructure in order to physically connect and improve access to these areas with the rest of the country, for example, the Qinghai-Tibet rail network.[30]

In that regard, China has identified that improving the standard of living in these areas is a long-term goal and process, which requires continuous improvement as the internal context evolves as the State continues to progress.[31] This acknowledgement that change is a continuous adaptation is a good starting-point for freedom of choice and inclusive development and the adequacy of China's Western Development

[27] The Western region refers to the Inner Mongolia Autonomous Region, Guangxi Zhuang Autonomous Region, Tibet Autonomous Region, Ningxia Hui Autonomous Region, and Xingjian Uygur Autonomous Region.
See: Ministry of Foreign Affairs of the People's Republic of China, 'Administrative Division System' (Ministry of Foreign Affairs of the People's Republic of China, 2021) <https://www.fmprc.gov.cn/mfa_eng/ljzg_665465/zgjk_665467/3572_665469/t1140993.shtml> accessed 25 August 2021.
See also: Enze Han, Christopher Paik, 'Ethnic Integration and Development in China' (2017) 93 World Development 31, 34.

[28] The Central People's Government of the People's Republic of China, '共和国的足迹 1999: 西部大开发' (*Xinhua*, 10 October 2009) <http://www.gov.cn/test/2009-10/10/content_1435029.htm> accessed 30 August 2021.
See also: Hongyi Harry Lai, 'China's Western Development Program: Its Rationale, Implementation, and Prospects' (2002) 28(4) Modern China 432, 436.

[29] The Central People's Government of the People's Republic of China (n 28); Lai (n 28) 447.

[30] Han, Paik (n 27) 34.

[31] Lai (n 28) 451; State Council of the People's Republic of China, '中共中央 国务院关于新时代推进西部大开发形成新格局的指导意见' (*Xinhua*, 17 May 2020) <http://www.gov.cn/zhengce/2020-05/17/content_5512456.htm> accessed 30 August 2021.

Strategy needs further study but such an assessment falls outside the scope of this thesis.[32]

This does not mean that China should discontinue its Western Development Strategy. It needs to continue with this Strategy, so that the area does not remain detached from the rest of Mainland China. This is because ethnic diversity is an important aspect of freedom of choice since these groups are a part of the State's identity and need to feed into that State's approach. In that regard, whilst China has made strides towards freedom of choice, like other developing States, it still has room for improvement.

To take steps towards freedom of choice, States but in particular developing ones must be willing to acknowledge that their experiences are individual. Each State needs to acknowledge its own experiences and context, so that the domestic frameworks can be built on these idiosyncrasies. To that end, the State in question needs to better understand what its society is composed of, for example, diverse ethnic groups. By starting with this foundational understanding for freedom of choice, the State is better equipped for positive change because it is internally-attuned.

Freedom of choice is not the only foundational pillar of the analytical framework or modification that developing States need to implement for inclusive development. Developing States also need to ensure that their activities are conducive to the

[32] Further study with accurate and recent data to assess whether these ethnic communities are accounted for within China would be useful. Within the Western region of China, insufficient economic resources adversely affect institutional processes which manifest in lack of education of relevant individuals and manpower to undertake regional surveys. As a result, official publication of data from these autonomous regions is not always available. The Western region's remoteness from Beijing as well as ongoing corruption have been cited as reasons as to why there is limited documentation regarding how adequate the Western Development Strategy. These points further emphasise the need for further study.
Dincer, Wang (n 25) 3.

betterment of their respective societies, so that the public interest is adequately accounted for. The public interest is examined further in the next section.

1.2. The Public Interest

The public interest is a broad and unwieldy concept, which lacks a precise definition because States want to retain a degree of flexibility, so that the concept can evolve alongside its society.[33] As such, the literature and even legal instruments will refer to it without definition.[34] For the purposes of this thesis, the public interest was defined in Chapter 4 (section 2.2) as the aim of progressing the overall well-being of society.[35] With the well-being of society at the heart of the public interest, this concept is inherently interconnected with IHRL and the right to food. To that end, this requires the State to be clear about the interrelationship between the public interest and IHRL, so that these two aspects can mutually reinforce each other.

Within the case study chapters, the Constitutions of Ethiopia and Tanzania were examined. The public interest within these instruments was either referred to expressly (in the Ethiopian context; see Chapter 5, section 4.1) or inferred by way of wider human rights (in the Tanzanian context; see Chapter 6, section 4.1). In both respects, the public interest was not defined, which meant the foundational principle as a concept was open to interpretation. As previously mentioned, this is due to a desire to retain

[33] John Benington, Jean Hartley, 'Action Research to Develop the Theory and Practice of Public Value as a Contested Democratic Practice in Adam Lindgreen, Martin Kitchener, Nicole Koenig-Lewis, John Brewer, Mark Moore, Timo Meynhardt (eds), *Public Value: Deepening, Enriching, and Broadening the Theory and Practice* (Routledge 2019) 145.

[34] Titi is one of the few scholars that defines the public interest; she acknowledges that it is a broad concept but conclusively identifies it is fundamentally concerned with the long-term wellbeing and welfare of society.
Aikaterini Titi, *The Right to Regulate in International Investment Law* (Bloomsbury 2014) 99.

[35] Titi (n 34) 99.

flexibility when using this concept. Whilst flexibility is important when it comes to the public interest, this flexibility must not come at the expense of the utility of this concept.

As a foundational principle of the analytical framework, it is important that the State attaches meaningful value to the concept, so that this principle can be actualised from the perspective of the State in question. This approach requires that the State in question is actively setting targets to achieve. By setting these targets, the State acknowledges and embraces its duty-bearer role (as assessed in Chapter 4, section 2.1) for the right to food, which is an integral aspect of the public interest.[36]

As part of its duty-bearer role, the State needs to be accountable for ensuring compliance with the right to food and the public interest.[37] To ensure that compliance, the State must be assured in its identity and also it must assure that it knows what it means by the public interest, so it can compel private actors, such as foreign investors, not to harm its society. More importantly, the State needs to ensure that private activities actually enable inclusive development by monitoring and directing these activities to benefit its society.

To give this unwieldy concept more substance, it is important that the right to food (as an exemplar of the public interest) is definitively articulated. This not only allows the State to retain a degree of flexibility regarding the public interest but it also can anchor the concept in concrete terms through the IHRL framework.

In Chapter 5 (section 4.1), it was identified that although the right to food was enshrined in the Ethiopian Constitution, the conditional language meant that the right was not concretely codified. In Chapter 6 (section 4.1), on analysis of the Tanzanian Constitution, the right to food was not expressly articulated. This was a notable

[36] UNCHR, 'General Comment 12: The Right to Adequate Food' (12 May 1999) UN Doc E/C.12/1999/5, para 20.
[37] UNCHR (n 36) paras 20, 27.

omission given that the right to food is enshrined within the Zanzibar Food Security and Nutrition Act. This Act is not applicable to Mainland Tanzania even though inadequate access to food remains a problem in this area.

Essentially, the right to food needs to be embedded within domestic frameworks so that it is expressly enshrined as a legal entitlement. By framing the right to food as a legal entitlement, there is a corresponding duty and onus on the State to take action.

Returning to the example of China, it is worth noting that its Constitution does not enshrine the right to food.[38] In terms of the analytical framework, China is a good example in relation to freedom of choice and its use of law as a regulatory tool (this point is further examined in the next section of this chapter). However, when it comes to the public interest as a foundational principle for inclusive development, there is still room for improvement when it comes to China.

Although China has enacted the Food Safety Law (2009) and the Food Hygiene Law (1995), it does not have any specific legislation affirming the right to food. Express recognition of this basic right is missing within the Chinese context as an exemplar of the public interest and inclusive development. Accordingly, express incorporation of the right to food is needed within China's Constitution, so that this basic need is highlighted as important to the State as part of its ongoing commitment to its people. Doing so will bolster the public interest and set a sturdier base to enable inclusive development.

Other NICs have taken steps to safeguard the right to food in their Constitutions, which is a positive step towards actualising the foundational principle of the public

[38] The Constitution of the People's Republic of China (14 March 2004).

interest.[39] Rather than overhaul the Constitution completely, in 2010, Brazil enacted an amendment to its Constitution.[40] Article 6 was inserted as an addition to the existing text of the Constitution. Article 6 codifies that 'social rights' are important to the Brazilian State and society, and that the right to food is an aspect of these rights.[41] Article 6, however, does not provide any further detail as to the duty of the State or how it will implement, which is a gap in relation to the enabling function of the law.

South Africa's Constitution is particularly notable in comparison. The South African Constitution clearly affirms the right to food, as Article 27(1)(b) establishes that 'everyone has the right to access sufficient food and water'.[42] Article 27 is phrased in clear mandatory language, which is a good example of legal protection afforded to this right. This Article also establishes that 'the [S]tate must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.[43] In other words, the Constitution places an express duty on the South African State to enact sufficient legislation to progress the right to food (and water).[44] The fact that Article 27(2) refers to the State's duty-bearer role is important for enabling the public interest, because it is a clear reminder that the State needs to act for inclusive development.

[39] It should be noted that the Constitution of India and also the Constitution of Russia do not contain any references to the right to food.
See respectively: The Constitution of India (9 December 2020); The Constitution of the Russian Federation (12 December 1993).
[40] The Constitution of the Federal Republic of Brazil 1988 (5 October 1988); Constitutional Amendment No. 64 (2010).
[41] Article 6 states that: 'Education, health, *food*, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute are social rights, as set forth by this Constitution'.
The Constitution of the Federal Republic of Brazil 1988 (5 October 1988); Constitutional Amendment No. 64 (2010) art 6.
[42] The Constitution of the Republic of South Africa 1996 (4 December 1996).
[43] The Constitution of the Republic of South Africa 1996 (4 December 1996) art 27(2).
[44] The Constitution of South Africa (n 42) art 27(2).

Law is instrumental for inclusive development but only if it can enable it through the public interest. To that end, the public interest as a foundational principle must provide a baseline for State action and legislation protecting basic rights is the first step towards actualising this principle. The State needs to be compelled enough to seek to improve the conditions within its respective society (or public interest).[45] This is because the State is the representative bulwark of that society.[46] In this capacity, the State needs to be willing and able to wield the law so that the law is an enabling instrument, for the betterment of its people so that these people can enjoy their life,[47] and to complement freedom of choice.

Law in its enabling form is not the only relevant aspect for inclusive development. Law also has a regulatory form, which is further needed in order to complement the other foundational principles of the analytical framework.

1.3. Duality of Law: Law as an Enabler and as Regulation

Freedom of choice and the public interest as the first two foundational principles of the analytical framework require law to be enacted so that law has an enabling role. As argued throughout this thesis, the State *can* and *should* intervene through law so that society's needs are advanced. The third foundational principle of the analytical framework highlights that beyond law's enabling function, law has a dual and additional function – that is, law's regulatory function. This, again, requires the intervention on the part of the State.

[45] Jean-Jacques Rousseau, *The Social Contract* (Christopher Betts tr, OUP 1994) 57.
[46] Rousseau (n 45) 57; Thomas Hobbes, *Leviathan* (C.B. Macpherson ed, OUP 1968) 252.
[47] Arturo Escobar, *Pluriversal Politics* (Duke University Press 2020) 106.

Law in its enabling and regulatory forms creates the necessary socio-legal bridge[48] between the private aspect of the economy and the (public) needs of society.[49] This connecting point can only be created by the State, because it is the central actor that ensures that society benefits from the activities of private actors or markets.[50] Arguably, the State's interception through law is a necessary component of inclusive development.

As previously argued in Chapters 2 and 3, traditional models for development focus on economic growth. The economic growth is premised on the self-efficiency of private actors. In turn, it is said that if private actors operate efficiently, their activities will have 'trickle-down' benefits for a given society. To allow these private actors to operate efficiently, the State should not intervene as it should take a passive and backseat role.

This is a fallacy because developing States cannot afford to passively anticipate the benefits of economic activity will 'trickle down' to their societies. Instead, the State needs to intercede, not only by enabling inclusive development but also through regulation. The State needs to adopt regulatory mechanisms (through law) to harness their economies, which also requires them to control private actors operating within their territories. Without this State intervention, the respective society will be unable to reap the economic benefits in a meaningful manner.

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[48] Haines argues that the State should make changes based on socio-cultural factors, but it is argued by this author that these changes should be based on socio-legal factors because of the regulatory nature of law in relation to the analytical framework.
Haines (n 51) 34-35.

[49] Habermas rightly argues that the State must navigate regulation, and obtains legitimacy from its society by furthering the respective values. See: Jürgen Habermas, *Philosophical-Political* Profiles (Frederick Lawrence tr, MIT Press 1983) 121.

[50] Ogus refers to this benefit as a public good and highlights that the benefits are shared by society as a whole.
Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Hart 2004) 33.

For law to have a regulatory role, State needs to be self-reflective so that it identifies existing and future problems, before implementing measures to address those problems.[51] In this capacity, the State continuously assesses the domestic context and the corresponding necessary measures so that the State's actions are commensurate to the problem.[52]

Law is a codification of the State's expectations which is a powerful tool because law is not stationary and should not be viewed in such a manner.[53] Law in both its forms, and particularly in its regulatory form, is concerned with continuous improvement. This reflects the ever-shifting nature of inclusive development. It also means that as the economy evolves, domestic legislation changes accordingly so that it aligns to the relevant developing interests of the State.

However, law (and the State) will be impotent if private actors gain a 'free ride' within society. The State needs to be in the position to retain power and autonomy over these private actors through 'regulatory compulsion'.[54] Otherwise, the State risks being divorced from its own economy and unable to act for its society.

In the context of the case studies presented in Chapters 5 and 6, both Ethiopia and Tanzania have attempted to regulate foreign investors through investment legislation. The respective instruments lack the precision that allow either host State to compel foreign investors in a meaningful manner. Both the Ethiopian Investment Proclamation (see Chapter 5, section 5) and the Tanzanian Investment Act (see Chapter 6, section

[51] Haines refers to this as the intersectionality between the risk and the task. For further details, see: Fiona Haines*, The Paradox of Regulation: What Regulation Can Achieve and What It Cannot* (Edward Elgar 2011) 34.
[52] Haines (n 51) 34.
[53] Ogus (n 50) 27.
[54] Ogus (n 50) 54. Morgan and Yeung rightly argue that law needs to constrain the power of such actors. See: Bronwen Morgan, Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (CUP 2007) 6.

5) stipulate that foreign investors need licences for operation in the host State. In spite of this licence requirement, neither of these instruments establish the expected behaviour of foreign investors.

In Ethiopia's case, there are some ambiguous provisions that potentially allow the State to intervene for non-compliance with the Proclamation. Whether the Proclamation is adequately implemented by Ethiopia is debatable, as the statistics and rationale for termination of investor licences are not clear (as analysed in Chapter 5, section 5.1). Similarly in Tanzania's case (examined in section 5.1.2 of Chapter 6), the Investment Centre is established to oversee foreign investment and has the power to sue foreign investors for non-compliance but it is not clear what the boundaries for non-compliance are and whether the Centre uses this power. As examples of regulatory tools, the texts of the Ethiopian and Tanzanian instruments are mere formalities but lack the regulatory substance to compel foreign investors to act in accordance with their respective interests. This is a missed opportunity for regulation.

For law in this regulatory form to realise positive change, regulation needs to establish definitive boundaries for private actors.[55] These boundaries not only determine accepted modes of behaviour but also channel these behaviours, so that they create advantages for the surrounding society.[56] These advantages are not automatically generated but require State action.[57] This is especially important if the State is to retain its relevance as a central actor vis-à-vis its society and also so that

[55] Andreas Georg Scherer, Guida Palazzo, Dorothée Baumann, 'Global Rules and Private Actors: Towards a New Role of the Transnational Corporation in Global Governance' (2006) 16(4) Business Ethics Quarterly 505, 514.
[56] John Braithwaite, Peter Drahos, *Global Business Regulation* (CUP 2001) 32.
[57] Strange rightly argues that private actors are diluting the power of the State to intervene but that does not mean that the State should surrender its power as a central actor. For more details, see: Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (CUP 1996) 14.

the State retains its overarching position in relation to the analytical framework.[58] To that end, this requires a strong State presence where the State undertakes an incremental approach to regulation. Regulation in this form requires the State to pinpoint the problem, agree a solution to the problem through a set of relevant rules, implement these agreed rules and also enforce these rules.[59]

Within the investment context, the regulatory problem is a complex one. The host State has the dilemma of balancing its obligation under IIAs, which require it not to unduly interfere with the assets of foreign investors but also needing to regulate these foreign investors. With this dilemma in mind, domestic legislation for the regulation of foreign investment provides a useful reference point in order to evaluate whether this balance has been adequately achieved.

In that vein, revisiting China's approach to foreign investment is a useful reference point here. China's freedom of choice is evident from its discerning approach to economic growth and also its vigilant use of IIL to further its own interests.[60] This is because China does not simply accept the existing rules, in fact China ideologically resists these rules and further claims that these rules are unsuitable for its needs since they are built on the Western experience.[61] To further China's interests and also as a further way to crystallise its freedom of choice, China strictly regulates the operation of foreign investors within its territory.

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[58] Braithwaite, Drahos (n 56) 34.
[59] Braithwaite, Drahos (n 56) 32.
[60] Anthea Roberts, *Is International Law International?* (OUP 2017) 185.
[61] UNSC, 'Letter Dated 8 July 2016 from the Representatives of China and the Russian Federation to the United Nations Addressed to the Secretary-General' (12 July 2016) UN Doc A/70/982-S/2016/600, para 2; Xi JinPing, 'Report to 19th CPC National Congress: Socialism with Chinese Characteristics for a New Era' (National Congress of the Communist Part of China, 18 October 2017) <http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-11/04/content_34115212.htm> accessed 7 July 2021.

China's Foreign Investment Law (2020) provides a noteworthy example of such regulation. This Act was enacted in January 2020 as a single piece of legislation to replace the Chinese-Foreign Equity Joint Venture Law,[62] the Chinese-Foreign Cooperative Joint Venture Law[63] and the Wholly Foreign-Owned Enterprise Law.[64]

From the outset, Article 1 of this Act highlights that this instrument serves China's interests as a State actor as it stipulates that the purpose of the legislation is to 'standardize the management of foreign investment' and enhance the 'socialist market economy'.[65] That is to say, that from Article 1, China clearly establishes that although foreign investors are welcome within its territory, it still retains power over them and also the activities of these investors need to be conducive to China's interests. This approach is also evident on further reading of the Act.

Article 6 requires all foreign investors to mandatorily comply with domestic laws and that foreign investors must not jeopardise the public interest in China.[66] The State Council of China is responsible for overseeing the management of these foreign investors.[67] Despite this clarity in terms of the expectations of foreign investors, the Act does not identify what measures will be imposed, if any, for non-compliance with Article 6. Such a reference would be useful for foreign investors as a regulatory reference point, so that these private actors are aware of the expected behaviour within China's territory and have a clear idea of how the Act will be implemented.

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[62] Law of the People's Public of China on Chinese Foreign Equity Joint Ventures (1979) (revised on 4 April 1990).
[63] Law on Sino-Foreign Cooperative Joint Ventures (1988) (revised on 31 October 2000).
[64] Law on Wholly-Foreign Owned Enterprises (1986) (revised on 31 October 2000).
See also: Foreign Investment Law of the People's Republic of China (2020) art 42 (hereinafter referred to as China's Foreign Investment Law).
[65] It is clear from the phrasing that this instrument is designed for regulation of foreign investment, which must be aligned with China's development and its socialist market ideals. See: China's Foreign Investment Law (n 64) art 1.
[66] Foreign Investment Law of the People's Republic of China (n 64) art 6.
[67] Foreign Investment Law of the People's Republic of China (n 64) art 7.

Within the Foreign Investment Law (2000), China has specified that the national treatment principle applies to the pre-establishment stage of foreign investment but certain sectors are exempted from the application of this principle because they are subject to the 'negative list' that the State Council updates.[68] This means that in terms of the treatment of foreign investors, China reserves the right to differentiate treatment for domestic investors in accordance with certain sectors and industries.[69]

Article 4 constrains (or more simply, excludes) the operation of foreign investors within these areas – the ability to constrain private actors is an important aspect of regulation.[70] China retains a strong grasp of its autonomy over its economy, especially since foreign investors are not permitted to operate within the 'negative list' sectors.[71] Agriculture, electricity and telecommunications are among the main industries that are on the negative list.[72] If foreign investors operate in contravention to the 'negative list', then all operations must be terminated and China retains the right to intervene by 'disposing of stock shares and assets'.[73]

The negative list is not strictly part of this legal instrument but is part of a separate document that is amended annually by the State. The ability to amend the negative list allows China to retain the further flexibility for future change without affecting the stability of the Act. Additionally, the negative list highlights China's strategic areas where it wants to retain control and so designates these sectors to domestic investors only.

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[68] China's Foreign Investment Law (n 64) art 4.
[69] China's Foreign Investment Law (n 64) art 4.
[70] Braithwaite, Drahos (n 56) 53.
[71] Foreign Investment Law (n 64) art 28.
[72] National Development and Reform Commission (China), '*国家发展改革委商务部关于印发*' (NDRC, 10 December 2020) <https://www.ndrc.gov.cn/xxgk/zcfb/ghxwj/202012/t20201216_1252897_ext.html> accessed 1 July 2021.
[73] China's Foreign Investment Law (n 64) art 36.

This instrument is noteworthy because it reflects China's regulatory stance, where China is maintaining its position as a central actor. Nonetheless, the Foreign Investment Law is not a perfect template for developing States, but China's approach is a valuable reference point. China has strategically planned with its evolving economic position and factored in future change; for example, the aforementioned 'negative list' is adaptable and demonstrates China's prudent foresight for future change. This is practical example of China's use of regulation, as it has designed legislation that has longevity but also establishes its role as a State vis-à-vis foreign investors so that it can continue harnessing foreign investment for its own ends. To that end, further study of the implications of this Law is warranted in order to assess whether it sufficiently regulates foreign investors. However, this investigation is not within the scope of this thesis.

Taking China's approach into account for guidance, developing States need reassess their current positions in terms of their economy and society. From there, they need to pinpoint interim goals that they want to achieve and whether they would benefit from excluding or including foreign investors within these contexts. Only by doing so can these developing States establish regulatory goals through law in order to meaningfully further this foundational principle. This domestic framework needs to be well-established before the host State can begin to extend its strategies to external affairs, such as investment agreements. The domestic frameworks 'set the scene' for the host State's expectations of foreign investors within their territory. Once these expectations and boundaries are clearly established, the host State can give its full attention to IIAs; the next section of this chapter analyses this next stage in relation to the BIT context.

2. APPLYING THE ANALYTICAL FRAMEWORK TO THE BIT CONTEXT

The work of the State and the applicability of the analytical framework do not end with change in relation to the relevant domestic frameworks. The State needs to be proactive also on an international level and the analytical framework is applicable to the IIL and BIT context.

Given how entrenched and established the IIL regime is within the wider framework of international law, it is not possible to completely overhaul it. It is an unfortunate reality that IIL cannot be redesigned from scratch, so that the interests of developing States are incorporated at its core. Accordingly, for change to be positive and realistic, the current framework needs incremental change at the edges. This incremental change is particularly valid for IIL because of its complex and hybrid nature that involves aspects of both public and private international law.[74]

Altering investment agreements is one-step towards rebalancing public-private obligations.[75] As one of the main sources of international investment law, it is vital that investment agreements are reconfigured to ensure that the obligations are less asymmetric.[76] It is particularly important that investment agreements are one of the first points of change because these agreements are the base to which tribunals will refer for clarification and also to determine the obligations of the relevant parties.[77] By

[74] Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Zachary Douglas, Joost Pauwelyn, Jorge Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 12.
[75] Vera Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs' (2017) 50 Vanderbilt Journal Transnational Law 355, 407.
[76] Korzun (n 75) 407; Julie Kim, 'Rebalancing Regulatory Interests Through an Exceptions Framework under the Right to Regulate Provision in International Investment Agreements' (2018) 50 George Washington International Law Review 289, 299.
[77] Kim (n 76) 293; Korzun (n 75) 363.

amending these instruments, BITs will be better aligned with the interests of host States and also better ensure that they can take steps to achieve inclusive development. Although the analytical framework can be applied to BITs generally, for reasons of space within this thesis, the framework has been specifically applied in the context of the preamble, pre-admission, national treatment and general exception provisions. The next section will first focus on the preamble.

2.1. The Preamble

Investment agreements are treaties.[78] As treaties, investment agreements do not operate in vacuum but in the wider scheme of international law.[79] Accordingly, they are subject to the international rules of interpretation – most notably, the Vienna Convention on the Law of Treaties.[80] As a general rule, the treaty must be interpreted in 'light of its object and purpose'.[81] In that regard, the preamble of a given treaty is a significant point of reference and tool for the agreement's interpretation.[82]

The preambles of traditional (older) investment agreements are too often brief, and rarely refer to wider non-investment concerns, such as development or even the public

[78] Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 American Journal of International Law 179.
[79] UNGA, 'Conclusions of the Work on the Study Group on the Fragmentation of international Law: Difficulties Arising from the Diversification of International Law' UNGAOR 58th session UN Doc A/61/10 para 251; Barnali Choudhury, 'Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements' (2011) 49 Columbia Journal Transnational Law 670, 677; Katia Yannaca-Small*, Arbitration under International investment Agreements: A Guide to the Key Issues* (OUP 2010) 573.
[80] Roberts (n 78) 179; Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 ICLQ 573, 581.
[81] The Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 1980, art 31(1).
[82] The Vienna Convention on the Law of Treaties (n 81) art 31(2); James Nedumpara, 'India's Trade and Investment Agreements: Striking a Balance Between Investor Protection Rights and Development Concerns' in Fabio Morosini, Michelle Ratton Sanchez Badin (eds), *Reconceptualizing International Investment Law from the Global South* (CUP 2017) 213.

interest, which are important in the developing State context.[83] The brevity of such preambles can be seen in the China-Zimbabwe BIT (1996),[84] China-South Africa BIT (1997),[85] and the China-Ethiopia BIT (1998) that was examined in Chapter 5.[86]

Brief preambles are problematic because past experience in investment arbitration demonstrates that substantive elements have been interpreted narrowly without due consideration for wider public interest concerns.[87] From these instances, tribunals rely on unimaginative preambles for the interpretation of disputes but do so narrowly.[88] A more expansive preamble is needed in order to better accommodate the interests of developing States within investment agreements.

Bland preambles are no longer enough.[89] Following Argentina's 1998-2002 financial crisis and the investment disputes that followed, there has been a renewed call by States and academics for more balanced investment treaties, particularly in

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[83] Peter Muchlinski, 'Negotiating New Generation International Investment Agreements: New Sustainable Development Oriented Initiatives' in Steffen Hindelang, Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016) 46.

[84] Agreement Between the Government of the People's Republic of China and the Government of the Republic of Zimbabwe on the Encouragement and Reciprocal Protection of Investments (adopted 21 May 1996, entered into force 10 July 1997).

[85] Agreement Between the Government of the People's Republic of China and the Government of the Republic of South Africa Concerning the Reciprocal Promotion and the Protection of Investments (adopted 30 December 1997, entered into force 1 April 1998).

[86] Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments (adopted 11 May 1998, entered into force 1 May 2000).

[87] Howard Mann (a), 'The IISD Model international Agreement on Investment for Sustainable Development: An Introductory Note' (2005) 20 ICSID Review 84, 85; Howard Mann (b), 'Reconceptualizing International Investment Law: Its Role in Sustainable Development' (2013) 17 Lewis & Clark Law Review 521, 537.

[88] For example, in *Biwater Gauff v Tanzania*, it was argued by the foreign investor that the objective of the BIT in question was to provide '[more] favourable conditions for investors' which was stipulated in the preamble of the preamble of the UK-Tanzania BIT.
See: *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22 (24 July 2008) Award, para 333.

[89] Howard Mann (a), 'The IISD Model international Agreement on Investment for Sustainable Development: An Introductory Note' (2005) 20 ICSID Review 84, 85; Howard Mann (b), 'Reconceptualizing International Investment Law: Its Role in Sustainable Development' (2013) 17 Lewis & Clark Law Review 521, 537.

relation to the respective preambles.[90] The preamble needs to be expanded to expressly refer to inclusive development and the public interest. Doing so will provide a striking reminder to States (and also arbitrators, in event of a dispute) that investment needs to mutually benefit both the home *and* host State. Additionally, it is also a reminder of the host State's commitment to its society and the advancement of that society.[91]

The preamble is an important place to embed normative standards, so that these are not relegated to the background, thereby providing better balance between investment and domestic society, so that the former can play a positive role towards inclusive development.[92] This is achieved by reference to specific concepts, such as, *inter alia*: inclusive development, the environment, human health, labour standards and/or human rights.[93] Such explicit references ensure that a more equitable balance is struck between the rights and obligations within investment agreements, so that investment protection obligations are formulated in light of the benefits offered to the host society, which helps bridge the public-private dichotomy.[94]

[90] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017) 263; Catherine Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 26(3) European Journal of International Law 639; Suzanne Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13(4) Journal of International Economic Law 1037 1044.
[91] Spears (n 90) 1044; UNGA (n 79) para 251; Yannaca-Small (n 79) 573.
[92] Spears (n 90) 1044; Karsten Nowrot, 'How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law' (2014) 15 Journal of World Investment & Trade 612, 630.
[93] Nowrot (n 92) 630; Marie-Claire Cordonnier Segger, Andrew Newcombe, 'An Integrated Agenda for Sustainable Development in International Investment Law' in Marie-Claire Cordonnier Segger, Markus Gehring, Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law 2010) 126; Spears (n 90) 1044.
[94] Mann (n 89) 85.

In more recently concluded investment agreements, there is evidence of this change in respect of the formulation of the preamble.[95] As highlighted in Chapter 6, the preamble of the China-Tanzania (2014) BIT admirably refers to 'corporate social responsibilities and… sustainable economic development'.[96] The preamble of China's BIT with Uzbekistan briefly recognises that development needs to be sustainable.[97] It is laudable that China is negotiating agreements and preambles that make reference to wider development, which reflects China's freedom of choice. Nonetheless, these preambles lack specific content in relation to the public interest, which would help ensure that investment enables inclusive development and is interpreted in this light.

Since China has concluded 145 BITs and 23 treaties with investment provisions,[98] it has carved out its own experiences within the IIL regime and tailored its investment agreements according to its needs.[99] On evaluation of China's more

[95] For example: Reciprocal Investment and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (adopted 3 December 2016) art 18, art 15; Agreement Between Canada and Mongolia for the Promotion and Protection of Investment (adopted 8 September 2016, entered into force 24 February 2017) art 14.

[96] Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments (adopted 24 March 2013, entered into force 17 April 2014), preamble.

[97] Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments (adopted 19 April 2011, entered into force 1 September 2011), preamble.

[98] UNCTAD, 'International Investment Agreements Navigator: China' (*UNCTAD*, 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> accessed 14 September 2021.

[99] Julian Chaise, 'Introduction: China's International Investment Law and Policy Regime – Identifying Three Tracks' in Julian Chaise (ed), *China's International Investment Strategy: Bilateral, Regional and Global Law and Policy* (OUP 2019) 3.

China roughly accounts for 5% of global BITs and 6% of treaties with investment provisions. As the world's largest economy, the United States only accounts for 1.6% of BITs and 17.7% of treaties with investment provisions. However, it should be noted that China concluded its first BIT in 1994, whereas the United States has been concluding BITs since 1982 and devised the FCN – the precursor to the BIT.

UNCTAD, 'International Investment Agreements Navigator: United States of America' (*UNCTAD*, 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/223/united-states-of-america> accessed 26 May 2019.

recent BITs, there is a pattern of increased complexity and references to non-investment norms within the preambles of these instruments.[100] On that note, it would seem that China is seeking proactive change within IIL and is actively attempting to do so – a necessary approach in the context of the analytical framework.[101] From that perspective, China is embodying the central role as a State and exerting its freedom of choice, so that it puts its 'stamp' on investment agreements and tailoring the relevant text of the preamble to suit its wants.

Although the China-Tanzania BIT reflects signs of positive change, it is not clear whether Tanzania is developing a pattern for expanding the preambles of its investment agreements, as other BITs that it has concluded do not include wider social references that incorporate the public interest.[102] In contrast to China, Tanzania has only concluded 20 BITs, only ten remain in force and only three of these agreements contain express reference to public interest issues, such as sustainable development or the environment. The fact that Tanzania has not concluded the same number of BITs as China highlights that it is more inexperienced.

[100] China-Tanzania BIT (n 96) preamble; China-Uzbekistan BIT (n 97) preamble; Agreement Between the Government of the Republic of Turkey and the Government of the People's Republic of China Concerning the Reciprocal Promotion and Protection of Investments (adopted 29 July 2015, entry into force 11 November 2020) preamble.
[101] Roberts (n 21) 416; Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the International Treaty System' (2013) 107 American Journal of International Law 45, 48.
[102] Agreement Between Government of the Republic of Mauritius and Government of the United Republic of Tanzania on the Promotion and Protection of Investments (adopted 4 May 2009, entered into force 2 March 2013), preamble; Agreement Between the Swiss Confederation and the United Republic of Tanzania on the Promotion and Reciprocal Protection of Investments (adopted 8 April 2004, entered into force 6 April 2006) preamble; Agreement on Encouragement and Reciprocal Protection of Investments Between the United Republic of Tanzania and the Kingdom of the Netherlands (adopted 31 July 2001, entered into force 1 April 2004) preamble; Agreement Between the Government of the United Republic of Tanzania and the Government of the Italian Republic on the Promotion and Protection of Investments (adopted 21 August 2001, entered into force 25 April 2003) preamble.

On that note, it is even more important that Tanzania, as a State actor, negotiates investment agreements to meet its needs and ensures that the preambles of such agreements expansively refer to the public interest previously argued. Taking such action will help Tanzania to make strides towards realising freedom of choice, the public interest and law as an enabler, which are foundational pillars of the analytical framework.

This is also a similar issue in relation to Ethiopia. As an older and outdated investment agreement, the preamble of the China-Ethiopia BIT does not reflect a conscious attempt to incorporate Ethiopia's interests in relation to its freedom of choice (see Chapter 5, section 6). The preamble of this agreement bears the hallmarks of the more orthodox (Western) text that is geared towards investment protection, as the text briefly refers to economic benefit and cooperation. It fails to refer to the public interest or even the interests of Ethiopia as a developing host State. Given that this is an outdated approach and an older investment agreement – one of the first that Ethiopia concluded, it would be advised the parties appraise the text of the preamble and the agreement. As a legal instrument, it should be renegotiated and revised with a more detailed preamble.

On review of the preambles of Ethiopia's BITs, there is a similar trend towards inconsistency. That is to say, Ethiopia does not demonstrate consistent practice regarding the expansion of the preambles of its BITs, even in the more recently concluded treaties, for example in the Brazil-Ethiopia BIT (2018)[103] or Ethiopia-South

[103] The preamble states that, the parties recognise 'the essential role of investment in promoting sustainable development, economic growth, poverty reduction… reassuring their regulatory autonomy and policy space'.
Agreement Between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation (adopted 11 April 2018, not yet in force) preamble.

Africa BIT (2008).[104] The preamble of Ethiopia's BIT with Brazil is noteworthy. The preamble of this BIT specifies that the treaty needs to be read in the context of sustainable development as well as the host's regulatory autonomy and that investment needs to contribute to poverty reduction.[105] Further, the Ethiopia-South Africa BIT also makes explicit reference to 'sustainable economic growth and development, when accompanied by appropriate domestic policies.'[106] These preambles are similar in the way that they refer to sustainable development but have been worded in different ways.

From a South-South context, Brazil and South Africa are hesitant and critical of the IIL regime,[107] and it is highly likely that Brazil and South Africa constructed or advocated for the given text within these preambles that refers to sustainable development rather than Ethiopia. This is positive because these more economically influential States (like China) set an example for developing States, such as Ethiopia and Tanzania, to tailor and amend the preambles of BITs rather than following the orthodox (Western) template. On that note, it is even more important that Ethiopia and Tanzania advance freedom of choice and public interest by devising their preambles by adopting a clearer stance within negotiations, so that their interests are better

[104] Agreement Between the Government of South Africa and the Government of the Federal Democratic Republic of Ethiopia for the Promotion and Reciprocal Protection of Investments (adopted 18 March 2008, not yet in force) preamble.
[105] Brazil-Ethiopia BIT (n 103) preamble.
[106] Ethiopia-South Africa BIT (n 104) preamble.
[107] Fabio Morosini, Michelle Ratton Sanchez Badin, 'Reconceptualizing International Investment Law from the Global South: An Introduction' in Fabio Morosini, Michelle Ratton Sanchez Badin (eds), *Reconceptualizing International Investment Law from the Global South* (CUP 2018) 19, 21; Jean Kalicki, Suzana Medeiros, 'Investment Arbitration in Brazil: Revisiting Brazil's Traditional Reluctance Towards ICSID, BITS and Investor-State Arbitration' (2008) 24(3) Arbitration International 423, 442; Yoram Haftel, Alexander Thompson, 'When do States Renegotiate Investment Agreements? The Impact of Arbitration' (2018) 13 Review of International Organizations 25, 30.

incorporated within the relevant text. In relation to preambles, how should the text be reconfigured?

A preamble for inclusive development should recognise that investment is and must be viewed as an enabler for inclusive development in the host State. This development must be conducive to the host State's society and the wider public interest. Furthermore, in light of freedom of choice, the host State retains a right to regulate for the public interest.

The preamble needs to expressly refer to the public interest and also relevant IHRL instruments. An express reference to the International Covenant on Civil and Political Rights (ICCPR)[108] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[109] would be useful reminder of public interest commitments that both States have in respect to their societies.

These references are necessary as they provide a significant reminder of public interest concerns that States need to be mindful of but do not feature at the forefront of the existing IIL framework. Moreover, by reference to these instruments in the preamble of investment agreements, this serves as a necessary prompt to State parties of their wider obligations and commitments to IHRL, which need to be considered in tandem with their investment obligations.

The preamble needs to also supported by other reforms within an investment agreement, so that these instruments can help contribute towards inclusive development. The next section provides further recommendations in light of the pre-admission provision.

[108] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[109] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

2.2. The Pre-Admission Provision

It is difficult for a given State to manage foreign investors or require them to adhere to rules once those investors have entered and are established within a given economy. The State can intervene more readily before this point, which also helps reassert their position as a central actor and their regulatory power over private actors, such as foreign investors. Pre-admission provisions within BITs are generally broad. Without specificity, these provisions do not clearly delineate the expectations of the host State or their interests. This is particularly important in the context of developing States, as they need to better ensure that the rules regarding admission of investment are clear, so that they can regulate, by determining where and how they can intervene.

A clear definitive pre-admission provision is a signal of the host State's intention to regulate and its ability to act (or freedom of choice). Considering that this provision is also tied to the national treatment provision (examined in the next section), establishing boundaries within this provision is a useful tool for developing host States. Through careful articulation and in conjunction with the national treatment provision, developing host States can ensure that they retain the ability to protect domestic industries and investors from external actors. It is ill-advised and potentially damaging for developing host States to grant unlimited and unfettered access to foreign investors.

Where the provision may be broad, the standard of treatment will fall back on the local laws of the host State, which previous chapters have identified as lacking detail and being insufficient (see Chapter 4, section; 3.3; Chapter 5, section 6.1.2; Chapter 6, section 6.1.2). Arguably, developing host States should look to comprehensively reinforce their domestic frameworks and also extend but also, ensure that the text of

this provision is precisely worded. In some cases, States have kept this pre-admission provision brief and merely used it to outline the scope of the BIT in question.[110]

In the China-Uzbekistan BIT,[111] Article 2 specifies that investors are subject to the host laws and regulations but does not stipulate whether this applies after the admission phase of the investment. Instead, it places an obligation on the host State to facilitate the provision of visas and work permits for the investors from the home State. In China's most recently concluded BIT (with Turkey),[112] Article 2(1) similar establishes that investments and investors are subject to domestic laws and regulations. This article does not provide further detail as to what pre-admission requirements are expected of foreign investors.[113]

The pre-admission provision needs to identify what (if any) rights are applicable to foreign investors before establishment within the host State. It is worth the host State specifying whether limitations are applicable in relation to certain sectors or industries.[114] Furthermore, to maintain the flexibility of the exemptions or limitations, this provision should stipulate that the host State retains the right to amend this list of sectors or industries.[115] Although it is not an investment agreement, this approach is reminiscent of the aforementioned Foreign Investment Law enacted in China because China has clearly thought about which sectors it is regulating. Arguably, this regulation

[110] Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (adopted 3 December 2016, not yet in force) art 3.
[111] China-Uzbekistan BIT (n 97) art 2.
[112] China-Turkey BIT (n 96).
[113] Instead, it strangely refers to fair and equitable treatment, as full protection and security. See: China-Turkey BIT (n 96) arts 2(3) – 2(4).
[114] Howard Mann, Konrad von Moltke, Luke Eric Peterson, Aaron Cosbey, 'IISD Model International Agreement on Investment for Sustainable Development' (*International Institute for Sustainable Development*, April 2005) 4 <https://www.italaw.com/sites/default/files/archive/ita1027.pdf> accessed 1 July 2021.
[115] Mann, von Moltke, Peterson, Cosbey (n 114) 4.

can also apply to the BIT context within this provision. This provision is a good opportunity for the host State to reflect on what it needs for freedom of choice and by setting limitations, it is setting boundaries for regulation, which reflects law's dual function. On that note, this provision needs to be complemented by the national treatment provision, which will be analysed in the next section.

2.3. The National Treatment Provision

The national treatment provision is interlinked with the previously mentioned pre-admission provision because the scope of national treatment needs to be specified within the BIT. That is, whether the national treatment provision is also applicable to the pre-admission stage of investment.

By carefully designing this provision, national treatment confers an opportunity on the host State to reassert its role as a central actor and ensure that its society benefits as an aspect of the public interest. This is because it allows it to insulate certain sectors and domestic investors from stronger (foreign) competition, so that they have a chance to flourish. Arguably, these domestic sectors and investors are part of the fabric of the host State's society, so by insulating them, the State is taking a step towards the public interest.

This provision is also a clear indication of the State's freedom of choice. Referring back to China as an example, in its early BITs, China omitted any mention of national treatment in order to preserve space for its own economy, so that it did not have to provide like-treatment to foreign investors. As a developing economy and capital-importing State, China willingly shielded its investors from outside competition because it was internally-needed. As identified in Chapter 4, it is unlikely that other

developing States can emulate China's approach by excluding this principle completely. IIL has evolved significantly since China's early BITs that were concluded in the 1980s and 1990s. Additionally, other developing States do not have China's economic clout to completely exclude this provision, which is now commonplace and entrenched within BITs.

As an alternative solution, the national treatment provision needs to be carefully articulated in the agreements that developing States negotiate and conclude. The China-Tanzania BIT provides a good example here. Article 3(1) recognises that foreign investment is subject to domestic laws and that the host State is responsible for the like-treatment of investments and investors. The reference to domestic laws is a useful phrasing within the text of this article. This is because, it allows a degree of flexibility, where domestic laws can be

Article 3(1) recognises that foreign investment is subject to domestic laws and that the host State is responsible for the like-treatment of investments and investors. The fact that this article refers to domestic laws means that this article also allows a degree of flexibility and reflects the host State's freedom of choice. This is because, domestic laws can be amended or new instruments can be enacted without affecting the operation of the national treatment principle within this provision, for example, China's Foreign Investment Law.

In Article 3(2) of the China-Tanzania BIT, the host State may retain the ability to grant more favourable treatment on the proviso that these steps are necessary for 'local entrepreneurship'. This article, however, does not provide definitions of like-treatment nor local entrepreneurship.

A more definitive approach to this provision would be beneficial in order to establish its scope, especially in relation to the developing host State's capacity to act and enable the public interest. For greater legal certainty, the national treatment provision needs to clearly establish to what extent this principle is applicable and its limitations. In that regard, like-treatment may be exempt in relation to certain sectors and these exemptions are subject to national laws as seen in China's approach.

Additionally, as a demonstration of freedom of choice and the public interest, it is important that there is a definition of like-treatment outlined within in this provision.[116] Experience from investment arbitration indicates that tribunals have wide discretion when interpreting like-treatment.[117] Arguably, the aforementioned preamble provides context and potentially an indication of the intention of the parties to the BIT but this could be further clarified in relation to this provision.

In that regard, like-treatment needs to be identified on factors that include (but are not limited to): its impact on the local level (particularly the society of the host State) and the public interest.[118] Again, this is another reason why the public interest in the preamble and the domestic context need to be clearly specified, so that national treatment principle elucidates when it is used within other provisions, such as this one. By reference to the public interest, the host State can limit the application of national treatment as a form of regulation, so they can restrict investments that pose a danger to environmental or human health.[119] That is to say, the host State can exclude like-

[116] Mann, von Moltke, Peterson, Cosbey (n 114) 5.
[117] In *S.D. Myers v Canada*, the Tribunal highlighted that the protection of the public interest can exempt a host State from applying like-treatment but this needs to be considered in terms of the environment and the distortive effect of non-application of this principle.
See: *S.D. Myers Inc. v Government of Canada* (1976) UNCITRAL, partial award, para 250.
[118] Mann, von Moltke, Peterson, Cosbey (n 114) 5; Morocco-Nigeria BIT (n 110) art 6(3)(a).
[119] Mann, von Moltke, Peterson, Cosbey (n 114) 5.

treatment, when there is a danger posed to the well-being of its society, thereby recognising their commitment and public-facing role.

Additionally, additional factors for the definition of like-treatment also need to be considered, so that the scope of the national treatment provision is defined. These additional factors, include: implications for third parties; the sector that the investment involves; the purpose of the measure adopted; the relevant instrument that the measure refers to, and other additional factors that may affect the investment or investor.[120]

When considering the definition of like-treatment with relation to this provision, it is important that the host State takes that conscious step towards freedom of choice, by reflecting on the extent of the provision. This means the State needs to establish whether it is applicable at the pre-establishment or admission stage of investment and also what it considers like-treatment to mean in the context of this provision. There is a pressing-need for developing host States not to simply acquiesce to maintaining the status quo within BITs. These States need to actively formulate provisions that work to their advantage and take a more hands-on role in that regard. This argument also applies to further aspects of BITs, such as the general exception provision.

2.4. The General Exception Provision

The general exception provision permits host States to lawfully deviate from their obligations under a given agreement. These provisions are necessary because they create space for the host State to regulate for the public interest. It also gives them

[120] Mann, von Moltke, Peterson, Cosbey (n 114) 5; Morocco-Nigeria BIT (n 110) art 6(3)(a).

greater autonomy or freedom of choice to adopt domestic measures necessary for the public interest without falling foul of their investment obligations. In that way, they confer a degree of flexibility on these States, as these clauses allow the possibility for them to adopt public interest measures which may be contrary or incompatible with their investment obligations.[121]

In the event of a dispute, rather than the tribunal having to weigh up the actions of the host State in relation to compatibility of investment obligations vis-à-vis wider societal obligations, an exception clause would provide the host with a legitimate reason for derogating from its investment obligations. In essence, the respective tribunal would determine whether the domestic measure was adopted lawfully and therefore a breach of the treaty has not taken place.[122] In that context, these general exception provisions are an important tool for developing host States, if used effectively, to take steps towards inclusive development as this provision embodies the three foundational pillars of the analytical framework.

Within the last five years, the legal literature on this topic has also rapidly expanded, especially in relation to the right to regulate.[123] As an emerging area of not only international law but also within the framework of IIL, general exception clauses

[121] United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body (20 April 2005) WT/DS285/AB/R, para 291.
[122] Spears (n 90) 1060.
[123] This has been an interesting development for this author who was working in the field in various capacities. As a postgraduate student studying international investment law in 2009, the topic of regulatory autonomy was unheard of and highly unusual to even discuss it during workshops. Instead, a doctrinal approach to IIL was encouraged – with a strong focus on the interpretation of the standards for investment protection. As a legal researcher, Gus Van Harten, David Schneidermann and M. Sornarajah were considered to be innovative pioneers for conceptualising emerging public-private tensions within IIL.
For example, see: Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Routledge 2016); Aikaterini Titi, *The Right to Regulate in International Investment Law* (Hart 2014); Steffen Hindelang, Markus Krajewski, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016).

are a recent addition to investment agreements, and so remain rare.[124] The addition of such provisions is a welcome development within this field, and also reflects a significant aspect of the ongoing evolution of investment agreements.[125]

As examined in Chapter 6, Article 10 of the China-Tanzania BIT (2014) is a remarkable example of a general exception clause. It is a notable and unexpected inclusion because both States are relative late-comers to the IIL regime (for further analysis of this provision, see Chapter 6). Furthermore, neither China nor Tanzania have been particularly vocal about recognition of the public interest vis-à-vis investment agreements, so the fact that the parties negotiated such a clause is striking.

Although this is a positive step, neither China nor Tanzania have been consistent in inserting general exceptions in their investment agreements, which could present future challenges. Tanzania has ten BITs in force,[126] and only two BITs provide for an explicit exception clause that recognise the host's ability to regulate in the public interest.[127] However, the formulation of this clause is not the same: as one refers to

[124] Kenneth Vandevelde, 'Rebalancing Through Exceptions' (2013) 17 Lewis and Clark Law Review 449, 451.
[125] Vandevelde (n 124) 451; Vera Korzun. 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs' (2017) 50 Vanderbilt Journal of Transnational Law 355, 365.
[126] UNCTAD, 'International Investment Agreements Navigator: Tanzania' (*UNCTAD*, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/222/tanzania-united-republic-of> accessed 26 August 2021.
[127] Agreement Between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (adopted 17 May 2013, entered into force 9 December 2013) art 17; Agreement Between the Government of the Republic of Finland and the Government of the United Republic of Tanzania (adopted 19 June 2001, entered into force 30 October 2002) art 15.

health, safety and the environment,[128] whilst the other refers to exception applying during times of war and armed conflict.[129]

Developing States, including Tanzania, need to foster a clear and consistent approach within their investment agreements, especially in relation to their general exception clauses. Such an approach means that the State is attuned in relation to its needs and the direction it wants to pursue those needs. Moreover, this signals the State's intentions (as freedom of choice) and their regulatory commitment to the public interest in relation to their respective society.

On that note, this foundational principle needs to be identified within this provision so that the host State retains the autonomy to regulate for the public interest.[130] By referring to the public interest within this general exception provision, there is potential for flexibility that means that the investment protection measures within the given BIT are not strictly applicable, if this provision is utilised.[131] The purpose of this exception clause is to balance the rights, obligations and interests of both the home and host State.[132] This provision should clearly identify that in pursuit of IHRL, host States have the right to adopt measures for the public interest. In derogating from their investment obligations, in a *bona fide* and non-discriminatory manner, host States will not violate the agreement if this provision is carefully designed to accommodate their needs, so that they retain the flexibility to regulate and also work progressively towards inclusive development. Inclusive development is vital for all States, since it is an ever-shifting goalpost concerned with the advancement of society. It is particularly imperative in the

[128] Canada-Tanzania BIT (n 127) art 15. Note: art 10 which also clarifies the scope of expropriation which can be derogated in light of the exemptions.
[129] Finland-Tanzania BIT (n 127) art 15.
[130] Mann, von Moltke, Peterson, Cosbey (n 114) 27.
[131] To prevent misuse of this provision and to ensure that investors are not disadvantaged, it is worthwhile to identify that this provision is also subject to due process.
Mann, von Moltke, Peterson, Cosbey (n 114) 14.
[132] Morocco Nigeria BIT (n 110) 13-14.

developing State context. To that end, the next section considers the further application of the analytical framework as it affirms that the foundational pillars are necessary in IIL in order to ensure that IIL becomes a more equitable playing field.

3. FURTHER APPLICATION OF THE ANALYTICAL FRAMEWORK TO IIL: TOWARDS A MORE EQUITABLE 'PLAYING FIELD'

There is no "one-size-fits-all"-approach to inclusive development. Equally, different States have background contexts, which affects how they approach investment.[133] This means that the starting-point will vary for each developing State and it is, unfortunately, not an even playing-field.[134] Developing (and developed) States are increasingly vocal about the need for change within the IIL regime.[135] Although Brazil has been less explicit about its dissatisfaction of the regime, its reluctance to ratify investment agreements is telling. To date, Brazil has only ratified two BITs.[136]

South Africa has been more explicit (than Brazil and also other developing States), especially in relation investment agreements. In 2009, the South African Department of Trade and Industry published a policy paper.[137] The paper saliently highlighted that

[133] Roberts (n 23) 412.
[134] Roberts (n 23) 412.
[135] For further details, particularly in light of investment arbitration, see: Anthea Roberts, Zeineb Bouraoui, 'UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims' (*EJIL Talks!*, 6 June 2018) <https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/> accessed 11 July 2021.
[136] Brazil has only ratified BITs with Angola and Mexico. See: UNCTAD, 'International Investment Agreements Navigator - Brazil' (UNCTAD, July 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil> accessed 11 July 2021.
[137] Department of Trade and Industry (South Africa), 'Bilateral Investment Treaty Policy Framework Review' (*Department of Trade and Industry*, June 2009) <https://www.gov.za/sites/default/files/gcis_document/201409/32386961.pdf> accessed 11 July 2021.

existing investment agreements are antiquated instruments where the interests of foreign investors from developed States are represented.[138] Given that South Africa has identified that the existing state of play does not accommodate its needs as a developing States, this is a factor that other developing States should bear in mind.[139]

The existing models for development and investment are not geared towards the interests of developing States. As newly-industrialised economies, Brazil, China and even South Africa have greater influence. With that influence also comes a higher degree of assurance to act. These aforementioned examples of State approaches to show that existing blueprints in terms of development and investment are not just simply accepted by these actors. Instead, these States have identified that the existing modes of practice are not compatible with their needs and that change (through freedom of choice) comes from within.

As previously argued, no State has the same experience or history. Each path for inclusive development is individual to that State. The main point that developing States can take into consideration is that they have positive attributes that come from within and these attributes need to inform their decisions for change. In other words, developing States should try to emulate the confidence and incremental steps to investment China, Brazil and South Africa have adopted. These example States have not, just simply, accepted and applied the existing rules. Rather, they have tailored these investment obligations (or even, refrained from engaging with these obligations) in order to meet their development needs.

[138] Department of Trade and Industry (South Africa) (n 137) 11.
[139] Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 347.

Sornarajah argues that balanced treaties with more extensive preambles and general exception provisions are not the answer.[140] He maintains that inconsistent State practice, divergent political systems and a hybrid approach are not suitable to achieve the desired change to IIL that developing States desire.[141] Instead, he suggests that a pre-screening process is undertaken before the dispute arises.[142] According to this scholar, if a dispute remains, the respective States should engage in a State consultation process, so that the dispute is mediated and the recourse to arbitration is limited.[143] Other scholars argue that the IIL is so deep-rooted, change to IIAs is difficult and will be slow due to State reluctance to negotiate.[144]

Nonetheless, IIAs still need change even if this change is slow.[145] States need to progressively work towards building on IIA best practice because this will help overcome inconsistent State practice and also allow flexibility for the heterogeneity of States.[146] After all, States have different context and experiences, so naturally their political systems will differ. These differences should be celebrated and allow for diffuse approaches, rather than an expectation of conformity among these State actors. Diffuse approaches are welcome considering that IIL's hybrid nature means

[140] Sornarajah (n 139) 352.
[141] Sornarajah (n 139) 352, 362.
[142] Sornarajah (n 139) 387.
[143] Sornarajah (n 139) 387.
[144] St. John further identifies that sunset clauses within BITs, which mean that measures for investment protection will apply in force after a given treaty is terminated. She argues that developing States are unaware of these clauses and are also reluctant to question of validity of these clauses.
Taylor St. John, *The Rise of Investor-State Arbitration: Politics, Law and Unintended Consequences* (OUP 2018) 244-245; Federico Lavopo, Lucas Barreiros, M. Victoria Bruno, 'How to Kill a BIT and Not Die Trying: Legal and Political Challenges of Denouncing and Renegotiating Bilateral Investment Treaties' (2013) 16 Journal of International Economic Law 869, 885.
[145] Andrew Newcombe, 'Developments in IIA Treaty-Making' in Armand de Mestral, Céline Lévesque (eds), *Improving International Investment Agreements* (Routledge 2012) 22; Lavopo, Barreiros, Victoria Bruno (n 144) 885; Timothy Meyer, Tae Jung Park, Renegotiating International Law (2018) 21 Journal of International Economic Law 655, 676.
[146] Newcombe (n 145) 22.

that it uses private models for dispute resolution (as identified in Chapter 3, section 2.2), but insights and the participation from developing States could provide alternative solutions. The aforementioned approaches in section 2 of this chapter highlights this argument, as NICs such as Brazil, China and South Africa are already providing other ways forward in relation to IIAs.

These States are able to strategically plan their approaches to IIAs since they have garnered experience in relation to the IIL regime and settled into their identity as States. This means they already have a head-start on developing States, which is a reminder that the IIL playing field between States is not level. In order to equalise this disparity between States, developing States need to be able to develop in an inclusive manner so that they can negotiate for the IIAs and attract the FDI that they want. To that end, this justifies the analytical framework since it provides a lens for identifying how these developing States can achieve this change.

Arguably, the existing IIL paradigm further entrenches the uneven ground between States and expecting developing States to conform is not conducive to positive change.[147] This is why the analytical framework as a way of identifying changes to better help developing States to participate within the IIL regime without compromising their needs and in a way that acknowledges that these State actors do not have the same starting-points. Developing States, for example, do not have the financial and even expertise to continuously defend measures adopted for inclusive development or as part of the public interest.[148] In order to defend these measures, vital resources are diverted from State budgets. These budgets could have been used to improve the

[147] St. John (n 144) 37-238.
[148] St. John (n 144) 253; Gus Van Harten, *Trouble with Foreign Investor Protection* (OUP 2020) 1-2; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2008) 2.

standard of living, for example, by progressing the right to food, which is an important aspect of the foundational principle of the public interest and the overall achievement of inclusive development.

The uneven playing field within IIL need to be addressed from the outset if developing States are to access FDI to their advantage. Since IIAs are a main source of IIL, amending these instruments is the much-needed first-step. Doing so will also allow developing States to build on their experiences and actively participate through the creation of their own IIAs. By being active participants, developing States will be enabled to take ownership for change and also be able to reassert themselves as central actors. Developing States need to be reminded of their centrality and embrace this centrality if they are to oversee and operationalise the foundational principles for inclusive development. Otherwise, developing States will remain on the periphery. Indeed, change in relation to the nexus between investment and development is necessary in order to recalibrate both to be more inclusive.

Change first starts with acknowledgement that the existing conceptualisations of development are too narrow and rigid to be of use to developing States. In this narrow form, development is a concept that is not actually inclusive. Additionally, developing States must reject the idea that investment through law will lead to automatic modernisation as a form of development. This is because these concepts and legal frameworks have been designed by developed States and their desire to protect their interests.[149] Arguably the interests of developing States need to start with well-articulated norms to bolster their inclusive development.

[149] Sornarajah (n 139) 410.

CONCLUSION

The achievement of development is not the ultimate aim of IIL. In their traditional form, investment agreements are tools for investment promotion.[150] Indeed, investment agreements were originally borne out of the need to clarify investor protection standards, in the form of substantive and procedural provisions, partly due to ambiguity within customary international law.[151] Investment agreements were never envisaged as vehicles for development. Furthermore, the original purpose of investment agreements was to ensure greater equity between investors and the host State, so that investors were not overly reliant on diplomatic protection should their assets be expropriated. With these considerations in mind, the rights of the host State were relegated to the background in investment agreements. This chapter has suggested revisions that developing States can and should adopt in relation to their domestic frameworks and investment agreements in order to ensure greater attention on inclusive development.

IIL has undergone significant change and investment agreements need to evolve in order to reflect these changes. Recent investment agreements have not only increased in terms of quantity, but also in relation to the length of these agreements and their complexity. An increasing number of investment agreements are notably including, *inter alia*, references to the public interest within their preambles and general exception provisions. Further changes are also necessary, for example, in relation to the pre-admission provision and national treatment provisions. This chapter focused

[150] For example: Treaty for the Promotion and Protection of Investments, Germany and Pakistan (adopted 25 November 1959, entered into force 26 March 1963) 457 UNTS 24, preamble.
[151] Newcombe (n 145) 16.

on these changes. That is, positive changes that should be made to investment agreements, as a means to ensure greater recognition for inclusive development, so that developing States can make this important step to advancing their societies.

CHAPTER 8 – CONCLUDING REMARKS

1. REVISITING THE KEY ISSUES

As identified throughout this thesis, FDI is an important source of capital for State economies. This is particularly true for the developing States because where there is a lack of domestic capital or available financial resources, these actors are keen to attract FDI to plug this economic gap.[1] FDI has the potential to increase job opportunities, transfer of knowledge, skills and technology – these potential benefits make FDI even more attractive to developing States.[2] Accordingly, these States have prioritised attracting FDI as a key policy goal.[3]

If FDI is to facilitate developing States to achieve the aforementioned potential, then it needs to enable knowledge, skills and technological transfers (referred to by economists as spillovers), so that it results in improved skills and wages within the

[1] Henrik Hansen, John Rand, 'On the Causal Links Between FDI and Growth in Developing Countries' (2005) UN WIDER Research Paper No. 2005/31, 1 <https://www.econstor.eu/bitstream/10419/63300/1/500775478.pdf> accessed 1 August 2021; Padma Mallampally, Karl Sauvant, 'Foreign Direct Investment in Developing Countries' (1999) 36 Finance and Development 34, 35; Annabel Gonzalez, Christine Zhenwei Wiang, Peter Kusek, '2017-2018 Global Investment Competitiveness Report: Foreign Investor Perspectives and Policy Implications' (The World Bank, 25 October 2017) 1 <https://www.worldbank.org/en/topic/competitiveness/publication/global-investment-competitiveness-report> accessed 2 August 2021.

[2] For example, see: Laura Alfaro, Areendam Chanda, Şebem Kalemli-Őzcan, Selin Sayek, 'FDI Spillovers, Financial Markets and Economic Development' (2003) IMF Working Paper WP/03/186, 3 <https://www.imf.org/external/pubs/ft/wp/2003/wp03186.pdf> accessed 2 August 2021; Roger Smeets, 'Collecting the Pieces of the FDI Knowledge Spillovers Puzzle' (2008) 23(2) The World Bank Research Observer 107, 109-110.

[3] Dirk Willem Te Velde, 'Government Policies Towards Inward Foreign Direct Investment in Developing Countries: Implications for Human Capital Formation and Income Inequality' (OECD FDI, Human Capital and Education in Developing Countries Technical Meeting, Paris, 13-14 December 2001) 2-3 <https://www.oecd.org/dev/2698620.pdf> accessed 1 August 2021.

local workforce.[4] Theoretically, increased wages should lead to a correlative rise in household incomes; in turn, this means that these households will have a better standard of living due to improved economic access to food, which is a starting-point for the right to food.[5] Additionally, these households will have improved access to healthcare and education.[6] FDI can be an important vehicle for positive change and development if developing States can use it to their advantage.[7] The desire to attract FDI forms the background context to this thesis and the issues examined.

Yet, the competition for FDI is another dimension to the background context which needs to be acknowledged. Developing States are not the only States in pursuit of FDI, as developed States and NICs also seek this capital. This adds a layer of complexity and disadvantage that developing States need to navigate as they are in competition to attract FDI. In order to attract FDI, developing States need to focus their efforts on creating favourable conditions and negotiating favourable terms within IIAs, so that the respective resources are allocated equitably.

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[4] Beata Smarzynska Javorcik, Marian Spatareanu, 'Disentangling FDI Spillover Effects: What do Firm Perceptions Tell Us?' in Theodore Moran, Edward Graham, Magnus Blomström (eds), *Does Foreign Direct Investment Promote Development?* (Columbia University Press 2005) 47; Federica Saliola, Antonello Zanfei, 'Multinational Firms, Global Value Chains and the Organization of Knowledge Transfer' (2009) 38(2) Research Policy 369.

[5] UNCHR, 'CESCR General Comment No. 12: The Adequate Right to Food (Art. 11)' (1999) UN Doc E/C.12/1999/5 para 6; Liesbeth Colen, Miet Martens, Johan Swinnen, 'Foreign Direct Investment as an Engine for Economic Growth and Human Development: A Review of the Arguments and Empirical Evidence' in Olivier de Schutter, Johan Swinnen, Jan Wouters (eds), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge 2013) 71.
Maria Carkovic, Ross Levine, 'Does Foreign Direct Investment Accelerate Economic Growth?' in Theodore Moran, Edward Graham, Magnus Blomström (eds), *Does Foreign Direct Investment Promote Development?* (Columbia University Press 2005) 211.

[6] Akinori Tomohara, Sadayuki Takii, 'Does Globalization Benefit Developing Countries? Effects of FDI on Local Wages' (2011) 33 Journal of Policy Modelling 511, 517; Vic George, Paul Wilding, *Globalization and Human Welfare* (Palgrave Macmillan 2002) 47.

[7] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (2nd edn, Princeton University Press 2012) 22; Fabio Morosini, Michelle Ratton Sanchez Badin, 'Reconceptualizing International Investment Law from the Global South' in Fabio Morosini, Michelle Ratton Sanchez Badin (eds), *Reconceptualizing International Investment Law from the Global South* (CUP 2018) 8.

IIAs are part of the IIL framework but the roots of this framework need to be acknowledged and overcome.[8] As analysed in Chapter 3 (sections 2.1 and 2.2), IIL has traditionally been conceptualised in Western terms, which arguably prioritises the capital-exporting interests of developed States and their respective (private) investors.[9] Since IIL has been founded on the interests of developed States, developing States are further disadvantaged because traditional IIAs are not representative of their need to attract FDI. This is not always recognised by developing States in their desire to attract FDI because they seemingly neglect to assert their needs and the needs of their respective societies when negotiating IIAs. As a result, the public interest (that reflects the societal needs of host States) is not always evident in the approaches of developing States. This thesis argues that developing States need to focus on inclusive development in order to address this issue.

To help operationalise and conceptualise development in a more inclusive manner, the analytical framework was proposed in Chapter 4. For inclusive development to actually enable positive change, it is argued that development needs to be conceptualised and framed in terms of its foundational principles. These foundational principles provide the baseline for change, so that the respective change is meaningful for the societies involved, and a long-lasting positive approach can be achieved.

The foundational principles are complementary and mutually-reinforcing. This means that the cumulative efforts of the State need to equally actualise all these principles. For the purposes of analogy, these principles are viewed by this author using the metaphor of a three-legged stool – each principle (or leg) must be

[8] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013) 25.
[9] Miles (n 8) 19.

approached in an alike manner in order to support the framework. Freedom of choice, the public interest and law's dual nature (its enabling and regulatory form) are the foundational principles.

The State (as a central actor) is the 'seat' of the stool, which oversees the design and implementation of the foundational pillars. The centrality of the State is particularly important to the developing context. This is because these States complacently accept the status quo.[10] To overcome this challenge, States need to embrace their own values, which is where the foundational pillars of the framework come into play.[11] These principles need to underpin the legal frameworks and policies of developing States, if they are to 'untangle' the complex web that surrounds the FDI, IIL, development nexus.

2. THE FDI-IIL-DEVELOPMENT NEXUS

An examination of the FDI-IIL-development nexus requires a socio-legal methodology. As a research approach, a socio-legal methodology allows for a contextual understanding of this interrelationship between these concepts, which is necessary since FDI and development are not strictly legal concepts. In that regard, the introduction (Chapter 1, section 4) posed the central question of how developing States can use FDI in order to ensure that it positively contributes to their development without compromising their own needs.

[10] Kerry Rittich, 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social' (2004) 26 Michigan Journal of International Law 199, 201.
[11] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP 2003) 29.

To answer this question, a step back needed to be taken in order to assess what is meant by development. Chapter 2 scrutinised the concept of development; it is argued that development needs to be (re-)conceptualised so that it is more inclusive. This is because, in its traditional form, development is built on the experiences of Western capital-exporting States. The existing conceptualisation of development is unsuitable for developing States because Western States have different histories and contexts to developing States, but also different interests at heart. For development to work for developing States, it needs to be inclusive so that the concept accounts for their interests and experiences.

The lack of due attention to the experiences of developing States is a recurring theme that is revisited throughout this thesis. As such, it is even more important that developing States have a voice for their own change and the ability to determine the development that they want. Unfortunately, under the traditional conceptualisation of development, rather than determining their own routes for change, developing States are rule-takers as they tread in the footsteps of developed Western States.[12] From this perspective, there is an overriding implicit expectation by developing States that accepting FDI will automatically generate economic benefits that will 'trickle-down' to society.[13]

FDI is an important source of capital to developing States, which can enable development. On that note, Chapter 3 assessed the nexus between FDI, IIL and development. The relationship between these three areas is complex and

[12] Morosini, Ratton Sanchez Badin (n 7) 6. See also: Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112(3) American Journal of International Law 410, 413.
[13] Merter Akinci, 'Inequality and Economic Growth: Trickle-Down Effect Revisited' (2018) 36 Development Policy Review 1, 2.

inconclusive, which is why this study is warranted.[14] In spite of the lack of concrete evidence that establishes the relationship between FDI, IIL and development, it is still a route that developing States pursue.[15] Moreover, given that this is a route that developing States have already embarked upon, it is difficult for them to turn-back. As Braithwaite and Drahos aptly argue, these State '[a]ctors find themselves connected through a web of influences', which not only include other States but also private actors.[16] Developing States need influence in relation to these webs and the respective private actors, so that they can best harness FDI.[17]

To gain this influence, developing States need to generate opportunities for themselves and shape the existing rules to secure the change that they want.[18] It is not enough that these States place their faith in increased FDI through the conclusion of IIAs and that developing States presume that reciprocity exists within the context of these agreements.[19] Instead, developing States need to independently and proactively seek change through securing their own interests first and foremost.

As a default, IIAs seem to include a degree of reciprocity reflected in the rights and obligations of the respective States.[20] In practice, this is not the case. In terms of the

[14] See: Matthias Busse, Jens Königer, Peter Nunnenkamp, 'FDI Promotion Through Bilateral Investment Treaties: More Than a BIT?' (2010) 146 Review of World Economics 147, 148; Srividya Jandhyala, Witold Henisz, Edward Mansfield, 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy' (2011) 55(6) The Journal of Conflict Resolution 1047, 1049; Jason Webb Yackee, 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42(4) Law & Society Review 805, 806; Jeswald Salacuse, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain?' (2005) 46 Harvard International Law Journal 67, 96.
[15] Salacuse, Sullivan (n 14) 96.
[16] John Braithwaite, Peter Drahos, *Global Business Regulation* (CUP 2001) 24.
[17] Braithwaite, Drahos (n 16) 24.
[18] Braithwaite, Drahos(n 16) 7.
[19] Salacuse, Sullivan (n 14) 77.
[20] Ferreira argues that it is a reciprocal relationship. See: Agata Ferreira, 'Intertwined Paths of Globalization and International Investment Law' (2020) 19(2) Journal of International Trade Law and Policy 85, 96. See also: Braithwaite, Drahos (n 16) 22.

flow of capital, developing States do not have the resources nor investors to export capital to benefit from the rights within these instruments.[21] Foreign investors often have more economic influence than developing States, considering the capital worth of a foreign investor can far exceed that of the State in question.[22] This has allowed investors to operate in countries without sufficient regard for local communities, and also, to challenge measures adopted by host States even if these measures are designed to benefit the host State's society.[23]

If the foreign investor challenges the host State's measures, the State will incur substantial costs associated with investment arbitration and the prospect of paying out compensation to these investors. This places further economic burden on developing States and a drain on the resources that they cannot afford to lose. Developing host States are in a difficult situation when it comes to IIL as the legal framework for FDI means that they are prevented from interfering with the operations of foreign investors.

Given the lack of reciprocity within IIAs (BITS included) and their original purpose – to ensure investment protection for home States – these agreements are not designed for inclusive development.[24] For these agreements to play a role towards

[21] Morosini, Ratton Sanchez Badin (n 7) 8.
[22] Global Justice Now, 'Corporations Vs Governments Revenues: 2015 Data' (*Global Justice Now*, 12 September 2016) <https://www.globaljustice.org.uk/sites/default/files/files/resources/corporations_vs_governments_final.pdf> accessed 27 September 2021.
[23] As identified in Chapter 1 (section 2.2), foreign investors challenged Australia for requiring plain packaging of tobacco. Foreign investors have also disputed when the USA adopted measures to protect the property of indigenous peoples and there have been a number of claims against Argentina for devaluing its national currency during an economic crisis.
For further details, see: *Philip Morris Asia Ltd. v The Commonwealth of Australia*, UNCITRAL PCA Case No, 2012-12; *Glamis Gold Ltd. v The United States of America*, NAFTA/UNCITRAL; *Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic*, ICSID Case No. ARB/01/3; *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16.
[24] Kenneth Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 University of California, Davis Journal of International Law & Policy 157, 171.

inclusive development as part of positive change, it requires reform of these instruments, as well as a shift in the perspective and thinking of developing States.

Developing host States need to undertake a shift with regards to how they view the FDI, IIL and development nexus and acknowledge that asymmetries exist. This means that developing States are aware that reciprocity in these agreements is not automatic, so the process for change requires them to be proactive and negotiate for their interests more adamantly and cohesively. That way, these States are positioned to shape the existing rules to suit their needs.[25]

The aforementioned issues and asymmetries in relation to FDI, IIL and development are not new issues but they are still worthy of further study because they continue to impede the ability of developing States to achieve inclusive development. These States are becoming more vocal about the fact that their interests (as part of the public interest) are not being sufficiently considered by other actors.[26] As such, developing States assert that they need greater control and means to regulate their economic affairs.[27]

This difficulty is perplexing given that under the traditional framing of wider international law (which IIL is a part), all States are supposed to be independent and equal – legally and also economically.[28] From this perspective, State sovereignty

[25] Morosini, Ratton Sanchez Badin (n 7) 6; Roberts (n 12) 413.
[26] Charles Brower, Stephen Schill, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law' (2009) 9 Chinese Journal of International Law 471, 473.
[27] UNGA, Declaration on the Establishment of a New International Economic Order 3201, UN Doc A/RES/3201 (S-VI) 1 May 1994.
Wenhua Shan, 'From "North-South Divide" to Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law' (2007) 27 North Western Journal of International Law & Business 631, 632; Muthucumaraswamy Sornarajah, 'Mutations of Neo-Liberalism in International Investment Law' 3 Trade, Law & Development 203, 210-211.
[28] Malcolm Shaw, *International Law* (5th edn, CUP 2003) 189.

should mean that all States have the prerogative and means to devise the legal rules and frameworks as they see fit.[29] When it comes to inclusive development, all States need the ability to pursue it through law in accordance to their society's needs, not because they feel pressured to. This means that no State is obliged to admit foreign investment for their development.[30]

Nevertheless, as highlighted throughout this thesis, the practical reality is that developing States join the IIL regime in order to chase FDI for their development, particularly because this has been the model for change advocated to them by developed States as exemplars for positive change.[31] Developing States did not devise the rules of IIL or the traditional model of development, so they are not equal participants in these frameworks.[32] This is a disadvantaged starting-point for these States.[33]

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[29] *Island of Palmas Case* (*United States v Netherlands*) (1928) II RIAA 829, 838; ILC, 'Report of the International Law Draft Declaration on the Rights and Duties of States' (1949) UN Doc A/CN.4/W.5, arts 3-5.

[30] *Aguas del Tunari v Bolivia* (21 October 2005) ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, para 147.
This specifically refers to customary international law.
See: Rudolf Dolzer, Christoph Schreuer*, Principles of International Investment Law* (2nd edn, OUP 2012) 22.

[31] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2008) 179; Muthucumarswamy Sornarajah, 'The Clash of Globalizations and the International Law on Foreign Investment' (2003) 10(2) Canadian Foreign Policy Journal 1, 3; Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints From Alternative Evidence' (2011) 51 Virginia Journal of International Law 397, 424; Liesbeth Colen, Miet Maertens, Johan Swinnen, 'Foreign Direct Investment as an Engine for Economic Growth and Human Development' in Olivier de Schutter, Johan Swinnen and Jan Wouters (eds), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge 2013) 102.

[32] Dolzer, Schreuer (n 30) 2; Muthucumarswamy Sornarajah, 'The Clash of Globalizations and the International Law on Foreign Investment' (2003) 10(2) Canadian Foreign Policy Journal 1, 15; Luke Eric Peterson, 'Bilateral Investment Treaty and Development Policy-Marking' (IISD, November 2004) 9 <https://www.iisd.org/pdf/2004/trade_bits.pdf> accessed 25 June 2019; Howard Mann, 'Reconceptualizing International Investment Law: Its Role in Sustainable Development' (2013) 17 Lewis & Clark Law Review. 521, 534.

[33] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP 2003) 56.

To combat this unequal positioning, development needs to be reconceptualised. This requires a shift in thinking, so that development is not conceptualised in economic terms only. To that end, Chapter 4 proposed that development needs to be an inclusive as well as a continuously shifting process and goalpost. By framing and applying development in accordance to the analytical framework, developing States can use FDI for positive change without compromising their needs.

3. THE APPLICABILITY OF THE ANALYTICAL FRAMEWORK

In applying the analytical framework, what do the findings within this thesis indicate in relation to the steps required for developing States to use FDI to fuel positive change? The analytical framework was tested in Chapters 5 (in the context of Ethiopia) and 6 (in the context of Tanzania).

3.1. Testing the Analytical Framework in the Ethiopian Context

In Chapter 5, the analytical framework and the respective foundational principles were applied to the Ethiopian context. By doing so, it was identified that gaps not only exist in terms of the domestic legal frameworks but also, gaps exist when it comes to the implementation of the foundational principles.

Ethiopia, for example, compromises itself when it comes to freedom of choice. Rising ethnic tensions in the Tigray region demonstrates that, in practice, Ethiopia fails

to appreciate that there is unity in diversity even if the Constitution recognises that it is the State's duty to protect all ethnic groups.[34] This practical failing on the part of the State also has repercussions for the public interest principle of the analytical framework. Using the exemplar of the right to food, Ethiopia's ongoing famines are a further indication of the State's shortcomings when it comes to actualising this basic need and foundational principle. It highlights that Ethiopia must address its domestic issues as a priority, particularly in relation to the prolonged ethnic tensions, which have led to inadequate access to food.[35]

Freedom of choice and the public interest as foundational principles of the analytical framework are enabled through law. These principles require the State to note and assume its central role as an actor in order to oversee and realise positive change for inclusive development through law.

The State has a further role to play in relation to the third foundational principle and also, law in its regulatory function. Regulation is necessary for developing States such as Ethiopia to harness and maximise FDI, but regulation is also needed in order to limit the adverse impacts of foreign investors within its society. This principle was applied to Ethiopia's Investment Proclamation (2020)[36] in section 5.1 (Chapter 5). In section 5.1.2, it is argued that the Investment Proclamation does not clearly establish an investment-development nexus nor does it establish clear boundaries for the operation of foreign investors, which are essentially 'guests' within Ethiopia's territory

[34] UNCHR, 'Statement by the United Nations High Commissioner for Human Rights, Michelle Bachelet' (*United Nations*, 13 September 2021) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27448&LangID=E> 26 September 2021.
[35] Peter Mwai, 'Ethiopia's Tigray Crisis: Why are Hundreds of Aid Trucks Stranded?' (*BBC News*, 27 September 2021) <https://www.bbc.co.uk/news/58681797> accessed 27 September 2021.
[36] Investment Proclamation of Ethiopia No. 1180 of 2020.

(examined in section 5.1.3). In testing the analytical framework, it is evident that the foundations for inclusive development are weak within the Ethiopian context.

The applicability of the analytical framework does not end there. It was further tested against the China-Ethiopia BIT. In doing so, Chapter 5 (section 6) identified that Ethiopia has made its 'mark' when negotiating the China-Ethiopia BIT, which is arguably easier to negotiate within this bilateral and South-South context. Ethiopia's motivations to attract FDI is not evident from this instrument, instead the China-Ethiopia BIT resembles a traditional (Western) BIT. In their traditional forms, BITs as a form of IIA do not accommodate the idiosyncrasies of developing States such as Ethiopia, which is why the analytical framework is needed to be applied to this setting.

4.2. Testing the Analytical Framework in the Tanzanian Context

In Chapter 6, the analytical framework was further applied to the Tanzanian context. Tanzania provided a useful case study and point of comparison to Ethiopia because there are fewer barriers to inclusive development, as there was better evidence of freedom of choice and the public interest within this developing State.

Tanzania has taken steps to enable inclusive development and the first two foundational principles through national law. However, Chapter 6 (sections 3 and 4) emphasised that Tanzania enacts law perfunctorily but does not fully commit to the implementation of the legal frameworks which is necessary to bolster the foundational principles of freedom of choice and the public interest. The preference for the English language over Kiswahili or other tribal languages, in practice, is an indication that Tanzania still has room for improvement when it comes to freedom of choice. After all,

freedom of choice is internally-grown but there are still preferences for the Western ideals in relation to language.

This has not affected the public interest principle nor the right to food as it has so clearly in the Ethiopian context. However, given that more than a quarter of Tanzania's population on the Mainland suffer from hunger, the State needs to take further steps to ensure that the basic needs of its society are adequately progressed. In that regard, Chapter 7 (section 1.2) recommended that concrete protection is needed to actualise the right to food; Brazil and South Africa provide illustrations of best practice in relation to this aspect of the public interest principle.

Freedom of choice and the public interest are enabled through law. The third principle of the analytical framework emphasises that the regulatory function of law is a necessary and complementary element. This third principle was applied to the Tanzania's Investment Act (1997)[37] in section 5.1 (Chapter 6). In section 5.1.2, it is argued that drafters of the Investment Act have used traditional (Western) IIAs as a template. However, in doing so, the Investment Act is hollow. The Act, for example, establishes the Tanzanian Investment Centre but the purpose and regulatory powers of this Centre are not clear. To that end, similar to Ethiopia, the investment-development nexus is not clearly established in this Act. Moreover, it is not clear as to the scope of the Tanzanian Investment Centre's operations and whether it establishes boundaries for foreign investors (examined in section 5.1.3).

The analytical framework is also useful in the BIT context and it is tested against the China-Tanzania BIT. Chapter 6 (section 6) highlighted that Tanzania has negotiated for a more equitable IIA that reflects its needs as a developing host State.

[37] Investment Proclamation of Ethiopia No. 1180 of 2020.

The China-Tanzania BIT includes pioneering developments that keenly recognises the wider public interest and the host State's right to regulate.[38] The treaty does not solely reflect China's interests, but also Tanzania's interests as a host State in the context of the national treatment provision.[39] The preamble and general exception clause provide further examples of the innovative changes made to this treaty.[40] Nevertheless, the treaty is not perfect, as there is still room for development but is an admirable step in the right direction.[41] At the time of writing, Tanzania was experiencing a number of political and legal shifts under the direction of President Suluhu, and so the State's policies in relation to FDI will be subject to change which will warrant further study.[42]

In the application of this framework to specific case studies, Chapters 5 (Ethiopia) and 6 (Tanzania) analysed the steps that the States should adopt – domestically and within IIL. Given that developing States are not the original architects of the traditional development approach or the IIL regime, they need to be aware that the rules of play that they have tacitly accepted have not been devised with their input. Accordingly, the cards are already stacked against them and their interests are not sufficiently represented. On account of this, these States should not simply accept the existing status quo and the respective rules. Rather, they should seek to adapt the rules to serve their interests. This requires them to be active actors rather than passive

[38] Amy Man, 'New Players, Old Rules: A Critique of the China-Ethiopia and China-Tanzania Bilateral Investment Treaties' in Clair Gammage, Tonia Novitz, *Sustainable Trade, Investment and Finance: Toward Responsible and Coherent Regulatory Frameworks* (Edward Elgar 2019) 153.
[39] Won Kidane, Weidong Zhu, 'China-Africa Investment Treaties: Old Rules, New Challenges' (2014) 37(4) Fordham International Law Journal 1035, 1069; Won Kidane, 'China's Bilateral Investment Treaties with African States in Comparative Context' (2016) 49 Cornell International Law Journal 141, 166.
[40] Kidane (n 39) 166.
[41] Man (n 38).
[42] There is a renewed State policy to pursue foreign investment. For further details, see: Andres Schipani, 'Tanzania's New President Turns Her Back on Magufuli' (*The Financial Times*, 14 April 2021) <https://www.ft.com/content/7549086b-515f-44ea-850c-9795d4a124d6> accessed 25 September 2021.

participants, which is why the analytical framework is relevant. By furthering the foundational and complementary pillars, the State is better-placed to act for inclusive development.

As an example of an active State, China has made impressive strides in relation to freedom of choice, and also law's dual function. Owing to its negative past experiences with unequal treaties, China has been sceptical of international law in general, but this also includes IIL.[43] It has not adopted investment agreements without question.[44] It has not outright rejected (economic) development nor IIL.[45] China has tailored or omitted specific rules to suit its requirements or the needs of its then infant industries.[46] China's cautious approach is noteworthy for a number of reasons. In attracting high levels of foreign investment, China maintains its position as a central actor and has not remained complacent. It distinctively has adopted reforms for a socialist market-economy and adapts the legal frameworks proactively, which suit its needs.

On a domestic level, China has constructed complementary domestic frameworks for positive benefits from foreign investment and ensure that this is channelled towards its own positive change.[47] In that context, China regulated and managed investment, rather than waiting for foreign investment to transform its economy. China did not simply just accept FDI but placed legal restrictions of foreign enterprises within its economy. Developing States should take a leaf out of China's regulatory use of law and also its assertive use of freedom of choice. At the same time,

[43] Julien Chaisse, 'Identifying the Three Tracks' in Julien Chaisse (ed), *China's International Investment Strategy* (OUP 2019) 8.
[44] Chaisse (n 43) 3.
[45] Chaisse (n 43) 5.
[46] Norah Gallagher, Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (OUP 2009) 28.
[47] See: Gallagher, Shan (n 46) 12; Chaisse (n 43) 5.

there is still room for improvement (referred to in Chapter 7, section 1.2) for China but more evidence of the public interest principle is needed within this context.

Inclusive development requires a comprehensive approach, so that the State not only protects the public interest, but also actively promotes it. In that regard, States will also need to develop complementary legal and institutional frameworks to enable the public interest, which means also furthering governmental knowledge for inclusive development. Arguably, the analytical framework provides a useful lens to identifying relevant areas for improvement. The framework helps bridge the public-private divide (identified in Chapter 3) that artificially exists between the State and its economy. By bridging this divide, steps can be taken by the State to ensure that FDI is harnessed.

This thesis acknowledges that Western approaches permeate the discourses on development and investment but provides a salient suggestion for reform. In order to provide a more detailed analysis, chapters 5 and 6 focus in more detail on Ethiopia and Tanzania as case study countries. These chapters hone in on the respective investment frameworks with particular focus on the South-South experience. In these chapters it is demonstrated that there is room for a more contextual approach not only from Ethiopia and Tanzania, but potential for further application to other developing States.

CONCLUSION

Using the analytical framework (presented in Chapter 4) and case study chapters, this thesis has provided key recommendations in Chapter 7 but also specific

suggestions for reform within Chapters 5 and 6. On that note, further study applying the analytical framework to further developing States is the next step.

Further, using the analytical framework, this author has suggested key changes to investment agreements, for example, express recognition of the public interest in preambles and the exception provisions. The analytical framework provides a way forward in terms of the nexus that exists between FDI, investment and development. Throughout this thesis, it is highlighted and argued that that host Stares must engage with relevant frameworks and develop more of a holistic and inclusive approach to development, which they can do so using the foundational principles of the analytical framework. With these points in mind, what is next for the relationship between FDI and inclusive development?

Many States, such as China, are concluding more balanced investment agreements. This is a significant development within this regime. Only time will tell, as well as future decisions in investment arbitration, as to whether more balanced investment agreements have the desired outcome of carving out space for the host State to act in relation to FDI. In order to do so, the body of investment agreements will need further development. Host States should seek to negotiate IIAs and also revise existing IIAs so that their intents can be more clearly identified from the outset by arbitral tribunals. While change in investment agreements has been slow to appear and although may slightly alter the character of IIL, as Sornarajah highlights, these changes towards more balanced investment agreements are here to stay.[48]

[48] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017) 263.

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