

ARTICLE

LAND, PROPERTY AND SOVEREIGNTY IN INTERNATIONAL LAW

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ABSTRACT

This article charts the relationship between land and international law. Tracing evolutions since the very origins of international legal ordering, the article identifies sovereignty and property as the two key concepts that have traditionally framed claims to land in international law. For centuries, international jurists primarily considered sovereignty and property claims in the context of changes in, and disputes over, territorial control. However, developments in international human rights, investment and environmental law have reconfigured the internal dimensions of the land-property-sovereignty nexus, redefining space for states lawfully to exercise their sovereign powers vis-à-vis property within their jurisdiction.

Relevant international instruments advance diverse normative values, conceptualizing land as a commercial asset, an ecological good and a resource having socio-economic, cultural and spiritual significance. Depending on the circumstances, international instruments can also protect different claims to land, including those of indigenous peoples and local communities, and natural resource concessions for commercial investments. Growing pressures on land create challenges in reconciling these different normative values, and can bring into contest competing land claims. Sovereign acts to award commercial concessions over ancestral lands, or to support the rights of indigenous peoples and local communities in the face of commercial investments, have exposed states to the risk of competing legal claims that mobilize different international norms relevant to the protection of property.

This situation raises new issues about the cohesive application of international law, and ultimately about how to arbitrate between multiple rights and interests. International law tools, both substantive and procedural, can help to address these issues, and they are

increasingly resorted to in the international jurisprudence. However, these tools tend to leave questions unanswered, because they allow considerable scope for discretion and diverging outcomes, or because they have so far displayed limited effectiveness in dispute settlement. The findings call for more effective arrangements to manage the interplay of land, property and sovereignty, and they contribute insights for debates about the emancipatory potential, or imperialistic underpinnings, of international law.

I. INTRODUCTION

Land is life for billions of people worldwide, sustaining economic activities, social identity, ecological and cultural value, and often the collective sense of justice. Land also provides the basis for political organization: there is currently no state without land, and land often constitutes the most important measure of the space where sovereignty is exercised. In fact, international law recognizes territory – “a portion of the earth’s surface and its resources,” including land but also internal waters and resources located above and below the surface – as a constitutive element of statehood.¹ Given the important place of land in social, economic and political relations, it is perhaps not surprising that land has featured prominently throughout the historical development of international law – from its early localized manifestations to juristic efforts to legitimize land acquisition during successive waves of European colonization in the Americas, Africa, Asia and Oceania.²

Land claims and international law continue to intersect in a wide range of situations. Territorial disputes, armed conflict and military occupation provide clear examples – for instance, where the International Court of Justice (ICJ) discussed land confiscation in the context of wider disputes stemming from military occupation,³ or where international treaties and tribunals addressed the handling of property

¹ ROBERT Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 3 (Manchester Univ. Press, 1963). See *Montevideo Convention on the Rights and Duties of States* art. 1, Dec. 26, 1933; *Arbitration Commission of the European Conference on Yugoslavia*, Opinion No. 1, 92 ILR 162 (1991) 165. See also Mieke van der Linden, *To Whom Belongs the Land? Territory, Sovereignty and Imperialism in the History of International Law*, EURO. SOCIETY OF INT’L L. CONFERENCE PAPER SERIES, Paper No. 15/2015, 3-4 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715688.

² Matthew Craven, *Colonialism and Domination*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 862, 862-89 (Bardo Fassbender et al. eds., Oxford Univ. Press, 2012).

³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 132-34 (July 9).

claims in post-conflict situations.⁴ However, the intersection between land claims and international law reaches well beyond the confines of these specific contexts. At the planetary level and from a long-term historical perspective, global demographic growth and rising consumption patterns and expectations have fostered transitions from relative land abundance to an increasingly resource-constrained world.⁵ In these circumstances, the global expansion and intensification of natural resource extraction have increased opportunities for encounters, and tensions, between competing claims to land – including those of indigenous peoples and local communities,⁶ and commercial

⁴ See, e.g., General Framework Agreement for Peace in Bosnia and Herzegovina, arts. XI-XIV, Annex 7, Dec. 14, 1995, 35 I.L.M. 1. For examples of international adjudication, see *Loizidou v. Turkey*, Eur. Ct. H.R. (1996) (concerning land dispossession in the context of the occupation of northern Cyprus), and subsequent cases stemming from the same factual circumstances; see also *Chiragov and Others v. Armenia*, Eur. Ct. H.R. (2015) (relating to claims for the restitution of property, including land, in the aftermath of the conflict in Nagorno Karabakh); and most recently the Eur. Ct. H.R. cases *Chiragov and Others v. Armenia* (June 16, 2015) and *Sargsyan v. Azerbaijan*, (June 16, 2015), both relating to claims for the restitution of property, including land, in the aftermath of the conflict in Nagorno Karabakh. See generally Comm'n on Human Rights, Principles on Housing and Property Restitution for Refugees and Displaced Persons, UN Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005).

⁵ Johan Rockström et al., *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, 14 *ECOLOGY & SOC'Y* 32, 32-63 (2009); *The Future Availability of Natural Resources: A New Paradigm for Global Resource Availability*, WORLD ECONOMIC FORUM (2014),

http://www3.weforum.org/docs/WEF_FutureAvailabilityNaturalResources_Report_2014.pdf; United Nations Environment Programme [UNEP], *Assessing Global Land Use: Balancing Consumption with Sustainable Supply* (Jan. 2014).

⁶ The concept of indigenous peoples has specific international law connotations, see, e.g., International Labour Organisation, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 (hereinafter ILO Convention 169); see also G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP]. There is no universally accepted definition of indigenous peoples, but international instruments and jurisprudence emphasize self-identification and characteristics such as a common historical tradition, racial or ethnic identity, and a strong connection between people, their ancestral land, and culture. See, e.g., Centre for Minority Rights and Development and Minority Rights Group on Behalf of Endorois Welfare Council v. Kenya, 276/03 AFR. C.H.P.R., ¶¶ 147, 151, 154 (Gambia, 2009). The concept of local communities presents even greater complexities. Some international instruments use this term. See, e.g., United Nations Convention on Biological Diversity, art. 8(j), June 5, 1992, 1760 U.N.T.S. 79 (referring to "indigenous and local communities") [hereinafter CBD]; U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, Principle 22, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex 1 (Aug. 12, 1992) (referring to "indigenous people and their communities, and other local communities.") [hereinafter Rio Declaration]. However, neither of these instruments defines the notion of community. International courts and tribunals have made extensive references to communities, particularly in human rights and investment law cases. See, e.g., *Copper Mesa Mining Corporation v. Republic of Ecuador*, 2012-2, ¶¶ 1.93-4, 1.103-4 (Perm. Ct. Arb, 2016); *William Ralph Clayton v. Government of Canada*, 2009-04 (Perm. Ct. Arb, Mar. 17, 2015) (containing numerous references throughout); and the extensive

concessions that governments award for large-scale agribusiness, extractive industry, forestry and infrastructure projects. A recent wave of agribusiness plantation deals in Africa, Asia and Latin America, which critics dubbed “land grabbing”, epitomizes this trend – raising hopes for new livelihood opportunities, but also triggering widespread reports of land dispossession,⁷ and calls for more effective international regulation.⁸

In this context, new soft-law instruments are making inroads into areas where international policy would previously not venture – a notable example being the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT).⁹ The past two decades have also witnessed growing recourse to international legal redress in relation to land disputes. This includes international human rights claims brought

human rights jurisprudence discussed further below. Tribunals appear to use the term community to describe very diverse groups. Depending on the circumstances, the term can refer to an indigenous people, a number of indigenous peoples or communities within an indigenous people; to cohesive groups that do not qualify as indigenous peoples under international law; or to local residents united by geographic proximity and the impact of an investment who do not necessarily see the group as a stable source of social identity. These diverse configurations can have important implications for the legal rights that communities and their members have under international law. In some jurisdictions, national law defines the notion of community. *E.g.*, Lei de Terras, Lei No. 19/97, art. 1(1) (Mozambique Land Law of 1997) (defining the concept of “local community.”); The Indigenous Peoples’ Rights Act, Republic Act No. 8371, art. 3(h) (Oct. 29, 1997) (defining “indigenous cultural communities.”). Important social differentiation often exists within and between communities – for example, on the basis of social status, wealth, income, gender, age or ethnicity. This article uses the term community very broadly as the diverse groups of people who hold or claim land by virtue of diverse combinations of individual to collective rights.

⁷ See, *e.g.*, KLAUS DEININGER ET AL., RISING GLOBAL INTEREST IN FARMLAND: CAN IT YIELD SUSTAINABLE AND EQUITABLE BENEFITS? 122-23 (World Bank, 2011); OAKLAND INST., UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA – COUNTRY REPORT: ETHIOPIA 39-44 (2011); George Schoneveld et al., *Land-based Investments for Rural Development? A Grounded Analysis of the Local Impacts of Biofuel Feedstock Plantations in Ghana*, 16 *ECOLOGY & SOC’Y* 10, 16-18 (2011); Ben White et al., *The New Enclosures: Critical Perspectives on Corporate Land Deals*, 39 *J. OF PEASANT STUD.* 619 (2012); Miles Kenney-Lazar, *Plantation Rubber, Land Grabbing and Social-Property Transformation in Southern Laos*, 39 *J. OF PEASANT STUD.* 1017, 1026-32 (2012). See also Human Rights Council, U.N. Doc. A/HRC/21/63/Add.1, Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, Surya P. Subedi (A Human Rights Analysis of Economic and Other Land Concessions in Cambodia), at ¶¶ 129, 138-45 (Sept. 24, 2012).

⁸ For a discussion, see Matias E. Margulis et al., *Land Grabbing and Global Governance: Critical Perspectives*, 10 *GLOBALIZATIONS* 1 (2013).

⁹ The VGGT were endorsed by the United Nations Committee on World Food Security in Rome on May 11, 2012. See generally Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, COMM. ON WORLD FOOD SEC. (FOOD & AGRIC. ORG. OF THE UNITED NATIONS) (2012), <http://www.fao.org/docrep/016/i2801e/i2801e.pdf> [hereinafter VGGT].

by indigenous peoples under pressure from commercial concessions, or seeking land restitution to redress historical dispossession.¹⁰ It also includes investor-state arbitrations that extractive industry, agribusiness and agroforestry companies brought under international investment treaties.¹¹ The growing activation of international norms and mechanisms in connection with land-related disputes raises new questions about how international law frames and addresses land claims – considering both the long-term historical evolutions that shaped the DNA of contemporary international law, and more recent developments responding to the social, environmental and economic challenges the world faces today.

This article charts the relationship between land and international law. First, the article explores the role of land claims in the historical development of international law (Section II). This analysis identifies sovereignty and property as the two key concepts that have traditionally framed claims to land in international law.¹² While sovereignty (*imperium*) refers to the establishment and exercise of public authority over a given territory, property (*dominium*) defines the legal relations through which natural or legal persons, or other identified groups, can hold, use, manage and transact valuable assets such as land.¹³ For

¹⁰ See, e.g., in the Americas, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, (ser. C) No. 79, Judgment, Inter-Am. Ct. H.R. (Aug. 31, 2001); *Yakye Axa Indigenous Community v. Paraguay*, (ser. C) No. 125, Judgment, Inter-Am. Ct. H.R. (June 17, 2005); *Sawhoyamaya Indigenous Community v. Paraguay*, (ser. C) No. 146, Judgment, Inter-Am. Ct. H.R. (Mar. 29, 2006); *Saramaka People v. Suriname*, (ser. C) No. 172, Judgment, Inter-Am. Ct. H.R. (Nov. 28, 2007).

¹¹ See, e.g., *Funnekotter & Others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009); *Von Pezold & Others v. Zimbabwe*, ICSID Case No. ARB/10/15, Award (July 28, 2015); and *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award (Apr. 15, 2016).

¹² Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927); L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. U. INT'L. L. REV. 263, 267 (1997). See van der Linden, *supra* I, at 16; see also *Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, 2008 I.C.J. ¶¶ 138-39, 222 (May 23).

¹³ This broad concept of property encompasses a wide range of land rights, from individual to collective. Traditionally, jurists have defined property as a relationship between a person and a thing, reflected in the Roman law concept of rights *in rem*. See JAMES E. PENNER, *THE IDEA OF PROPERTY IN LAW* (Clarendon Press, 1997) for a recent articulation of this approach. However, some recent legal scholarship has emphasized the relational nature of property, framing property as a web of “relationships . . . among persons or other entities with respect to things.” See STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 16 (Cambridge Univ. Press, 1990). The relational concept of property draws on the works of analytical jurist Wesley N. Hohfeld. See Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 710, 710-770 (1913). The concept has been considerably developed in legal anthropology and socio-legal studies. See, e.g., Franz Von Benda-Beckmann, *Anthropological Approaches to*

centuries, international law primarily considered both sovereignty and property claims in the context of changes in, and disputes over, territorial control.

Second, the article discusses the interplay of land, property and sovereignty in contemporary international law (Sections III, IV, and V.A). It finds that, unlike earlier historical evolutions primarily concerned with territorial acquisitions and disputes, developments in international human rights, investment and environmental law have reconfigured the “internal” dimensions of the land-property-sovereignty nexus, redefining spaces for states lawfully to exercise their sovereign powers vis-à-vis property within their jurisdiction. Relevant international instruments advance diverse normative values, conceptualizing land as a commercial asset, an ecological good and a resource having socio-economic, cultural and spiritual significance. Depending on the circumstances, they can also protect different claims to land, including those of indigenous peoples and local communities, and natural resource concessions for commercial investments.

Tensions can arise between different land claims or normative values. For example, indigenous peoples brought cases to international human rights courts, invoking their human right to property over their ancestral lands to challenge the sovereign award of natural resource concessions for commercial investments. Conversely, businesses initiated investor-state arbitrations to challenge state action to support local land claims or address environmental concerns in the face of commercial investments. These legal disputes can raise difficult questions about the articulation between different norms of international law.

Third, the article assesses the international law tools for addressing these questions (Section V). The analysis focuses on interpretive techniques such as systemic integration; procedural arrangements such as *amicus curiae* submissions in investor-state arbitration; and holistically framed soft-law instruments such as the VGGT. It finds that some of these tools are increasingly resorted to in the international jurisprudence, and that their effective use can help arbitrate tensions in the interplay between land, property and sovereignty.

However, available tools tend to leave important questions

Property Law and Economics, 2 EUR. J.L. & ECON. 4, 309-336 (1995). For a fuller discussion of the concept of property in relation to land and international law, see Lorenzo Cotula, 'Land Grabbing' and International Investment Law: Toward a Global Reconfiguration of Property?, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2014-2015 177, 185-93 (Andrea K. Bjorklund ed., Oxford Univ. Press, 2016).

unanswered, because they allow considerable scope for discretion and diverging outcomes, they are established in non-binding instruments, or – in the case of *amicus curiae* submissions – they have so far displayed limited effectiveness in influencing dispute settlement outcomes. The findings call for more effective arrangements to manage the interplay of land, property and sovereignty, and they contribute insights for debates about the emancipatory potential, or imperialistic underpinnings, of international law (Section VI).

II. LAND, PROPERTY AND SOVEREIGNTY IN HISTORICAL PERSPECTIVE

A. *Land in the Early History of International Law*

In this age of finance and industry, it is easy to forget how important land was in the historical development of international law – a reflection of the role of land in sustaining livelihoods for much of human history. From time immemorial, wars have been fought over land, leading to numerous peace treaties that dealt with land and territorial claims. In fact, the oldest known historical document concerns the settlement of a conflict over disputed agricultural land between the Sumerian city-states of Lagash and Umma. This war, and the ensuing solemn commitment by the ruler of Umma not to encroach on the contested land, is recorded in the “Stele of the Vultures” – a masterpiece of cuneiform inscriptions and tantalising reliefs dating back to around 2450 BC.¹⁴

Land was an important issue in several early manifestations of international law. Rules governing war, treaty making and diplomatic relations existed in many ancient civilizations, though geographic distances and socio-political factors circumscribed the reach of these experiences to primarily localized arrangements premised on relative cultural homogeneity and political fragmentation.¹⁵ In addition to ancient Mesopotamia, examples documented in writing include India, pre-unification China, the Greek city-states, and the relations between nascent Rome and its Italic neighbours.¹⁶ Historiographic accounts indicate that arrangements regulating relations among political

¹⁴ STEPHEN C. NEFF, *JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW* 14, (Harvard Univ. Press, 2014). Fragments of the victory stele are kept at the Louvre Museum in Paris: <http://www.louvre.fr/en/oeuvre-notices/stele-vultures>.

¹⁵ R. P. ANAND, *NEW STATES AND INTERNATIONAL LAW* 11-12 (Hope India, 2d ed. 2008). See NEFF, *supra* note 14, at 13.

¹⁶ NEFF, *supra* note 14.

authorities also existed in pre-colonial Africa and pre-Columbian America.¹⁷

Cultural and political specificities influenced the place of land, and of law, in these early developments. However, issues concerning the interface between claims of public authority and private control were a recurring theme. For example, the ancient Greeks applied recognizable rules to resolve territorial disputes between city-states. In this context, claims to property and to public authority intersected, and the rules governing territorial disputes drew on modes of acquisition largely based on property law.¹⁸ The Romans made extensive use of the “right of conquest,” subjecting many defeated enemies to land confiscation, and developing legal arrangements to regulate the distribution of conquered lands (*ager publicus*) to Roman citizens.¹⁹ In other words, the acquisition of territory could unleash reconfigurations of property relations.

Arbitrations played a role in Rome’s early disputes over land and territory, at least in public imagination. In the infamous, and most likely fictitious,²⁰ proceeding concerning land disputed between Ardea and Aricia, the Roman people called upon to arbitrate the case decided that the contested land really belonged to Corioli, and that since Rome had now conquered Corioli, the land belonged to Rome.²¹ A more nuanced take on the “right of conquest” appears to have been applied in ancient India. Here, legal rules governing the conduct of war distinguished between combatants and non-combatants, protecting from violence the “tillers of the soil.”²² In this context, political thinker and adviser

¹⁷ See ROBERT S. SMITH, WARFARE AND DIPLOMACY IN PRE-COLONIAL WEST AFRICA 3-4 (Univ. of Wisconsin Press, 2d ed. 1989); see also T.O. Elias, *History of the Law of Nations: Regional Developments: Africa*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 205, 210-11 (Rudolph Bernhardt ed., Elsevier, 1984); see also Antonio Truyol y Serra, *History of the Law of Nations: Regional Developments: Latin America*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 231, 231 (Rudolph Bernhardt ed., Elsevier, 1984).

¹⁸ Angelos Chaniotis, *Justifying Territorial Claims in Classical and Hellenistic Greece: The Beginnings of International Law*, in THE LAW AND THE COURTS IN ANCIENT GREECE 185 (E.M. Harris & L. Rubinstein eds., Duckworth, 2004).

¹⁹ For a more detailed discussion, see SASKIA T. ROSELAAR, PUBLIC LAND IN THE ROMAN REPUBLIC: A SOCIAL AND ECONOMIC HISTORY OF AGER PUBLICUS IN ITALY, 396-89 BC (Oxford Univ. Press, 2010).

²⁰ See GARY FORSYTHE, A CRITICAL HISTORY OF EARLY ROME: FROM PREHISTORY TO THE FIRST PUNIC WAR 229-30 (Univ. of California Press, 2006).

²¹ See generally TITUS LIVIUS, AB URBE CONDITA (THE HISTORY OF ROME) 3.71-72. For another reference to inappropriate behaviour by a Roman arbitrator in a dispute between Nola and Naples, see M. TULLIUS CICERO, DE OFFICIIS (ON DUTIES) 1.10.33 (Walter Miller ed., Harvard Univ. Press, 1913).

²² Manoj Kumar Sinha, *Hinduism and International Humanitarian Law*, 87 International Review of the Red Cross 285, 291 (2005); see also ALAIN DANIELOU, A BRIEF HISTORY OF

Kautilya held that immovable property did not belong to the conqueror by right, and advised the conqueror not to take the property of those killed.²³

B. Colonialism and the Emergence of Modern International Law

Historical encounters, both peaceful and violent, brought into contact distant localized arrangements, fostering cross-fertilization or displacing the law of the defeated, and ultimately establishing the foundations of the current worldwide system of international law.²⁴ Claims to land were an important driver of this process. The formative years of modern international law accompanied successive waves of European colonization of the Americas, Oceania, Asia and Africa.²⁵ Besides exploring legal solutions to facilitate unimpeded commerce and navigation, European jurists sought to justify the acquisition of territorial sovereignty over the colonies, and grappled with managing the encounter between different land tenure concepts and systems – those of the colonizers, shaped by the imperatives of an increasingly capitalist economy, and those of the colonized, which often emphasized the spiritual and collective dimensions of landholding.²⁶ Put differently, concerns about sovereignty and property coexisted and intersected in the colonial project.

The nature of that intersection evolved over time. Echoing semi-feudal conceptions, some early international jurists conflated sovereignty and property, for example framing colonization in terms of the acquisition of land ownership rather than territorial annexation.²⁷ By the 18th century, however, the demise of feudalism and the rise of more centralized forms of political authority in Europe led to a sharper distinction between property and sovereignty, with European nation-states articulating ever more explicit claims to territorial sovereignty over the lands they colonized.²⁸ Colonial authorities then used their sovereign powers to regulate and allocate property rights in land.²⁹

INDIA 106 (Kenneth F. Hurry trans., Inner Traditions 1st ed., 2003).

²³ Sinha, *supra* note 22, at 293.

²⁴ Sundhya Pahuja, *Laws of Encounter: A Jurisdictional Account of International Law*, 1 LOND. REV. INT'L L. 63, 75 (2013).

²⁵ ANAND, *supra* note 15, at 18-26.

²⁶ ANDRO LINKLATER, *OWNING THE EARTH: THE TRANSFORMING HISTORY OF LAND OWNERSHIP* 1-6 (Bloomsbury, 2013).

²⁷ Craven, *supra* note 2, at 869.

²⁸ *Id.* at 874-79.

²⁹ For example, the Royal Proclamation of 1763, issued by King George III to claim the North American territories ceded by France to Britain through peace treaties at the end of the

European jurists deployed various arguments to provide a legal cloak of legitimacy to colonial claims. Among the legal arguments debated by Spanish jurists in the 1500s were papal grants, just war and the *dilatatio* principle whereby conquest was necessary to promote the religious conversion of the natives.³⁰ When the English and the Dutch launched their own colonial endeavours in the 1600s and 1700s, they challenged the notion that territory could be acquired without effective possession – a notion that allowed their Spanish and Portuguese competitors to claim vast areas of land. The Reformation and the gradual secularization of political power also led to a decline of legal justifications grounded in religion.³¹ English and Dutch jurists primarily relied on cession (the derivative acquisition of title through treaty) and effective occupation (the original acquisition of *terra nullius*, i.e. land belonging to nobody).³² The doctrine of *terra nullius*, loosely based on (reinterpreted) Roman law,³³ was endorsed by some of the leading jurists of the time – including Emmerich de Vattel, who considered uncultivated land to be open to appropriation.³⁴

Patterns in the use of the *terra nullius* doctrine illustrate the coexistence of concerns about both property and sovereignty in the colonial enterprise. In relation to territorial sovereignty, use of the *terra nullius* doctrine varied over space and time. The British relied on this doctrine when they colonized Australia.³⁵ On the other hand, there is controversy about the extent to which *terra nullius* was used in the colonization of Africa. In its *Western Sahara* advisory opinion, the ICJ held that the 19th-century colonization of Africa generally relied on agreements with the natives, rather than the *terra nullius* doctrine.³⁶

Seven Years War, regulated the acquisition of land ownership from the natives, prohibiting private transactions and granting the Crown the exclusive right to acquire land and distribute it to the settlers. King George III, *The Royal Proclamation No. 1* (Oct. 7, 1763), <https://primarydocuments.ca/documents/RoyalProc11763Oct7>.

³⁰ NEFF, *supra* note 14, at 112-26; see also Donald W. Greig, *Sovereignty, Territory and the International Lawyer's Dilemma*, 26 OSGOODE HALL L.J. 127, 140-43 (1988)

³¹ See van der Linden, *supra* note 1, at 6.

³² NEFF, *supra* note 14, at 128-31; see also Greig, *supra* note 30, at 144-45.

³³ Classical Roman law used the concept of *res nullius* in relation to movable objects only, and did not allow acquisition of land through occupation. The extension of the doctrine to land took place in the low Middle Ages. See NEFF, *supra* note 14, at 128; see also Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16 EUR. J. INT'L L. 2, 45 (2005).

³⁴ See Emmerich De Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW*, ¶¶ 207-08 (Book I, Chapter 18), (Lonang Inst., 1758), <http://lonang.com/library/reference/vattel-law-of-nations/>, paras. 207-208.

³⁵ Greig, *supra* note 30, at 150.

³⁶ *Western Sahara, Advisory Opinion*, 1975 I.C.J. Rep. 12, ¶ 80 (Oct. 16). See Craven, *supra*

However, research suggests that the colonial powers did make some use of *terra nullius* arguments, as part of a wider array of legal strategies also involving treaties of cession and protectorate agreements.³⁷ Indeed, while the colonizers often concluded agreements with the natives,³⁸ legal opinion at the time cast doubt as to whether these agreements constituted treaties capable of transferring title, mainly because the natives had no statehood,³⁹ and as a result, many jurists continued to rely on *terra nullius* arguments.⁴⁰

In a sense, *terra nullius* constituted the implicit premise of the 1885 General Act of the Berlin Conference – an important milestone in the European colonization of Africa.⁴¹ In establishing the rules whereby colonial powers could acquire and maintain sovereignty over the coastal territories of Africa, Article 34 of the General Act required those powers to notify the other state parties of new acquisitions “in order to enable them, if need be, to make good any claims of their own.” As no African polity was represented in Berlin, the implied assumption of this provision was that territories in Africa were (if not necessarily unoccupied at least) non-sovereign domains where the Europeans could establish territorial sovereignty through original rather than derivative title.⁴² In later years, changing attitudes towards indigenous populations led to shifts in perceptions about *terra nullius* and the value of protectorate agreements.⁴³ It is in this evolving context that international rulings started to recognize that, while protectorate agreements did not constitute treaties capable of creating legal obligations, they nonetheless

note 2, at 883; see also van der Linden, *supra* note 1, at 15-16.

³⁷ See e.g. J. CASTELLINO AND S. ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW. A TEMPORAL ANALYSIS 91-118 (Ashgate, 2003); see also Lesaffer, *supra* note 33 at 44; see also Ederington, *supra* note 12, at 292-94.

³⁸ Many protectorate agreements were concluded by the British, for example in Uganda, Gambia, Sierra Leone and Somaliland. See Craven, *supra* note 2, at 885.

³⁹ Greig, *supra* note 30, at 151.

⁴⁰ Sookyeon Huh, *Title to Territory in the Post-Colonial Era: Original Title and Terra Nullius in the ICJ Judgments on Cases Concerning Ligitan/Sipadan (2002) Pedra Branca (2008)*, 26 EUR. J. INT'L. L. 709, 716 (2015).

⁴¹ General Act of the Berlin Conference on West Africa, Feb. 26, 1885.

⁴² Greig, *supra* note 30, at 149. This issue formed the object of much debate at the time, and positions diverge considerably. See Matthew Craven, *The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law*, in CONSTRUCTING INTERNATIONAL LAW: THE BIRTH OF A DISCIPLINE 363, 391 (Miloš Vec & Luigi Nuzzo eds., Klosterman, 2012). Commentators have noted the ambivalent character of the Berlin General Act: while the General Act regulated colonial claims to territory, it also restricted these rules to coastal areas, and aimed to safeguard freedom of commerce and navigation in important river basins (the Congo and the Niger) against the particularistic claims of individual European powers. See Craven, *supra* note 2, at 880-81.

⁴³ Greig, *supra* note 30 at 160-63, 169.

had some legal significance and had to be taken into account.⁴⁴

In addition to sustaining claims to territorial sovereignty on the international plane, the notion of *terra nullius* was instrumental for colonial authorities to establish municipal law arrangements that enabled them to claim property rights over land in the colonies, particularly in Africa. Firstly, the colonial powers reinterpreted pre-existing customary land tenure systems, which often involved complex social, cultural and spiritual dimensions, through the prism of European property concepts.⁴⁵ In that process, commonly applied customary rules whereby land could not be sold outright were construed as evidence that the natives did not own the land but held mere usufruct rights.⁴⁶ In effect, vast areas of colonized land were deemed to be without owners. Secondly, colonial authorities enacted legislation that vested ownership of “vacant” land with the colonial state.⁴⁷ In other cases, comparable outcomes were achieved through asymmetrical agreements with the natives.⁴⁸ As a result, the acquisition of territorial sovereignty went hand in hand with profound reconfigurations of property relations: customary land tenure systems were marginalized, colonial authorities came to own vast areas of land, and in many cases these authorities used their newly established legal prerogatives to open up land for commercial operations.⁴⁹

While the notion of *terra nullius* exposed indigenous populations to the risk of dispossession, the 19th century also saw the emergence of concerns about protecting the colonists’ landholdings when territorial sovereignty changed hands. This trend is reflected in the court jurisprudence of the time. In a landmark case, for example, the United States (US) Supreme Court held that a change in sovereignty did not affect property claims.⁵⁰ Also, some treaties dealing with state

⁴⁴ *Island of Palmas Case (Neth. v. U.S.)*, 2 R.I.A.A. 829, 858-859 (Perm. Ct. Arb. 1928).

⁴⁵ Liz Alden Wily, *Looking Back to See Forward: The Legal Niceties of Land Theft in Land Ruses*, 39 J. OF PEASANT STUD. 751, 757 (2012).

⁴⁶ See e.g., *Amodu Tijani v. The Secretary, Southern Provinces* (1921) 2 AC 399, 403, 409-10.

⁴⁷ With regard to Francophone West Africa, for example, see Decree of 23 October 1904, partly reproduced in CHEIK FATY FAYE, *LA VIE SOCIALE À DAKAR (1945-1960)* 11 (L’Harmattan, 2000).

⁴⁸ Under the 1904 Agreement between His Majesty’s Commissioner for the East Africa Protectorate and the Chiefs of the Masai Tribe, Maasai “representatives” agreed that the Maasai would resettle into reservations and vacate the prime land of the Rift Valley for European settlement. See 1904 Agreement, Aug. 10, 1904, http://www.geocities.ws/olmorijo/maasai_agreement_1904.htm.

⁴⁹ Wily, *supra* note 45, at 757-58, 760, 762.

⁵⁰ *United States v. Percheman*, 32 US 51 (1833) (concerning a claim to 2,000 acres of land granted to an individual by the Spanish governor of Florida, which United States authorities

succession or territorial acquisitions required the states parties to respect existing property rights.⁵¹ At the 1885 Berlin Conference, states emphasized the obligation for new colonial powers “to insure the establishment of authority [...] sufficient to protect existing rights” acquired by nationals from other Western states.⁵² This concern about protecting private property held by people of European descent added new dimensions to the relationship between property and sovereignty, laying the foundations for an even clearer separation between the two – so that changes in territorial sovereignty do not in themselves affect land ownership and the new sovereign has a legal obligation to uphold pre-existing property rights.⁵³

The Hague Regulations of 1907 extended the imperative to respect private property to situations involving military occupation rather than changes in territorial sovereignty.⁵⁴ An even more far-reaching blow to the old “right of conquest” came in the mid-20th century, when conquest stopped being considered a lawful means to acquire territory.⁵⁵ In the years after African and Asian states acquired independence, collective action at the United Nations (UN) resulted in the solemn affirmation of the permanent sovereignty of independent states over their land and natural resources.⁵⁶ While still premised on legal concepts such as sovereignty, which had been developed by the former colonizers,⁵⁷ these processes reflected aspirations for a more genuinely “universal” system of international law.

C. Historical Legacies and External Dimensions in Land, Property and Sovereignty

Overall, these evolutions point to the important place of land in the

initially rejected following their acquisition of the territory from Spain).

⁵¹ On the protection of existing land rights in state succession treaties between Greece and the Ottoman Empire, see Ilias Bantekas, *Land Rights in Nineteenth-Century Ottoman State Succession Treaties*, 26 EUR. J. INT'L L. 375 (2015).

⁵² General Act, *supra* note 41, art. 35; see also Ederington, *supra* note 12, at 297.

⁵³ Settlers of German Origin in Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 36 (Sept. 10); see also Ederington, *supra* note 12, at 267, 310.

⁵⁴ See the Hague Convention Respecting the Laws and Customs of War on Land (Hague IV) art. 46, Oct. 18, 1907; see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 3, ¶¶ 89, 132.

⁵⁵ U.N. Charter art. 2, ¶ 4; see also G.A. Res. 2625 (XXV), annex, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24, 1970).

⁵⁶ G.A. Res. 1803 (XVII) (Dec. 14, 1962).

⁵⁷ ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (Cambridge Univ. Press, 2004).

historical development of modern international law – considering land not only in its public law, territorial dimensions, but also its private appropriation. The colonial legacy left indigenous populations “relegated to minor spaces, reservations, bread-crumbs of land conceded by the dominant society.”⁵⁸ That legacy also undermined security of tenure for millions of people, including through the continued application by independent states of legal concepts of colonial origin.⁵⁹ In more conceptual terms, these historical evolutions point to the articulation between property and sovereignty as the prism through which international law has come to frame control over land.⁶⁰

These evolutions are reflected in contemporary international law. Sovereignty and property remain important concepts, with sovereignty establishing political authority over a given territory, and property defining the legal relations through which natural or legal persons, or other identified groups, can hold, use, manage and transact valuable assets, such as land. In this context, property and sovereignty operate on different planes: the acquisition of sovereignty is mainly governed by international law, while property is primarily allocated under national law,⁶¹ in a legal configuration whereby transfers of territorial sovereignty in principle do not affect property rights in land.⁶²

At the same time, international legal developments point to important connections between sovereignty and property. This is not only because some of the modes of acquisition of territory, including cession and original occupation, are loosely based on property law.⁶³ Other property dimensions can also come into play when determining

⁵⁸ Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 58 (1999).

⁵⁹ Patrick McAuslan, *Only the Name of the Country Changes: The Diaspora of European Land Law in Commonwealth Africa*, in *EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA* 77 (Camilla Toulmin & Julian Quan eds., Int'l Inst. for Env't & Dev., 2000); Wily, *supra* note 45, at 763-66.

⁶⁰ See also van der Linden, *supra* note 1, at 16.

⁶¹ See the Australian case *Mabo v. Queensland (No 2)* (1992) 175 CLR 1, ¶ 45 (Austl.) (Brennan, J.) (“The acquisition of territory is chiefly the province of international law; the acquisition of property is chiefly the province of the common law.”).

⁶² Settlers of German Origin in Poland, *supra* note 53; In the Matter of an Arbitration Before a Tribunal Constituted in Accordance With Article 5 of the Arbitration Agreement Between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area (Government of Sudan v. Sudan People's Liberation Movement/Army), Case No. 2012-01, Final Award, ¶¶ 754, 766 (Perm. Ct. Arb. 2014) [hereinafter *Abyei Arbitration*].

⁶³ See MALCOM N. SHAW, *INTERNATIONAL LAW* 490, 495 (Cambridge Univ. Press, 6th ed. 2008). While decolonisation discredited the notion of *terra nullius*, the ICJ has reframed the concept of original occupation, which includes not only occupation of unoccupied territories but also occupation from the very beginning of the political entity; see Huh, *supra* note 40, at 717-18.

territorial sovereignty. For example, property taxation and administration can constitute evidence of effective occupation for the purposes of sovereignty claims.⁶⁴ The factual circumstances of territorial disputes can be intertwined with disputes over property rights to land and resources.⁶⁵ States have concluded agreements to lease land for commercial projects, for example for transport⁶⁶ and agriculture,⁶⁷ and the establishment and life cycle of land leases between states could affect evolutions in territorial sovereignty.⁶⁸ Far from being relegated to the exclusive domain of national law, property has long been and remains an important issue in international legal ordering.⁶⁹

Throughout the historical period discussed in this section, international law was mainly concerned with what can be referred to as the “external” dimensions of the relationship between land, property and sovereignty: from the early localized manifestations to colonialism’s project of global domination, the primary land-related preoccupations in international law were about supporting, or challenging, sovereignty and property claims in the context of territorial acquisitions or disputes. In fact, peaceful or violent contestation over territorial control constituted an important engine for the historical development of the contemporary worldwide system of international law.

Inter-state territorial disputes remain an important issue in international law, with experts having counted over 100 active boundary disputes in Africa alone,⁷⁰ with control over commercially valuable

⁶⁴ The *Minquiers and Erehos Case* (Fr. v. U.K.), Judgment, 1953 I.C.J. Rep. 47, at 65-66, 69 (Nov. 17).

⁶⁵ See, e.g., *Abyei Arbitration*, *supra* note 62, ¶¶ 106-07, 130, 183-91, 306-09, 320-56, 544-57, 738-47, 748-66 (discussing land and grazing rights).

⁶⁶ In the *Matter of the Railway Land Arbitration* (Malay. v. Republic of Sing.), Case No. 2012-01, Award (Perm. Ct. Arb. 2014) [hereinafter *Railway Land Arbitration*].

⁶⁷ See, e.g., *Convention d'Investissement dans le Domaine Agricole entre la République du Mali et la Grande Jamahiriya Arabe Libyenne Populaire et Socialiste, Mali-Libya*, 2008; see also *Special Agricultural Investment Agreement between the Government of the Arab Republic of Syria and the Government of the Republic of Sudan, Syria-Sudan*, May 22, 2002.

⁶⁸ A well-known example of a land lease concluded between states is the *Convention between the United Kingdom and China respecting an extension of Hong Kong Territory*, where negotiations between the United Kingdom and China in the run-up to the expiry of this land lease resulted in the transfer to China not only of parts of Hong Kong under lease, but also of areas over which the United Kingdom had acquired sovereignty. See *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, U.K.-China*, June 9, 1898.

⁶⁹ See Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution* 61 U. TORONTO L.J. 1 (2011) (discussing the importance of private ordering in international law).

⁷⁰ GBENGA ODUNTAN, *INTERNATIONAL LAW AND BOUNDARY DISPUTES IN AFRICA* 157 (Routledge, 2015) (the figure includes both maritime and overland disputes).

natural resources being an important driver of those disputes,⁷¹ and with international law having been invoked in a substantial number of territorial disputes taken to the ICJ,⁷² and to international arbitral tribunals.⁷³ However, developments in international human rights, investment, and environmental law have reconfigured the relationship between land, property and sovereignty, setting the scene for new types of tensions in the application of international law. The next two sections turn to exploring these issues.

III. LAND AND INTERNATIONAL HUMAN RIGHTS LAW: RESHAPING THE NOTIONS OF PROPERTY AND SOVEREIGNTY

A. *The Place of Land in International Human Rights Law*

While in positivist terms international human rights law emerged after World War II, its philosophical underpinnings draw on constitutional developments since the 18th century, when the ideas of the Enlightenment and political change epitomized by the French Revolution led over time to a reconfiguration of the relations between citizen and state.⁷⁴ These historical and philosophical roots place human rights law on a different plane compared to earlier evolutions in international law. Unlike the norms governing territorial acquisitions and disputes, which primarily engage the external dimensions of the land-property-sovereignty nexus, human rights law reshapes the internal foundations of the social contract, through affirming fundamental rights

⁷¹ Saadia A. Bhatti & Nefeli Lamprou, *Pitfalls of Investing in Sub-Saharan African Regions with Unsettled Boundaries: How Foreign Investors May Minimize and Manage Investment Risk*, 13 TRANSNATIONAL DISP. MGMT. (2016).

⁷² See, e.g., *Case Concerning Sovereignty Over Certain Frontier Land (Belg. v. Neth.)*, Judgment, 1959 I.C.J. Rep. 209 (June 20); *Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.)*, Judgment, 1962 I.C.J. Rep. 6 (June 15); *Case Concerning the Frontier Dispute (Burk. Faso v. Mali)*, Judgment, 1986 I.C.J. Rep. 554 (Dec. 22); *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, 1994 I.C.J. Rep. 6 (Feb. 3); *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Judgment, 2002 I.C.J. Rep. 303 (Oct. 10); *Case Concerning the Frontier Dispute (Benin v. Niger)*, Judgment, 2005 I.C.J. Rep. 90 (July 12); *Territorial and Maritime Dispute (Nicar. v. Colom.)*, Judgment, 2012 I.C.J. Rep. 624 (Nov. 19); *Frontier Dispute (Burk. Faso v. Niger)*, Judgment, 2013 I.C.J. Rep. 44 (Apr. 16).

⁷³ See, e.g., *Abyei Arbitration*, *supra* note 62; see also *Eritrea-Ethiopia Boundary Commission*, <http://www.haguejusticeportal.net/index.php?id=6162>.

⁷⁴ See also Dinah L. Shelton, *An Introduction to the History of International Human Rights Law* (Geo. Wash. Univ. Law Sch. Pub. Law, Research Paper No. 346, 2007), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1010489 (discussing a longer term perspective on the history of international human rights law).

and redefining the parameters for the lawful exercise of sovereign powers.⁷⁵ Therefore, while land, property and sovereignty are important notions in international human rights law, their interplay differs significantly from the patterns discussed thus far.

Land featured prominently in early modern conceptions of human rights. This is reflected in 17th-century liberal political theory,⁷⁶ and in the historical affirmation and contestation of the human right to property as a bulwark against the arbitrary exercise of sovereign powers.⁷⁷ In more recent times, the connections between land and human rights have attracted renewed attention, with international law providing an arena for mobilizing human rights language and processes in relation to land struggles. These more recent developments are reflected in the work of the UN Office of the High Commissioner for Human Rights;⁷⁸ in sessions of the UN bodies that review periodic reports submitted by states on the implementation of human rights treaties;⁷⁹ in the work of UN Special Rapporteurs responsible for specific human rights,⁸⁰ or country contexts;⁸¹ and in litigation before

⁷⁵ Space constraints prevent a discussion of extraterritorial dimensions in international human rights law. See MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (Oxford Univ. Press, 2011); CASES AND CONCEPTS ON EXTRATERRITORIAL OBLIGATIONS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Fons Coomans & Rolf Künnemann eds., Intersentia, 2012); Ralph Wilde, *The Extraterritorial Application of International Human Rights Law on Civil and Political Rights*, in *ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 635 (Scott Sheeran & Sir Nigel Rodley eds., Routledge, 2013).

⁷⁶ See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press, 1988) (1690) (discussing the idea that the acquisition of landed property through labour is a natural right preceding statehood, and that the protection of property constitutes a key function of the exercise of sovereign powers).

⁷⁷ See, e.g., 1789 CONST. art. 17 (Fr.) (defining the right to property as “*inviolable et sacré*”), available at <https://www.legifrance.gouv.fr/Droit-français/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789>; see, e.g., U.S. CONST. amend V; see also THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 116, 117, 141, 151, 157 (Arthur Goldhammer trans., Harvard Univ. Press, 2014) (discussing that the industrial revolution reduced the relative importance of land as a property asset vis-à-vis industrial, intangible and other forms of property).

⁷⁸ E.g., U.N. Human Rights Office of the High Commissioner, *Realizing Women's Rights to Land and Other Productive Resources*, U.N. Doc. HR/PUB/13/04 (2013); High Commissioner for Human Rights, *Report of the United Nations Commissioner for Human Rights*, U.N. Doc. E/2014/86 (July 11, 2014).

⁷⁹ See, e.g., *Committee on Economic, Social and Cultural Rights Considers Report of Indonesia*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R (May 1, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14554&LangID=E>.

⁸⁰ E.g. Olivier De Schutter (Report of the Special Rapporteur on the Right to Food), *The Right to Food*, U.N. Doc. A/65/281 (Aug. 11, 2010).

⁸¹ E.g. Surya P. Subedi (Report of the Special Rapporteur on the Situation of Human Rights in Cambodia), *A Human Rights Analysis of Economic and Other Land Concessions in Cambodia*,

international human rights courts.⁸² This growing body of international jurisprudence has both enriched and qualified the articulation between property and sovereignty as the main conceptual framing for addressing land issues in international law.

Before examining this jurisprudence, it is necessary to clarify the relationship between the concepts of land rights and human rights. Land rights are a manifestation of property, as defined above, and include the rights to hold, use, manage or transact a particular piece of land. They are granted to identified natural or legal persons, or to identified groups, typically under national law and, in some contexts, under local (“customary” but continuously evolving) land tenure systems. Depending on the context and the jurisdiction, land rights may take diverse forms such as ownership, leases, easements and public concessions. Human rights, on the other hand, protect fundamental goods that are inherent to human dignity, and are recognized to all human beings by international law and often national constitutions. Examples discussed in this article include the rights to property, food and housing.⁸³ Enjoyment of land rights may be instrumental to realizing these fundamental goods. In such situations, international human rights norms may in effect require states to respect and protect land rights. As will be seen, for instance, the right to property is commonly interpreted as requiring states not to arbitrarily dispossess people of their property, including land rights. So, while conceptually distinct, land rights and human rights can be closely interlinked.

Borderlines can blur further because international human rights law establishes special protections for the land rights of certain groups, particularly indigenous peoples. While the most relevant treaty – Convention No. 169 Concerning Indigenous Tribal Peoples in Independent Countries – has had relatively few ratifications to date,⁸⁴ and while the most recent comprehensive international document – the United Nations Declaration on the Rights of Indigenous Peoples, UNDRIP – is formally a soft-law instrument,⁸⁵ regional human rights

U.N. Doc. A/HRC/21/63/Add.1 (Sept. 24, 2012).

⁸² See, e.g., *infra* notes 90 to 102.

⁸³ See Poul Wisborg, *Human Rights Against Land Grabbing? A Reflection on Norms, Policies, and Power*, 26 J. AGRIC. & ENVTL. ETHICS, 1199 (2013), for a discussion of the distinction between land rights and human rights.

⁸⁴ As of December 2016, the Convention had been ratified by 22 states, primarily in Latin America. See ILO, *Ratification of C169 – Indigenous and Tribal Peoples Convention*, available at

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314.

⁸⁵ UNDRIP, *supra* note 6.

courts have developed an extensive jurisprudence that, partly drawing on these instruments, articulates the special circumstances of indigenous peoples in relation to generally applicable human rights, such as the right to property.⁸⁶ As a result, international human rights law provides differentiated arrangements for different groups, with indigenous peoples being entitled to protections that do not apply to other local communities. This differentiated treatment responds to the historical marginalization that many indigenous peoples have experienced in their national societies, their particularly strong social, cultural and spiritual connection to land, and their continued vulnerability in the face of natural resource projects.

As a final preparatory remark, it is worth noting that different human rights norms have diverse political and intellectual origins, and applying international human rights law to land relations can involve tensions and trade-offs between different human rights – for example, where aspiring land reform beneficiaries invoke the right to food to frame their land struggles, while land owners rely on the right to property to resist redistribution.⁸⁷

B. *The Human Right to Property*

The human right to property has historically provided a particularly important site for linking land to human rights, and offers a good starting point for this exploring the interplay of land, property and sovereignty. While affirmed in the Universal Declaration on Human Rights (UDHR),⁸⁸ the right to property is absent from the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). As a result, it is primarily protected by regional human rights systems, particularly in Europe, Africa and the Americas.⁸⁹ There are differences

⁸⁶ See the cases cited below and the work of successive UN Special Rapporteurs on the rights of indigenous peoples. See also S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (Oxford Univ. Press, 2d ed. 2004); CATHAL M. DOYLE, *INDIGENOUS PEOPLES, TITLE TO TERRITORY, RIGHTS AND RESOURCES: THE TRANSFORMATIVE ROLE OF FREE PRIOR AND INFORMED CONSENT* (Routledge, 2014); JÉRÉMIE GILBERT, *INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS* (Brill Nijhoff, 2d ed. 2016); BEN SAUL, *INDIGENOUS PEOPLES AND HUMAN RIGHTS: INTERNATIONAL AND REGIONAL JURISPRUDENCE* (Hart Publishing, 2016).

⁸⁷ See Lorenzo Cotula, *Property in a Shrinking Planet: Fault Lines in International Human Rights and Investment Law*, 11 *INT'L J.L. IN CONTEXT* 113, at 120-122 (2015).

⁸⁸ G.A. Res. 217 (III) A, art. 17, Universal Declaration of Human Rights (Dec. 10, 1948).

⁸⁹ See Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms [Protocol 1], art. 1 (Paris, 20 Mar. 1952) ("Protection of Property"); see also American Convention on Human Rights, art. 21 (San José, Costa Rica, 22 Nov. 1969)

in treaty formulation and jurisprudence, partly reflecting the diverse realities of property relations in different social, economic and political contexts. The European Court of Human Rights has developed an extensive jurisprudence on the right to property, including cases concerning land owned by individuals,⁹⁰ companies,⁹¹ and religious bodies.⁹² In the Americas, the Inter-American Court of Human Rights has developed jurisprudence on the collective right to property of indigenous and tribal peoples, interpreting the right to property in the light of Convention No. 169, and placing particular emphasis on the spiritual and cultural dimensions of land.⁹³ In Africa, use of the right-to-property clause of the African Charter on Human and Peoples' Rights in relation to land issues has been more limited but is growing, again with collective landholdings featuring prominently.⁹⁴

While the right to property historically emerged in connection with a liberal political tradition that emphasized individual land ownership, this international jurisprudence has broadened the relevance of the right to property to a wider set of tenure models. Indeed, beyond the specificities of each regional human rights system, international jurisprudence has made it clear that the right to property protects both individual and collective landholdings, and applies irrespective of whether land rights are formally titled and legally recognized as

("Right to Property"); African Charter on Human and Peoples' Rights [Banjul Charter], art. 14 (Nairobi, Kenya, 27 June 1981) ("Right to Property").

⁹⁰ *E.g.*, *Scordino v. Italy* (No. 1), App. No. 36813/97, 45 Eur. Ct. H.R. Rep. 7 (2006); *Ucci v. Italy*, App. No. 213/04, 2006-V Eur. Ct. H.R. While Protocol 1 protects "peaceful enjoyment of possessions," the European Court has interpreted this expression as equivalent "in substance" to the right to property. *See Marckx v. Belgium*, App. No. 6833/74, 2 Eur. H.R. Rep. 330, ¶ 63 (1979).

⁹¹ *E.g.*, *Pine Valley Developments Ltd and Others v. Ireland*, App. No. 12742/87, 222 Eur. Ct. H.R. (ser. A) (1991).

⁹² *Holy Monasteries v. Greece*, App. No. 13092/87, 2001 Eur. Ct. H.R.

⁹³ ILO Convention No. 169, *supra* note 6. *See, e.g.*, *Yakye Axa Indigenous Community* *supra* note 10 at, ¶¶ 127-37; *Sahoyamaya Indigenous Community*, *supra* note 10, at ¶ 117.

⁹⁴ *See Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, 155/96 AFR. C.H.P.R. (Gambia, 2001); *Centre for Minority Rights and Development and Minority Rights Group on Behalf of Endorois Welfare Council*, *supra* note 6. This latter case cites ILO Convention No. 169 and the UNDRIP, at ¶153-159, although the respondent state had not ratified the convention and withheld its approval of the UNDRIP. *See also African Commission on Human and Peoples' Rights v. The Republic of Kenya*, App. No. 006/2012, African Court on Human and Peoples' Rights, Judgment (May 26, 2017). *See also Decision Regarding Communication 260/02 (Bakweri Land Claims Committee v. Cameroon)*, ¶¶ 5, 55 (Afr. Comm'n Hum. & Peoples' Rts. Dec. 4 2004) (involving alleged violations of the right to property linked to a land conflict, but deeming the complaint inadmissible due to non-exhaustion of domestic remedies).

property under national law.⁹⁵ It is equally clear that the right to property protects not just land ownership but also a wider range of use rights,⁹⁶ including rights claimed under customary tenure systems, and that it places significant emphasis on the social, cultural, and spiritual values of property.⁹⁷ In contrast to the colonial era, when the *terra nullius* doctrine made indigenous populations vulnerable to dispossession, contemporary international human rights law explicitly recognizes indigenous land rights as protected property.

This broad framing of the right to property increases the emancipatory potential of a human right that has often been deemed to mainly protect the landed elites. However, the reconfigured right to property can also involve tensions with features of customary land tenure systems: while the notion of property presupposes a clear "separation between the owner and the owned," many customary systems emphasize the all-encompassing inter-penetration between people and the environment surrounding them, reflected in the intimate connection between land, traditional ways of life and systems of belief.⁹⁸ To obtain international redress, indigenous peoples have invoked property concepts originally derived from the Western tradition, and in the process fostered mutual cross-fertilization – translating indigenous concepts into property terms, while also taking the right to property into new directions.

While this exploration has so far linked land to property, sovereignty is another key part of the equation. The historical emergence of the right to property has shifted important parameters of

⁹⁵ *Holy Monasteries*, *supra* note 92, ¶¶ 6, 58, 60-61, 66; *Case of Dogan and Others v. Turkey*, App. Nos. 8803-8811/02, 8813/02 & 8813-8819/02, 41. Eur. Ct. H.R. Rep. 231, ¶ 139 (2004); *Mayagna (Sumo) Awas Tingni Community*, *supra* note 10, ¶¶ 146, 148-49, 153; *Sawhoyamaya Indigenous Community*, *supra* note 10, ¶¶ 117-21; *Saramaka People*, *supra*, note 10, ¶ 91; *Case of the Moiwana Community v. Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 130-34 (June 13, 2005); *Decision Regarding Communication 279/03-296/05 (Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan)*, ¶ 205 (Afr. Comm'n Hum. & Peoples' Rts. 2010).

⁹⁶ See, e.g., *Chiragov and Others*, *supra* note 4, ¶¶ 146-49; see also *Sargsyan*, *supra* note 4, ¶¶ 202-03.

⁹⁷ See, e.g., *Mayagna (Sumo) Awas Tingni Community*, *supra*, note 10, ¶ 149; *Yakye Axa Indigenous Community*, *supra* note 10, ¶ 131; *Sawhoyamaya Indigenous Community*, *supra* note 10, ¶¶ 120-21.

⁹⁸ PIERRE-ETIENNE KENFACK ET AL., *LAND INVESTMENTS, ACCOUNTABILITY AND THE LAW: LESSONS FROM CAMEROON* (Int'l Inst. for Env't & Dev., 2016) 9; See also Stuart Kirsch, *Juridification of Indigenous Politics, in LAW AGAINST THE STATE: ETHNOGRAPHIC FORAYS INTO LAW'S TRANSFORMATIONS* 23, 34 (Julia Eckert et al. eds., Cambridge Univ. Press, 2012); James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. OF INT'L & COMP. L. 7 (2005).

state sovereignty. As the right to property is primarily based on regional human rights systems, the contours of this shift vary depending on applicable regional treaties. In general terms, however, the legal protection of the right to property has traditionally placed safeguards against expropriation at centre-stage, with non-discrimination, public purpose and payment of compensation being common requirements for expropriations to be lawful.⁹⁹ International human rights law also imposes discipline on lesser forms of interference with property that fall short of expropriation, though human rights bodies have recognized that states enjoy considerable discretion in balancing public and private interests.¹⁰⁰

Further, the international jurisprudence has taken the normative content of the right to property beyond the classic contours established by the liberal political tradition, particularly when applying the right to property to cases stemming from the award of natural resource concessions in territories claimed by indigenous peoples. In such cases, the Inter-American Court of Human Rights and the African Commission on Human and People's Rights have connected the protection of the right to property to environmental and social impact assessment requirements; to benefit-sharing arrangements that enable indigenous peoples and local communities to participate in the benefits generated by the investments; and to free, prior and informed consent.¹⁰¹ Although some more recent judgments have referred in more general terms to a "right to consultation," rather than specifically to free, prior and informed consent,¹⁰² the overall jurisprudential approach has

⁹⁹ Unlike Article 21 of the ACHR, Article 14 of the ACHPR does not require payment of compensation for expropriations of property – it merely requires compliance with applicable law. See Banjul Charter, *supra* note 89. Article 1 of Protocol 1 of the ECHR is also silent on compensation, but the European Court of Human Rights held that compensation is implicitly required and must be "reasonably related" to market value. See *James and Others v. United Kingdom*, App. No. 8793/79, 8 Eur. H.R. Rep. 123, ¶ 54 (1986); *Lithgow and Others v. United Kingdom*, App. Nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, 8 Eur. H.R. 329, ¶ 121 (1986).

¹⁰⁰ See, e.g., *James and Others*, *supra*, note 99, ¶¶ 47-50, 54-57, 69, 75-77; *Lithgow and Others*, *supra* note 99, ¶¶ 122, 143, 147, 150, 177, 194, 197 (discussing Article 1, third sentence, of ECHR Protocol 1, and the European Court's "margin of appreciation" doctrine).

¹⁰¹ *Saramaka People*, *supra* note 10, ¶ 134. See *Centre for Minority Rights and Development and Minority Rights Group on Behalf of Endorois Welfare Council*, *supra* note 94, for the African Commission on Human and People's Rights application of this jurisprudential approach.

¹⁰² See, e.g., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (June 27, 2012). This judgment confirmed the overall approach but did not mention benefit sharing and free, prior and informed consent, talking instead of a "right to consultation." See, e.g., *id.* ¶¶ 160, 163-167. The decision, however, clarified that the consultation must be in good faith and "with the aim of reaching an agreement or obtaining consent." See, e.g., *id.* ¶185. See also *Comunidad Garífuna Triunfo de la Cruz y Sus Miembros v. Honduras*,

redesigned the protection of the right to property beyond the traditional safeguards against expropriation. This reconfigured conception of the right to property requires states to consult affected people, to consider the social and environmental impacts of proposed developments, and to ensure that affected people benefit from those developments (rather than being merely compensated for their losses).¹⁰³

Framed in these terms, the right to property establishes “internal” boundaries for the lawful exercise of sovereign powers, enabling landholders to challenge adverse state conduct that occurs within the jurisdiction or control of a given state. Put differently, the right to property engages the internal dimensions of the relationship between land, property and sovereignty, breaking with longer-term historical evolutions that were primarily concerned with external dimensions linked to the acquisition of land and territory.¹⁰⁴ In the colonial enterprise, changes in sovereignty and property often went hand in hand, as the colonial powers claimed sovereignty over territories and allocated land to their settlers. On the other hand, the internal dimensions highlight the potential for tensions between property and sovereignty, with international human rights law protecting property and imposing limits on the exercise of sovereignty. These limits do not “erode” a timeless, immutable conception of sovereignty, but they do reconfigure that conception based on evolving practices and normative frameworks.¹⁰⁵

C. *Non-proprietary Foundations in Human Rights Law*

In addition to providing a different perspective on the interplay of land, property and sovereignty, international human rights law also qualifies the role of that interplay in conceptualizing and addressing land claims. This is because human rights law does not frame land claims solely or even primarily in property terms. Some scholars have noted the limitations of the legal protection that the right to property –

Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶156 (Oct. 5, 2015) (mentioning environmental impact assessment, reasonable benefit sharing and the right to consultation).

¹⁰³ See Elisa Morgera, *The Need for an International Legal Concept of Fair and Equitable Benefit-Sharing*, 27 EUR. J. INT'L L. 353 (2016) (discussing the concept of benefit sharing in international law).

¹⁰⁴ However, the internal dimensions arguably present a degree of conceptual continuity with the legal safeguards that, from the late 19th century, protected existing property in the aftermath of sovereignty transfers.

¹⁰⁵ See Thomas J. Biersteker & Cynthia Weber, *The Social Construction of State Sovereignty*, in STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 1, 7 (Thomas J. Biersteker & Cynthia Weber eds, Cambridge Univ. Press, 1996).

even if reconfigured to cater for collective and customary land rights – can provide. Where commercial pressures threaten the ancestral lands of indigenous peoples and local communities, much more is at stake than property alone. Yet conduct that can significantly undermine livelihoods and ways of life is, in effect, treated as a “mere” violation of property, placing ancestral land rights on the same footing as the private rights acquired by commercial developers, and granting states significant latitude in overriding the rights of people who depend on the land for their cultural or physical survival.¹⁰⁶

The perceived inadequacies of the right-to-property framing have resulted in the establishment of non-proprietary foundations for harnessing international human rights law to protect land rights. These foundations place considerable emphasis on the socio-economic, cultural and spiritual significance of land, and on its strong connection to self-determination. Some authors have advanced an expansive interpretation of the right to life as a “right to a decent life” as a basis for protecting indigenous peoples’ land rights.¹⁰⁷ International human rights bodies have indeed found that this right had been violated where land dispossession resulted in major compressions of access to healthcare, food and clean water.¹⁰⁸ In addition, several internationally recognized economic, social and cultural rights indirectly protect enjoyment of land rights as a means to achieve socio-economic outcomes. For example, the right to an adequate standard of living, including food and housing,¹⁰⁹ primarily frames its close connection to land in terms of livelihoods: where people depend on land for their food security, secure land rights are essential to the progressive realization of the right to food.¹¹⁰ Therefore, land dispossessions would violate the right to food if people are deprived of the land on which they depend for their livelihoods without a suitable alternative.¹¹¹

¹⁰⁶ Thomas M. Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. PA. J. INT'L L. 113, 162-72 (2013).

¹⁰⁷ *Id.* at 172-83.

¹⁰⁸ *Yakye Axa Indigenous Community*, *supra* note 10, ¶¶ 167-76.

¹⁰⁹ Among other sources, the right to an adequate standard of living is recognized by Article 25 of the UDHR, and Article 11 of the ICESCR. See UDHR, *supra* note 90, art. 25; see also International Covenant on Economic, Social and Cultural Rights, *adopted*, Dec. 16, 1966, 993 U.N.T.S. 3, art. 11 [hereinafter ICESCR].

¹¹⁰ U.N. ECON. & SOC. COUNCIL, *The Right to Adequate Food (Art. 11)*, E/C.12/1999/5, at ¶¶ 12-13, 26. See also Olivier De Schutter (Special Rapporteur on the Right to Food), *Rep. of the Special Rapporteur on the Right to Food*, U.N. Doc. A/65/281 (Aug. 11, 2010). The report is specifically devoted to the relationship between land access and the right to food.

¹¹¹ Olivier De Schutter (Special Rapporteur on the Right to Food), *Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human*

Similarly, forced evictions constitute *prima facie* violations of the right to housing,¹¹² and international instruments on development projects call on states to ensure “full and prior informed consent regarding relocation.”¹¹³ Further, expropriation of lands providing the basis for traditional ways of life could violate the right of minorities to enjoy their own culture, affirmed in the ICCPR,¹¹⁴ and the UNDRIP affirms the strong spiritual dimensions of indigenous peoples’ rights to their lands and territories.¹¹⁵ While diverse in their legal sources and normative content, these norms and instruments all highlight the importance that international human rights law attaches to the socio-economic, cultural and spiritual values of land, and the significant non-proprietary dimensions of the human rights protection of land rights.

A further illustration of these dimensions concerns the intimate connections that link land to the right to self-determination, and more broadly to rights of political participation. Land issues are eminently political, and often emotive, particularly – but not only – in societies where land provides an important basis for economic activity, social relations and political power. As a result, political rights can be relevant to the interface between land rights and human rights, including the rights of freedom of expression, assembly and association,¹¹⁶ and – in jurisdictions where political space is constrained – the human rights of

Rights Challenge, ¶ 4, U.N. Doc. A/HRC/13/32/Add.2 (Dec. 28, 2009).

¹¹² Committee on Economic, Social and Cultural Rights, General Comment No. 7, *The Right to Adequate Housing* (Art. 11.1 of the Covenant): *Forced Evictions* (May 20, 1997); *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR)*, *supra* note 94, ¶¶ 60-63.

¹¹³ Miloon Kothari (Special Rapporteur on Adequate Housing), *Basic Principles and Guidelines on Development-Based Evictions and Displacement* (in *Report of the Special Rapporteur on Adequate Housing as a Component of the Right of an Adequate Standard of Living*), ¶ 56, U.N. Doc. A/HRC/4/18, annex 1 (Feb. 5, 2007).

¹¹⁴ International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171, art. 27 [hereinafter ICCPR]. *See also* UN Human Rights Comm., CCPR General Comment No. 23: Art. 27 (Rights of Minorities), ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994); *see also* U.N. Human Rights Comm., *Ivan Kitok v. Sweden*, Comm. No. 197/1985, U.N. Doc. CCPR/C/33/D/197/1985 (1988); UN Human Rights Comm., *Lubicon Lake Band v. Canada*, Comm. No. 167/1984, U.N. Doc. Supp. No. 40 (A/45/40) (Mar. 26, 1990).

¹¹⁵ UNDRIP, *supra* note 6, arts. 25-26.

¹¹⁶ For example, UN Special Rapporteurs have scrutinized situations where the award of commercial land concessions was associated with repression to quell local resistance or silence activists. *See, e.g.*, Surya P. Subedi (Special Rapporteur on the Situation of Human Rights in Cambodia), *A Human Rights Analysis of Economic and Other Land Concessions in Cambodia*, ¶¶ 129, 159-160, U.N. Doc. A/HRC/21/63/Add.1 (Sept. 24, 2012); Tomás Ojea Quintana (Special Rapporteur on North Korea), *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶ 27, U.N. Doc. A/HRC/25/64 (Apr. 2, 2014).

land rights defenders.¹¹⁷

In collective terms, land can also provide the foundation for the exercise of the right to self-determination: in recognizing self-determination as the right of peoples to “freely determine their political status and freely pursue their economic, social and cultural development,” both the ICCPR and the ICESCR explicitly refer to the right of peoples to “freely dispose of their natural wealth and resources” and not to be deprived of their means of subsistence.¹¹⁸ This framing recognizes the role of land as a basis for pursuing development pathways that respond to local agendas and priorities. The connection to self-determination is especially relevant to collective landholdings, as international human rights institutions have applied the notion of “peoples” to groups within states.¹¹⁹

Where indigenous peoples are involved, the connection between land and self-determination is particularly prominent.¹²⁰ This reflects the special place of land in indigenous societies, and the UNDRIP’s affirmation of the right of indigenous peoples to self-determination and to freely pursue their economic, social and cultural development within their ancestral territories.¹²¹ As is well known, international instruments on the rights of indigenous peoples construe self-determination as political empowerment and greater autonomy, rather than independent statehood.¹²² The duty of states to consult indigenous peoples on proposed measures or programmes that may affect those peoples or their land rights, to be carried out in good faith and “in order to obtain their free and informed consent prior to the approval,” is an important pillar of this internal self-determination.¹²³

¹¹⁷ Human rights organizations have documented cases of repression, intimidation and killing of land rights defenders in contexts of polarized politics and authoritarian regimes, exposing violations of the rights to life and to physical integrity. See, e.g., *Land and environmental rights defenders in danger: an overview of recent cases*, FIDH (INTERNATIONAL FEDERATION FOR HUMAN RIGHTS) (Dec.2013); *On Dangerous Ground – 2015’s Deadly Environment: The Killing and Criminalization of Land and Environmental Defenders Worldwide*, GLOBAL WITNESS (June, 2016).

¹¹⁸ ICCPR, *supra* note 114, art. 1(1)-(2); ICESCR, *supra* note 111, art. 1(1)-(2). See also Banjul Charter, *supra* note 89, art. 20.

¹¹⁹ See, e.g., *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, *supra* note 94, ¶¶ 55-58; *Centre for Minority Rights and Development and Minority Rights Group on Behalf of Endorois Welfare Council v. Kenya*, *supra* note 94, ¶ 147-62.

¹²⁰ See UNDRIP, *supra* note 6, arts. 3, 32; see also ILO Convention No. 169, *supra* note 6, arts. 13-19.

¹²¹ UNDRIP, *supra* note 6, arts. 3, 32.

¹²² UNDRIP, *supra* note 6, art. 4-5, 18-20. See also Antkowiak, *supra* note 106, at 136.

¹²³ UNDRIP, *supra* note 6, arts. 19, 32(2). See also ILO Convention No. 169, *supra* note 6,

This legal architecture challenges some established parameters in the relationship between land, property and sovereignty. In departing from a purely proprietary framing, it charts new reconfigurations of sovereignty through protecting ultimate socio-economic outcomes such as access to nutritious and culturally acceptable food,¹²⁴ and through creating opportunities for influence in public decision-making. Further, the international instruments and jurisprudence on the rights of indigenous peoples blur the traditionally neat terminological distinction between land (the term commonly used in property relations) and territory (more typically connected to sovereignty claims).¹²⁵ And the link to self-determination qualifies the analogies traditionally drawn between property law concepts and international law modes of acquisition of territory, mentioned above, as questions may arise about the legitimacy of a voluntary cession of sovereign control against the wishes of the local population.

D. Implications for the Interplay of Land, Property and Sovereignty

Unlike historical evolutions in the norms governing the acquisition of land and territory, which were primarily concerned with the outer boundaries of both political authority and property relations, international human rights law locates the interplay of land, property and sovereignty primarily within the jurisdiction of a given state. In the liberal tradition, this internal dimension is centred on the protection of the human right to property, including property relations over land, against the arbitrary exercise of state sovereignty, particularly with regard to expropriation. Contemporary international human rights law has reconfigured the right to property, protecting collective, customary land rights that depart from the Western canon of land ownership, and establishing substantive and procedural obligations beyond the

arts. 6 and 16(2). See also UN Human Rights Comm., *Ángela Poma Poma v. Peru*, Comm. No. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (Apr. 24, 2009); Comm. on the Elimination of Racial Discrimination, General Recommendation No. 23, Rights of indigenous peoples, U.N. Doc. A/52/18, annex 5 (Aug. 18, 1997); *Saramaka People*, *supra* note 10, ¶ 134; *Centre for Minority Rights Development and Minority Rights Group on behalf of Endorois Welfare Council*, *supra* note 94, ¶¶ 290-91.

¹²⁴ Comm. on Econ., Soc. and Cultural Rts., General Comment No. 12, The Right to Adequate Food (Art. 11), ¶¶ 6, 9, 11, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

¹²⁵ See ILO Convention No. 169, *supra* note 6, arts. 13-19, particularly art. 13(2) ("The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use."). See also, e.g., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, *supra* note 102, ¶¶ 146-149 (applying the right to property to "territories").

traditional safeguards against expropriation.

In emphasizing the economic, social, cultural, and spiritual significance of land, and the strong connections between land and self-determination, international human rights law has also reconfigured the notion of property itself, and displaced that notion as the only or even the main construct for framing land claims in international law. Compared to longer-term historical evolutions, these developments build on more plural intellectual sources, including concepts that originate from articulating right-to-property jurisprudence in the context of indigenous claims. The overall result is a body of international law that can protect the property assets of landed elites, but that also presents significant emancipatory potential – for example, offering legal protection to the land rights of indigenous peoples and local communities under pressure from natural resource investments, and thereby reversing, at least in part, the marginalization of those rights during colonial history.

Overall, the expanding international human rights jurisprudence points to the growing efforts on the part of indigenous peoples and local communities to mobilize “rights” language and legal processes to advance their land struggles.¹²⁶ On paper, international human rights law provides a wide range of legal remedies to meet this demand for international justice, including land restitution where relevant.¹²⁷ In practice, however, the extent to which international human rights law can help to advance land struggles and impose real discipline on the exercise of state sovereignty still requires thorough empirical assessment. The record of compliance with human rights decisions is mixed, and important land-related decisions have not been implemented.¹²⁸ In other cases, implementation has been slow, and has required protracted litigation and political mobilization at local and national levels.¹²⁹ International human rights law as it exists today ultimately provides limited legal avenues for enforcement vis-à-vis a

¹²⁶ Julia Eckert et al., *Introduction: law's travels and transformations*, in *LAW AGAINST THE STATE: ETHNOGRAPHIC FORAYS INTO LAW'S TRANSFORMATIONS* 1, 2 (Julia Eckert et al. eds., Cambridge Univ. Press, 2012). See also Jacobo Grajales, *Land Grabbing, Legal Contention and Institutional Change in Colombia*, 42 *J. OF PEASANT STUD.* 541 (2015).

¹²⁷ See, e.g., *Sawhoyamaya Indigenous Community*, *supra* note 10, ¶ 248(6) (2006).

¹²⁸ See, e.g., Resolution Calling on the Republic of Kenya to Implement the Endorois Decision, African Comm. Hum. & Peoples' Rts. (Nov. 5, 2013).

¹²⁹ See, e.g., Julia Cabello Alonso, *Sawhoyamaya and the Path towards Dignity*, 9 *RIGHT TO FOOD J.* 13 (2014) (writing on the outcome of *Sawhoyamaya v. Paraguay*). Following significant political mobilization to put pressure on the government to comply with the *Sawhoyamaya* judgment, the Paraguayan parliament enacted legislation providing for the expropriation of the land and its restitution to the Sawhoyamaya community (Law No. 5194 of 12 June 2014).

state determined to avoid or delay compliance.

Compliance and enforcement issues aside, the substantive safeguards also present some limitations, particularly outside contexts that would trigger the special protections applicable to indigenous peoples, and especially in geographies where regional human rights systems are absent or weak. Particularly difficult issues arise where large-scale agribusiness or extractive industry investments bring into contest claims to land backed by international human rights law, and by international norms that protect foreign investment. The next section explores this issue.

IV. INTERNATIONAL INVESTMENT LAW AND THE PROTECTION OF PROPERTY

A. Mapping the Terrain: Investment Protection and Land Relations

The spread and deepening of economic globalization has highlighted the ever closer connections between the international legal arrangements governing the global economy on the one hand, and claims to land and natural resources on the other. As with international human rights law, relatively recent processes build on longer-term evolutions: international norms that protect foreign landholdings date a long time. In the 19th and early 20th centuries, for example, diplomatic or arbitral proceedings were activated for disputes over urban and residential land,¹³⁰ and for farmland expropriations and occupations in the context of agrarian reform.¹³¹ In the 1930s, the expropriation of land owned by US nationals as part of Mexico's agrarian reform triggered celebrated diplomatic correspondence between the US and Mexican governments, with then US Secretary of State Cordell Hull arguing that the expropriation of foreign property requires states to pay prompt, adequate and effective compensation.¹³² Currently known as the "Hull formula," this standard of compensation is widely used in contemporary investment treaties¹³³ – a testament to the important role that land

¹³⁰ Great Britain v. Greece (George Finlay Claim), 39 British and Foreign State Papers 410 (1849); Great Britain, Spain and France v. Portugal, 1 R.I.A.A. 7 (1920); Walter Fletcher Smith v. The Compañía Urbanizadora del Parque y Playa de Mariano (Cuba v. U.S.), 2 R.I.A.A. 913-18 (1929).

¹³¹ See, e.g., Marguerite de Joly de Sabla (U.S. v. Pan.), Award, 6 R.I.A.A. 358-70 (1993).

¹³² See Dep't of State Press Release, *Mexico-United States: Expropriation by Mexico of Agrarian Properties Owned by American Citizens*, 32 AM. J. OF INT'L L. 18 (1938).

¹³³ August Reinisch, *Legality of Expropriations*, in STANDARDS OF INVESTMENT PROTECTION 171, 196 (August Reinisch ed., Oxford Univ. Press, 2008).

disputes played in the historical development of the norms of international law governing the treatment of foreign investment.

But it is the meteoric rise of investor-state arbitration based on bilateral and regional investment treaties that has made investment law an increasingly resorted-to body of international law in disputes over land. This trend is redefining the contours of both property and sovereignty, because international norms protect foreign landholdings against the adverse exercise of sovereign powers. To be clear, international investment treaties protect investment rather than property, and there are important differences between the two concepts.¹³⁴ These differences are particularly significant where investment treaties restrict the application of some of their provisions, particularly on expropriation, to situations involving the existence of property rights.¹³⁵

However, there is also significant overlap between the notions of property and investment, not least because both can involve broad definitions that encompass wide-ranging economic realities. Many treaty definitions of investment focus on protected “assets” and would typically include immovable assets, land concessions and shares in landholding companies.¹³⁶ Conversely, arbitral tribunals have adopted a dynamic notion of “property” that emphasizes expectations and wealth creation,¹³⁷ following a philosophical tradition that dates back to Jeremy Bentham.¹³⁸ There is little doubt that the norms on the treatment of foreign investment are an important part of the international legal architecture for the protection of property, and that commercial landholdings would qualify as a protected asset under many investment treaties. And while many arbitrations relate to sectors with limited connections to land claims, land continues to form the object of investment disputes – in relation not only to agriculture but also to

¹³⁴ Zachary Douglas, *Property, Investment and the Scope of Investment Protection Obligations*, in *THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE* 363, 374 (Zachary Douglas et al. eds., Oxford Univ. Press, 2014); Cotula, *supra* note 13.

¹³⁵ See, e.g., Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, Annex B, Art. 2, Feb. 19, 2008.

¹³⁶ See, e.g., 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, U.K.–Colom., art. I(2), Mar 17, 2010.

¹³⁷ *Methanex Corp. v. U.S.*, Final Award on Jurisdiction and Merits, United Nations Commission on International Trade Law (UNCITRAL), Part IV, Ch. D, ¶ 17 (Aug. 3, 2005).

¹³⁸ JEREMY BENTHAM, *THEORY OF LEGISLATION*, 145 (Charles Milner Atkinson trans., Humphrey Milford, Oxford University Press, 1914) (“Property is nothing more than the basis of a certain expectation.”).

extractive industries, real estate and tourism projects.¹³⁹

As a result, investor-state arbitral tribunals have developed a sizable jurisprudence on investment disputes with significant land dimensions. Several arbitrations concerned land reform programmes, including in relation to land redistribution,¹⁴⁰ restitution,¹⁴¹ privatization,¹⁴² occupation,¹⁴³ as well as sovereign bonds stemming from agrarian reforms.¹⁴⁴ In principle, land tenure reforms affecting the nature, content or duration of land rights could also activate international investment protection standards – for example, reforms that convert ownership into long-term leases, or that change the duration of land leases. While land tenure reform has not yet resulted in publicly known investor-state arbitrations, tenure reform in the mining sector has formed the object of arbitration,¹⁴⁵ and the conversion of riparian water rights into water permits in the context of a wider land reform dispute was deemed to violate investment treaty standards.¹⁴⁶

The arbitral jurisprudence is not confined to land reform contexts. Land valuation has come up in investor-state arbitration,¹⁴⁷ including in relation to land transactions that the government allegedly signed at

¹³⁹ For examples of land-related arbitrations in the tourism sector, see *Siag v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009); *Vigotop Ltd. v. Hungary*, ICSID Case No. ARB/11/22, Award, (Oct. 1, 2014); *Unglaube v. Republic of Costa Rica*, ICSID Cases No. ARB/08/1, ARB/09/20, Award (May 16, 2012); *Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award (June 27, 2016); *Sajwani v. Arab Republic of Egypt*, Case No. ARB/11/16. See also Islam Zayid, *Egypt Negotiates End to International Disputes*, DAILY NEWS EGYPT (June 16, 2013), <http://www.dailynewsegypt.com/2013/06/16/egypt-negotiates-end-to-international-disputes/>.

¹⁴⁰ See, e.g., *Funnekotter & Others*, *supra* note 11; *Von Pezold & Others*, *supra* note 11; *Vestey Group Ltd.*, *supra* note 11; *Border Timbers Ltd. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Award (July 28, 2015).

¹⁴¹ There are no known investor-state arbitrations directly relating to rural land restitution but one recent arbitration partly hinged on public action to return real estate confiscated during the communist era. See *Awdi v. Romania*, ICSID Case No. ARB/10/13, Award (Mar. 2, 2015).

¹⁴² *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award (Apr. 29, 1999).

¹⁴³ See, e.g., Luke Eric Peterson, *Swiss Investor Prevailed in 2003 in Confidential BIT Arbitration over South Africa Land Dispute*, INV. ARBITRATION REPORTER (Oct. 22 2008), http://www.iareporter.com/articles/20091001_2.

¹⁴⁴ *Gramercy Funds Management LLC v. The Republic of Peru*, Claimants' Notice of Arbitration and Statement of Claim, UNICITRAL (June 2, 2016).

¹⁴⁵ *Foresti & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award (Aug. 4, 2010). Investors challenged South African mining legislation that changed the nature of the mining rights held by investors, as well as measures to transfer minority shareholdings to historically disadvantaged groups, as part of South Africa's Black Economic Empowerment programme. *Id.*

¹⁴⁶ *Von Pezold & Others*, *supra* note 11, ¶¶ 512, 553-54.

¹⁴⁷ See, e.g., *Vigotop Ltd.*, *supra* note 139.

favourable terms and then rescinded after a regime change.¹⁴⁸ The termination of land leases for failure to develop the land within prescribed timeframes has also resulted in investor-state arbitration,¹⁴⁹ as have failure to transfer all the land necessary for project implementation,¹⁵⁰ the direct or indirect expropriation of land to create natural parks,¹⁵¹ and lack of inter-ministerial coordination in connection with investment approval and land use zoning requirements.¹⁵²

Under customary international law and many investment treaties, states have the right to expropriate landholdings, including in the context of land reform programmes, so long as the expropriation complies with certain conditions, including payment of compensation usually at full market value.¹⁵³ In addition to safeguards against expropriation, land-related investment disputes can activate other investment protection standards too, including fair and equitable treatment and full protection and security. Arbitral tribunals have interpreted fair and equitable treatment as protecting, among other things, the “legitimate expectations” that investors had when they made the investment, which subsequent state conduct could frustrate.¹⁵⁴ Full protection and security claims are particularly relevant where investors argue that authorities failed to protect landholdings from occupations, including by people advocating for land reform.¹⁵⁵ While compensation

¹⁴⁸ See, e.g., *Sajwani*, *supra* note 139. On this arbitration, see Jonathan Bonnitche, *Investment Treaties and Transition from Authoritarian Rule*, 15 J. OF WORLD INV. & TRADE 965, 983 (2014).

¹⁴⁹ *Ekran Berhad v. People's Republic of China*, ICSID Case No. ARB/11/15 (May 24, 2011). The arbitration concerned a project to develop “arts and culture facilities” on 900 hectares of land. *Id.* It was initiated in 2011, immediately suspended, and discontinued in 2013. *Id.* On this arbitration, see Perry S. Bechky, *International Adjudication of Land Disputes: For Development and Transnationalism*, 7 L. & DEV. REV. 313, 314 (2014).

¹⁵⁰ *Ansung Housing Co. Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award (Mar. 9, 2017) (concerning an investment in a country club and golf course). Information on this case is based on, David Baron et al., *ICSID Arbitration Initiated Against China as Negotiations Move Ahead on U.S.-China Bilateral Investment Treaty*, NAT'L L. REV. (Dec. 12, 2014), <http://www.natlawreview.com/article/icsid-arbitration-initiated-against-china-negotiations-move-ahead-us-china-bilateral>.

¹⁵¹ E.g., *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award (Feb. 17, 2000); *Un glaube*, *supra* note 139.

¹⁵² *MTD Equity Sdn. Bhd. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004).

¹⁵³ See, e.g., *Agreement (U.K.-Colum.)*, *supra* note 139, art. VI. See also *Un glaube*, *supra* note 139, ¶ 205.

¹⁵⁴ *Int'l Thunderbird Gaming Corp. v. The United Mexican States*, Award, UNICITRAL, ¶ 147 (Jan. 26, 2006).

¹⁵⁵ In one undisclosed arbitral award, the tribunal reportedly found that South Africa breached the full protection and security standard for failure to protect the landholding of a foreign investor against incursions from nearby residents. See Peterson, *supra* note 143 (an article based on

is the main remedy for breaches of international investment law, some arbitral tribunals have awarded land restitution, providing for compensation in case of non-compliance.¹⁵⁶

B. Human Rights and Investment Protection Norms: Convergence and Divergence

There are parallels in the interplay of land, property and sovereignty under international human rights and investment protection norms.¹⁵⁷ Like international human rights treaties, investment norms protecting foreign investment redefine space for the lawful exercise of sovereign powers within a state's national jurisdiction, and thus reconfigure what this article has called the internal dimension of that interplay. As pointed out by an arbitral tribunal in its discussion of an alleged expropriation, "while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. [. . .] [T]he rule of law, which includes [investment] treaty obligations, provides such boundaries."¹⁵⁸

In this context, both human rights and investment protection norms establish substantive standards and legal remedies for private actors to seek international review of the legality of public conduct that adversely affects claims to land. In other words, both bodies of international law ultimately protect property against the adverse exercise of state sovereignty. Depending on the nationality of the landholders and on applicable treaties, claims of discriminatory or uncompensated expropriations under the same land reform programme have given rise both to international disputes based on international human rights

reading the arbitral award, which has not been made public).

¹⁵⁶ See *Von Pezold & Others*, *supra* note 11, ¶¶ 670-744.

¹⁵⁷ On the relationship between international human rights and investment law, see, e.g., James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77 (2007); Ursula Kriebaum & Christoph Schreuer, *The Concept of Property in Human Rights Law and International Investment Law*, in HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW: LIBER AMICORUM LUZIUS WILDHABER, 743 (Stephan Breitenmoser et al. eds., Nomos, 2007); PIERRE-MARIE DUPUY ET AL., HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Oxford Univ. Press, 2009); Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L.Q. 573 (2011). For a specific focus on land issues, see LORENZO COTULA, HUMAN RIGHTS, NATURAL RESOURCE AND INVESTMENT LAW IN A GLOBALISED WORLD: SHADES OF GREY IN THE SHADOW OF THE LAW (Routledge, 2011); see also Cotula, *supra* note 87; Kaitlin Cordes & Anna Bulman, *Corporate Agricultural Investment and the Right to Food: Addressing Disparate Protections and Promoting Rights-Consistent Outcomes*, 20 UCLA J. INT'L L. & FOREIGN AFF. 87 (2016).

¹⁵⁸ *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, ¶ 423 (Oct. 2, 2006). The case does not concern land relations.

arguments,¹⁵⁹ and to investor-state arbitration.¹⁶⁰ In some investor-state arbitrations, the investors had arguably suffered human rights violations on the part of public authorities, including violence and racial discrimination, and this formed part of the tribunal's reasoning.¹⁶¹

From the perspective of the investors' home state, however, international investment protection norms also engage the external dimension of the nexus between land, property and sovereignty. During colonialism, this external dimension typically involved claiming sovereignty over the colonies, and facilitating and protecting commercial operations through the legal system of the colonial power. On the other hand, contemporary international law protects landholdings against the conduct of independent states. In this sense, the historical transition to independence in Africa and Asia and the development of international investment law could be said to represent, at least in part, a shift from sovereignty to property as the implicit legal construct for exerting control over land and natural resources in territories outside national jurisdiction.¹⁶² While capital exporting states primarily promoted the negotiation of investment treaties to protect the economic interests of their nationals operating overseas, narratives about the role of foreign investment in fostering economic development, and of the rule of law in promoting investment, provided the political legitimacy necessary for capital importing states to buy into these legal developments.¹⁶³

These historical and conceptual origins have important implications for the ways in which international investment protection norms frame the relationship between land, property and sovereignty, and drive significant differences compared to the international human rights jurisprudence. First, different normative values underpin human rights and investment protection norms. International human rights law is centred on global and regional multilateral regimes that connect land, property and the related reconfiguration of sovereignty to the goal of

¹⁵⁹ Southern African Development Community (SADC) Tribunal Windhoek, Namibia (*Mike Campbell (Pvt) Ltd. & Others v. The Republic of Zimbabwe*), Judgment, SADC (T) Case No. 2/2007 (Nov. 28 2008).

¹⁶⁰ See *Funnkotter & Others*, *supra* note 11; *Von Pezold & Others*, *supra* note 11; *Border Timbers Ltd.*, *supra* note 140.

¹⁶¹ See, e.g., *Von Pezold & Others*, *supra* note 11, ¶¶ 110-15, 445-48, 645, 652-57, 918-920.

¹⁶² See also Nicolás Perrone, *The International Investment Regime and Foreign Investors' Rights: Another View of a Popular Story* (2013) (unpublished Ph.D. dissertation, London School of Economics) (<http://etheses.lse.ac.uk/776/>); Cotula, *supra* note 13.

¹⁶³ See, e.g., LAUGE POULSEN, *BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES* 47-109 (Cambridge Univ. Press, 2015).

promoting human dignity; while investment law regulates the exercise of state sovereignty with regard to lands held by foreign investors primarily through reciprocal treaties aimed at facilitating cross-border commercial relations.¹⁶⁴ In line with these different premises, international human rights and investment protection norms embody different conceptions of land and property: while as discussed human rights law recognizes the important social, cultural and spiritual dimensions of land and ties land relations to self-determination and socio-economic rights, investment protection norms tend to primarily conceptualize land as a commercial asset the value of which is expressed in monetary terms.¹⁶⁵

Second, and in more practical terms, human rights and investment law differ with regard to whose rights they protect, and the legal protection they provide. To be sure, there is overlap in the range of possible claimants. For example, individuals hold human rights by virtue of their being human beings; and they can also be foreign investors, and they have initiated several land-related investor-state arbitrations.¹⁶⁶ Companies have brought right-to-property cases, including in relation to land, under the European regional human rights system,¹⁶⁷ though such opportunities are more restricted under other regional human rights treaties.¹⁶⁸

On the other hand, as discussed earlier, international human rights law establishes special protections for certain groups, including indigenous peoples, while international investment protection norms only protect investment by foreign nationals (both natural and legal persons). The overall outcome of this patchwork of legal coverage is that international human rights and investment protection norms can advance different claims to land – ranging from the land rights of indigenous peoples and local communities, protected under human

¹⁶⁴ On this difference, see *Sawhoyamaza Indigenous Community*, *supra*, note 10, ¶ 140.

¹⁶⁵ For a more detailed discussion, see Lorenzo Cotula, *The New Enclosures? Polanyi, International Investment Law and the Global Land Rush*, 34 3D. WORLD Q. 1605 (2013).

¹⁶⁶ See, e.g., *Funnekotter & Others*, *supra* note 11; *Von Pezold & Others*, *supra* note 11.

¹⁶⁷ See *Pine Valley Developments Ltd. & Others*, *supra* note 91.

¹⁶⁸ In the Inter-American system, the Inter-American Commission on Human Rights declared inadmissible a petition brought by a company, holding that the ACHR only protects natural persons. See *Mevopal, S.A. v. Argentina*, Inter-Am. Comm'n H.R., Report 39/99, ¶ 17 (1999). The Inter-American Court took a more nuanced approach in *Cantos v. Argentina*, Judgment (Preliminary Objections), Inter-Am. Ct. H.R. (Sept. 7 2001) – a case brought by an individual in relation to government actions affecting his business enterprises. See *id.* ¶ 27, 29. For other Inter-American Court cases brought by individuals and including right-to-property aspects relating to business activities, see *Bronstein v. Peru*, Judgment, Inter-Am. Ct. H.R., ¶¶ 117–31 (Feb. 6, 2001); *Íñiguez v. Ecuador*, Judgment, Inter-Am. Ct. H.R., ¶¶ 173–218 (Nov. 21 2007).

rights treaties, to commercial landholdings protected under investment treaties. Large-scale natural resource investments can bring these different claims contest, creating tensions in the application of international law.

It is worth noting that human rights and investment protection norms also present differences in protection standards, legal remedies and interpretive approaches. For example, international tribunals have applied different standards of deference to national sovereignty. Some human rights jurisprudence, particularly in Europe, holistically examined the overall balance struck between public and private interests in ways that leave states with a significant “margin of appreciation.”¹⁶⁹ Arbitral jurisprudence is divided on the relevance of this approach in an investor-state arbitration context: while a few awards have referred to the “margin of appreciation” doctrine,¹⁷⁰ most have not, and some have explicitly ruled out its relevance arguing that investment law sets more stringent standards.¹⁷¹ In expropriation claims, the European Court of Human Rights has examined the overall balance struck by the terms and conditions applied, while investment jurisprudence has more commonly assessed strict compliance with each legal requirement (such as compensation, public purpose, non-discrimination, due process).¹⁷²

Besides these differences in the overall approach, specific standards may also vary. Depending on their formulation, investment treaties could require more stringent compensation standards than may be applicable under international human rights law. Even leaving aside issues linked to the uneven coverage of regional human rights treaties, international human rights jurisprudence has allowed states to consider the public purpose at stake and the systemic nature of reform

¹⁶⁹ See *James & Others*, *supra* note 99, ¶¶ 47-50, 54-57, 69, 75-77; *Lithgow & Others*, *supra* note 99, ¶¶ 122, 143, 150, 177, 194, 197.

¹⁷⁰ See *Continental Casualty v. Argentine Republic*, Award, ICSID ARB/03/9, ¶ 181 (Sept. 5, 2008); and the majority decision in *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, Award, ICSID Case No. ARB/10/7, ¶ 388 (July 8, 2016).

¹⁷¹ See *Siemens A.G. v. Argentine Republic*, Award, ICSID ARB/02/08, ¶ 354 (Feb. 6, 2007); *Quasar De Valores SICAV S.A., Orgor De Valores SICAV S.A., GBI 9000 SICA V S.A. and ALOS34S.L. v. Russian Federation*, Award, SCC Arbitration, ¶ 22-23 (July 20, 2012); *Von Pezold & Others*, *supra* note 11, ¶¶ 465-468; and the Concurring and Dissenting Opinion of Gary Born in *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A.*, *supra* note 170, ¶¶ 85-88.

¹⁷² Contrast for example the European Court of Human Rights case, *James & Others*, *supra*, note 99, ¶¶ 46, 50, 54, 56, on the one hand; with the investor-state arbitrations *Siag*, *supra* note 139, ¶ 428; *Compañía del Desarrollo de Santa Elena, S.A.*, *supra* note 151, ¶¶ 71-72; *Quasar De Valores SICAV S.A.*, *supra* note 171, ¶¶ 22-23, on the other.

programmes when determining compensation,¹⁷³ while international investment law ties compensation standards to full market value “independently [...] of the number and aim of the expropriations done.”¹⁷⁴ Access to international remedy also operates differently, with exhaustion of domestic remedies being the rule under human rights law but not under many investment treaties. Compared to the limited enforcement options available under human rights law, mentioned above, international investment law provides relatively effective arrangements to enforce pecuniary awards.¹⁷⁵

These differences point to variable geometries in the interface between land, property and sovereignty, creating structural asymmetries in the extent to which the international protection of property imposes discipline on the exercise of state sovereignty in land matters. In addition, tensions can arise in the practical application of international law, for example because action to advance human rights (e.g., by returning land to historically dispossessed indigenous peoples) could adversely affect commercial landholdings, and as such trigger the application of investment treaties. Over the past few years, international human rights institutions have raised concerns that – where this happens – overly broad investment protection standards could make it more costly, and therefore more difficult, for states to take action to realize human rights.¹⁷⁶ Researchers and activists have also raised concerns that investment law could crystallize historical land injustices.¹⁷⁷

In response to these types of concern, the United Nations Guiding Principles on Business and Human Rights call on states to maintain the sovereign space needed to meet their human rights obligations when

¹⁷³ See *James & Others*, *supra* note 99, ¶¶ 46, 54; *Lithgow & Others*, *supra* note 99, ¶ 121.

¹⁷⁴ See *Funnkotter & Others*, *supra* note 11, ¶ 24; see also *Compañía del Desarrollo de Santa Elena, S.A.*, *supra* note 151, ¶¶ 71-72. For a fuller discussion, see *Cotula*, *supra* note 89, at 124-27.

¹⁷⁵ For a fuller comparative discussion of substantive protections and legal remedies under human rights and investment law, see *Cotula*, *supra* note 87, at 124-27.

¹⁷⁶ See High Commissioner for Human Rights, *Human Rights, Trade and Investment*, ¶ 35, U.N. Doc. E/CN.4/Sub.2/2003/9 (July 2, 2003); Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples on the Impact of International Investment and Free Trade on the Human Rights of Indigenous Peoples, ¶¶ 20, 22-30, 35, 37-41, U.N. Doc. A/70/301 (Aug. 2, 2015); Report of the Special Rapporteur on the Rights of Indigenous Peoples, ¶¶ 31-54, U.N. Doc. A/HRC/33/42, (Aug. 11, 2016).

¹⁷⁷ Luke Eric Peterson & Ross Garland, *Bilateral Investment Treaties and Land Reform in Southern Africa*, RIGHTS & DEMOCRACY 5-10 (2010), <https://www.peacepalacelibrary.nl/ebooks/files/334103282.pdf>; Pieterje Vervest & Timothé Feodoroff, *Licensed to Grab: How International Investment Rules Undermine Agrarian Justice*, TRANSNATIONAL INST. (2015), https://www.tni.org/files/download/licensed_to_grab.pdf.

they conclude investment treaties.¹⁷⁸ In effect, the Guiding Principles encourage states to acknowledge that tensions can emerge between human rights and investment treaties, and that the formulation of investment treaties can affect scope for those tensions. They also imply that, in reconfiguring sovereignty, international human rights law limits the restrictions of sovereign space that states can accept under international instruments to protect foreign investment.

C. Tensions in the Interplay of Land, Property and Sovereignty: A Look at the International Jurisprudence

The international jurisprudence illustrates in more concrete terms the potential for tensions that can arise between the land struggles of indigenous peoples and local communities, and the protection of commercial rights to land and resources. Sovereign acts to award commercial natural resource concessions over ancestral lands, or to support the rights of indigenous peoples and local communities in the face of commercial investments, have exposed states to the risk of competing legal challenges based on the international protection of property under human rights or investment law instruments. These tensions have emerged both in the international human rights jurisprudence, where investment issues – including investment treaty issues – have been directly at stake; and in several investor-state arbitrations, which presented significant land-related human rights dimensions. These cases involve very diverse factual circumstances, but they also present some commonalities – particularly their raising questions about the articulation between international human rights and investment protection norms, and their being ultimately rooted in tensions at the interface between land, property and sovereignty.

The international human rights jurisprudence provides several examples. Some of the judgments on the collective right to property of indigenous peoples issued by the Inter-American Court of Human Rights, discussed earlier, concern disputes arising out of the award of natural resource concessions in lands claimed by indigenous or tribal peoples. For instance, in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court of Human Rights held that the issuance of a logging concession in circumstances where national law

¹⁷⁸ Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

and administrative practice did not adequately protect the land and resource rights of the Awas Tingni, an indigenous community, constituted a violation of that community's collective right to property under Article 21 of the American Convention on Human Rights.¹⁷⁹ At the heart of the case was a tension between the collective right to property of indigenous peoples and the exercise of sovereign powers in allocating concessions for commercial investments. Although this and several other Inter-American Court cases did not trigger investor-state arbitration or otherwise mobilize international investment law, broadly speaking their factual fabric could have done so, given the prominence of investment processes, and depending on the circumstances, investor nationality, applicable law and investor inclinations.¹⁸⁰

In the later Inter-American Court case *Sawhoyamaxa v. Paraguay*, also concerning a claim based, at least in part, on the collective right to property of an indigenous community, the connection with investment law was more explicit. The Sawhoyamaxa community claimed restitution of the ancestral land it had been historically dispossessed of. The government of Paraguay resisted the restitution claim partly on the ground that it "collide[d] with a property title which has been registered," lastly with a German investor protected under an applicable bilateral investment treaty.¹⁸¹ The *Sawhoyamaxa* case illustrates the tensions that can arise in the application of human rights and investment treaties. It also exemplifies a direct clash between different property claims – one reflecting the special relationship between land and traditional ways of life, the other premised on the commercial significance of land.

Ultimately, the Inter-American Court of Human Rights dismissed the government's investment treaty defence, noting that the relevant investment treaty did permit expropriation so long as certain requirements were met, including public purpose; and that returning land to indigenous peoples could constitute a public purpose.¹⁸² Differently put, the Inter-American Court interpreted the property protections applicable under the investment treaty as not infringing on the sovereign space for the state to expropriate the land, return it to the Sawhoyamaxa people, and thus give effect to the Sawhoyamaxas'

¹⁷⁹ *Supra* note 10, ¶¶ 142-155. The Court also found a violation of the right to judicial protection.

¹⁸⁰ Patrick Wieland, *Why the Amicus Curia Institution is Ill-Suited to Address Indigenous People's Rights before Investor-State Arbitration Tribunals: Glamis Gold and the Right of Intervention*, 3 TRADE L. & DEV. 334, 353 (2011).

¹⁸¹ *Sawhoyamaxa Indigenous Community*, *supra* note 10, ¶¶ 115(b), 125, 137.

¹⁸² *Id.* ¶ 140.

human right to property over their ancestral lands.

In the more recent case *Kichwa Indigenous People of Sarayaku v. Ecuador* – a case stemming from the conduct of oil operations in the Amazon region – the Inter-American Court found that, by approving an investment project without consulting the indigenous community whose territory would be impacted, the state had violated the collective right to property of that community.¹⁸³ In the separate legal proceeding *Burlington Resources Inc. v. Republic of Ecuador*, an oil company that was part of the consortium implementing this project (and that was also involved in the development of other oil blocks in Ecuador) filed an arbitration claim against the state under an applicable bilateral investment treaty. In relation to the oil block relevant to the *Sarayaku* case, the company claimed that authorities had failed to protect the investment from disruption caused by opposition from local communities, thereby violating the full protection and security clause included in the treaty. The arbitral tribunal ultimately found this part of the claim to be inadmissible due to the investor's non-compliance with procedural requirements when submitting the claim.¹⁸⁴

The legal proceedings in *Sarayaku* and *Burlington* presented no points of contact. In connection with the relevant oil block, the Inter-American Court did not discuss investment protection norms, and the investor-state arbitral tribunal did not discuss human rights dimensions. Nonetheless, the *Sarayaku / Burlington* dispute illustrates how state conduct relating to a commercial investment can give rise to multiple claims under both human rights and investment protection norms – in this dispute, to challenge the state's failure to consult communities before awarding concessions, and its alleged failure to protect the investment from ensuing community opposition. And while by its very nature, investor-state arbitration involves a legal dispute between one or more investors and a state, the *Sarayaku / Burlington* dispute shows that the underlying facts may involve, at least in part, competing property claims opposing international capital and local groups, mediated by sovereign acts such as the award of natural resource concessions.

These issues have emerged in several other investor-state arbitrations. Disputes stemming from land reform programmes create an obvious arena for encounters between businesses invoking investment protection norms on the one hand, and aspiring land reform beneficiaries who mobilize human rights language to advance land

¹⁸³ *Kichwa Indigenous People of Sarayaku*, *supra* note 102, ¶¶ 211, 232, 341(2).

¹⁸⁴ *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Jurisdiction, ICSID Case No. ARB/08/5, ¶¶ 250-340, 342(E)(2) (June 2, 2010).

redistribution or restitution on the other. For example, the investor-state arbitration *Von Pezold and Others v. Zimbabwe* involved a legal challenge to Zimbabwe's controversial "fast-track" land redistribution programme. The claimants suffered uncompensated expropriations, land invasions, violence and racial discrimination, and the arbitral tribunal found that the state had violated several provisions of an applicable investment treaty.¹⁸⁵ In this case, prospective land reform beneficiaries petitioned the arbitral tribunal to make an *amicus curiae* submission articulating human rights arguments. However, the tribunal rejected this petition partly because it found that the petitioners lacked impartiality.¹⁸⁶

In such land reform cases, investors may be individuals, and they may have operated within or near the community for a long period of time. Investor-state arbitrations concerning extractive industry projects tend to present different factual circumstances. Issues about local consultation prior to the award of the concession may feature prominently in community perceptions and claims, as the *Sarayaku / Burlington* dispute illustrates. In several investor-state arbitrations, investors challenged action that authorities claimed to have taken, at least in part or in the rhetoric, in response to demands from indigenous peoples and local communities opposing the project. In these cases, recourse to human rights arguments became a strategy for inviting tribunals to reject the investors' claims.

In some ongoing arbitrations, states articulated human rights arguments along these lines as part of their defence strategies.¹⁸⁷ In other cases, indigenous peoples and non-governmental organizations invoked human rights law in *amicus curiae* submissions. In *Glamis Gold Ltd. v. United States of America*, for example, the investor challenged environmental measures taken in the context of a mining project that impacted on lands hosting sites sacred to a native tribe – a challenge that the arbitral tribunal ultimately dismissed.¹⁸⁸ The native tribe had raised concerns about the project's possible impacts on the

¹⁸⁵ *Von Pezold & Others*, *supra* note 11, ¶¶ 103-159, 445-448, 645, 652-657, 918-920, 1016-1017.

¹⁸⁶ *Von Pezold & Others v. Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No. 2, ¶¶ 25-27, 51, 55-56 (June 26, 2012).

¹⁸⁷ *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, ¶¶ 58, 62, 71 (Oct. 6 2015); more extensively, *see also* *South American Silver Ltd. v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, ¶¶ 32-177, 192-209, 217-20, 300-24 (Mar. 31, 2015).

¹⁸⁸ *See Glamis Gold Ltd. v. United States of America*, Award, UNCITRAL (May 14, 2009).

cultural sites during the consultation phase.¹⁸⁹ In the arbitration, the tribe made an *amicus curiae* submission citing international human rights law; arguing that the area included a sacred trail and formed part of their ancestral land base, even though they did not legally own the land; and calling on the tribunal to uphold their cultural and spiritual rights.¹⁹⁰ The tribunal accepted this submission and referred to it in the award,¹⁹¹ though the award did not engage with the human rights arguments contained in the submission.

The arbitration *Pac Rim Cayman LLC v. The Republic of El Salvador*, also a mining case, brought up the interface between land, property and sovereignty in more explicit terms. The investor acquired mining exploration licences but could not obtain the exploitation concessions necessary to implement the project. One important factor that prevented the project from going forward was that the government interpreted national law requirements for mining operators to obtain the authorisation of all surface landowners as being applicable to underground as well as open-pit mines. Despite efforts to amend the legislation, the investor ultimately ran out of time, the exploration permits expired and the concessions were denied. The investor brought an arbitration against the state to seek compensation, but the tribunal dismissed the investor's claim.¹⁹²

This case attracted sustained public attention, partly because local and national organizations mobilized and ultimately mounted an advocacy campaign to promote a moratorium on metals mining in El Salvador.¹⁹³ So when the investor brought the arbitration, a coalition of non-governmental organizations petitioned to make an *amicus curiae* submission to the arbitral tribunal, arguing that the case was "fundamentally not a dispute between [the investor] and the Republic, but rather between [the investor] and the independently-organized communities who have risen up against [the investor's] projects."¹⁹⁴ The coalition also made a submission on the merits, arguing – among other things – that "the collective property rights of indigenous communities

¹⁸⁹ *Id.* at ¶¶ 111-114, 126-127.

¹⁹⁰ See *Glamis Gold Ltd. v. United States of America*, Application for Leave to File a Non-Party Submission and Submission of the Quechan Indian Nation, UNCITRAL (Aug. 19, 2005).

¹⁹¹ *Supra* note 188 at ¶ 8.

¹⁹² *Pac Rim Cayman LLC v. The Republic of El Salvador*, Award, ICSID Case No. ARB/09/12 (Oct. 14, 2016).

¹⁹³ Zoe Phillips Williams, *Investor-State Arbitration in Domestic Mining Conflicts*, 16(4) GLOBAL ENVIRONMENTAL POLITICS 32 (2016).

¹⁹⁴ *Pac Rim Cayman LLC v. The Republic of El Salvador*, Application for Permission to Proceed as *Amici Curiae*, at 2 (Mar. 2, 2011).

to their lands and territories impose a limit on the exercise of the State's sovereignty," which the arbitral tribunal ought to consider in assessing the investor's claim.¹⁹⁵

At least implicitly, the petitioners effectively argued that international human rights law has reframed the relationship between land, property and sovereignty in such ways that limit the type of obligations states can be deemed to have lawfully entered into under international instruments to protect foreign investment. The award did not address these human rights arguments, though property issues featured prominently in other ways: the tribunal's decision hinged on the national law requirements for mining companies to secure authorization from local land owners as a condition for obtaining mining concessions.¹⁹⁶

D. A Practical Example: Legitimate Expectations and Consultation Requirements

The discussion thus far highlights that, while long-term historical evolutions developed the interplay of land, property and sovereignty primarily in relation to the acquisition of land and territory, both international human rights and investment protection norms reconfigure space for the exercise of sovereignty within a state's jurisdiction. From the viewpoint of the investors' home state, the international norms on the protection of foreign investment also present an external dimension, because they protect landholdings outside the national jurisdiction. These trends set the scene for tensions in the interface that connects i) different claims to land and resources, and different (commercial, social, cultural, spiritual) values of those resources; ii) the legal protection of property under international human rights and investment law; and iii) the exercise of sovereign powers to advance different land claims and normative values.

The expansion and intensification of natural resource extraction, and growing recourse to international law in the settlement of resource-related disputes, enhance opportunities for these tensions to become more explicit in international legal proceedings. This trend is reflected in the small but growing number of cases where human rights and investment law arguments intersected, including the rise of human

¹⁹⁵ See *Pac Rim Cayman LLC v. The Republic of El Salvador*, Submission of Amicus Curiae Brief on the Merits of the Dispute (Center for International Environmental Law), ICSID Case No. ARB/09/12, section iii(iv) (July 15, 2014).

¹⁹⁶ The claim was ultimately unsuccessful due to the investor's failure to meet these requirements. *Pac Rim Cayman LLC*, *supra* note 192, parts VI, VIII.

rights arguments in investor-state arbitration, and references to investment treaties in human rights jurisprudence. This situation creates new challenges for the cohesive application of international law, and ultimately for arbitrating between multiple rights and interests at the land-property-sovereignty interface.

The doctrine of legitimate expectations, briefly mentioned earlier, illustrates the nature of these challenges. Widely considered to be a key element of the fair and equitable treatment standard affirmed in many international investment treaties, the legitimate expectations doctrine refers to a situation where the conduct of the host state creates reasonable expectations on the part of an investor, yet the state subsequently fails to honour those expectations causing the investor to suffer losses.¹⁹⁷ Representations made by public officials as part of efforts to attract investments or during contract negotiation or land allocation procedures could be deemed to create legitimate expectations. These representations could include assurances to the investor that the land is available and free of any encumbrances, and promises that the necessary permits will be issued.

Yet government officials may have made these representations to the investor before any local consultation has taken place on the proposed investment. Should indigenous peoples and local communities subsequently oppose the project, the question would arise as to whether the obligation for the state to comply with such investment protection standards could make it more difficult for indigenous peoples and local communities to get authorities to protect their rights after approvals have been granted, if doing so would adversely affect the investment and as such expose the state to the risk of costly arbitral proceedings and possibly expensive compensation bills. Methodological challenges constrain systematic evidence about this possible “chilling effect” on public action. But reports suggest that, on some occasions at least, concerns about arbitration risks were a factor in government responses to local protests.¹⁹⁸

How international law addresses such situations partly depends on the articulation between human rights and investment protection norms.

¹⁹⁷ *Int'l Thunderbird Gaming Corp.*, *supra* note 154, ¶ 147.

¹⁹⁸ See, e.g., M. Taj, *Peru Hopes to Revive Bear Creek Mine, Avoid Legal Battle*, REUTERS (Aug. 14, 2014) (reporting that the Peruvian government “hope[d] to ease local opposition to [a] silver mine and avoid a costly legal battle with the company”), www.reuters.com/article/peru-bear-creek-mining-santaana-idUSL2N0QL00Z20140815. This attempt was ultimately unsuccessful and the investor brought an arbitration claim. See also Phillips Williams, *supra* note 193 (reporting that concerns about investor-state arbitration affected the outcomes of advocacy for legislation banning metals mining in El Salvador).

Indeed, one of the major questions is whether government representations made without consultation can actually form the basis of legitimate expectations under international investment treaties. As discussed earlier, for example, international instruments and jurisprudence require states to consult indigenous peoples in good faith to secure their consent before approving commercial investments affecting ancestral territories. There is therefore a compelling argument that arbitral tribunals should not deem investors' expectations to be legitimate if, in granting the necessary approvals, the government breached its duty to respect and protect human rights. While this duty rests with the state, the UN Guiding Principles on Business and Human Rights affirm the corresponding responsibility of businesses to respect human rights, including by conducting human rights due diligence.¹⁹⁹ Arguably, this responsibility entails that investors should ensure that their own expectations are premised on respect for human rights.

At present, however, it is unclear how arbitral tribunals would address these issues, and how the underlying tensions in the interplay of land, property and sovereignty would be mediated in the context of a legal proceeding. The absence of international jurisprudence on this specific point leaves questions open about the instruments and techniques that an arbitral tribunal – in the example of the legitimate expectations doctrine – could mobilize in reaching a decision that considers both human rights and investment protection dimensions. To put it in more general terms: as pressures on land increase, there is potential for tension as well as convergence in the relationship between international human rights and investment protection norms, and this raises questions as to whether international law provides adequate tools for handling the challenge.

V. HARD CASES AND SOFT RULES: ADDRESSING TENSIONS IN THE APPLICATION OF INTERNATIONAL LAW

A. *Environmental Dimensions*

Besides increasing opportunities for tensions between commercial interests and the social, cultural and spiritual values of land, the growing pressures that humankind is placing on the world's natural resources have also heightened public concerns about the environmental effects of land use – from localized pollution and land degradation to biodiversity

¹⁹⁹ Guiding Principles, *supra* note 178, Principles 11, 13, 15.

loss and carbon emissions.²⁰⁰ Over the past few decades,²⁰¹ an expanding body of international environmental law has come to recognize the ecological significance of land, adding new dimensions to situations that this article has thus far primarily characterized as encounters between the protection of human rights and legal safeguards for international capital. These developments have far-reaching repercussions for the relationship between land, property and sovereignty.

Contemporary international law balances the sovereign right of states to exploit their land and natural resources with the responsibility “to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”²⁰² In this sense, and in some ways similarly to human rights and investment protection norms, international environmental norms establish internal limits on the lawful exercise of sovereign powers within a state’s jurisdiction or control – although extraterritorial impacts were at centre-stage in the early development of international environmental norms. Damage to private property located outside national jurisdiction was among the circumstances that triggered the inter-state arbitrations where cross-border environmental pollution was first discussed as an internationally wrongful act.²⁰³ So the limitations of sovereignty that international environmental law has gradually established have at least some roots in property dimensions.

International environmental treaties have since emphasized the intrinsic value of the environment as a common concern of humankind.²⁰⁴ However, adverse impacts on property interests could

²⁰⁰ An emblematic case illustrating these multiple dimensions is the use of forest fires to clear land for oil palm plantations in Indonesia. See, e.g., *Photos Confirm Indonesia Being Burned for Palm Oil*, MONGABAY (Nov. 5, 2015), <https://news.mongabay.com/2015/11/photos-confirm-indonesia-being-burned-for-palm-oil/>.

²⁰¹ For a longer-term perspective on the history of international environmental law, see PHILIPPE SANDS ET AL., *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 22-49 (Cambridge Univ. Press, 3d ed. 2012).

²⁰² U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, Principle 21, U.N. Doc. A/CONF.48/14/Rev.1 (June 16 1972). See also Rio Declaration, *supra* note 6, Principle 2; CBD, *supra* note 6, art. 3. This principle builds on earlier jurisprudence. See, e.g., *Trail Smelter Case* (United States v. Canada), 3 R.I.A.A., 1905 (Perm. Ct. Arb. 1938, 1941).

²⁰³ In the *Trail Smelter* case, the tribunal ordered the government of Canada to compensate the United States for damage suffered by US farmers and landowners from smokes generated by a smelter located in Canadian territory. *Trail Smelter Case*, *supra* note 202, at 1917-18. The international arbitration followed court proceedings and settlement negotiations initiated by US landowners for damage to property. *Id.*

²⁰⁴ For example, the preamble of the Convention on Biological Diversity refers to the

still provide the basis for international environmental claims, highlighting the enduring connections that can exist between the protection of property, the reconfiguration of sovereignty and environmental goals. The protection of the environment as a common concern of humankind can also involve property dimensions, and reset parameters for the "internal" exercise of state sovereignty. This is reflected, for example, in provisions that direct states i) to increase the security of resource tenure as a means to create incentives for sustainable land use,²⁰⁵ ii) to conduct environmental impact assessments in public decision-making processes, which would include decisions on allocating resource rights for commercial investments,²⁰⁶ and iii) to respect the land rights of indigenous and local communities in the context of conservation initiatives.²⁰⁷

The ecological dimensions of the nexus between land, property and sovereignty increase room for both mutual reinforcement and possible tensions between different international instruments. For example, authorizing land use investments that harm the environment could expose states to litigation under international environmental law;²⁰⁸ while cancelling or renegotiating those investments on environmental grounds could trigger an investor-state arbitration.²⁰⁹ And while

"intrinsic value of biological diversity" and affirms that its conservation is a "common concern of humankind." CBD, *supra* note 202, Preamble.

²⁰⁵ United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), art. 4(2)(b), June 17, 1994, 1954 U.N.T.S. 3.

²⁰⁶ CBD, *supra* note 189, art. 14(1)(a).

²⁰⁷ See, e.g., Rep. of the Conference of the Parties on Its Sixteenth Session, Appendix I ("Guidance and safeguards for policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries"); see also Appendix I, at ¶ 2(c), U.N. Doc. FCCC/CP/2010/7/Add.1 (Dec. 10, 2010), adopted under United Nations Framework Convention on Climate Change, U.N. Doc. FCCC/INFORMAL/84 (May 9, 1992).

²⁰⁸ See, e.g., *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 2010 I.C.J. Rep. (Apr. 20, 2010) (concerning the development, in Uruguayan territory, of a pulp mill and eucalyptus plantations to supply the mill). The case was primarily based on a bilateral treaty setting the legal regime for the River Uruguay. *Id.* The ICJ found that Uruguay breached some procedural obligations but did not violate any substantive obligations. *Id.* Among other things, Argentina alleged that the tree plantations had an impact not only on soil and woodlands in Uruguayan territory, but also on the quality of the waters of the Uruguay River. *Id.* The ICJ dismissed this contention due to lack of evidence. *Id.* ¶¶ 178-80.

²⁰⁹ In the *Pulp Mills* case, Uruguay insisted that cancelling the project could expose the government to investor claims under an applicable investment treaty. See *id.* See also Fernando Cabrera Diaz, *Oral Arguments Held in ICJ Dispute over Pulp Mills on the River Uruguay*, INV. TREATY NEWS (Sept. 28, 2009), <https://www.iisd.org/itm/2009/09/28/oral-arguments-held-in-icj-dispute-over-pulp-mills-on-the-river-uruguay/>. Several investor-state arbitrations involved

environmental protection and human rights are often mutually reinforcing,²¹⁰ tensions cannot be ruled out: concerns that “REDD+” initiatives might undermine land rights led to the development of international “guidance and safeguards,” including “[r]espect for the [...] rights of indigenous peoples and members of local communities.”²¹¹

Overall, the historical development of internal dimensions in the land-property-sovereignty nexus has created space for tensions linked to the varying emphases that different international instruments place on the commercial, ecological and human rights significance of land – with repercussions for the policy objectives and the legal contours both of the protection of property and of the related reconfiguration of sovereignty. Addressing these tensions would require mechanisms to arbitrate the multiple land claims that may be at stake in any legal dispute; the diverse social, cultural, economic and environmental dimensions of the property relations involved; and asymmetries in the space for the lawful exercise of sovereign powers. A quest for operational tools would take the international jurist in three complementary directions: first, interstitial rules to guide choices on the application and interpretation of substantive norms; second, procedural arrangements to facilitate consideration of all relevant aspects in dispute settlement processes; and

challenges to environmental measures, including the non-issuance or non-renewal of environmental permits. *See, e.g.,* Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (May 23, 2003); Clayton v. Government of Canada, Award on Jurisdiction and Liability, PCA Case No. 2009-04 (Perm. Ct. Arb. 2015). For the references to the right to a healthy environment contained in the *amicus curiae* submission, *see Pac Rim Cayman LLC, supra* note 195, sections ii(v), iii(iv).

²¹⁰ For example, the Inter-American Court of Human Rights held that environmental impact assessments form part of the procedural safeguards protecting indigenous peoples’ collective right to property. *See, e.g., Saramaka People, supra* note 10, ¶ 134. *Cf.* U.N. Conference of the Parties to the Convention on Biological Diversity, U.N. Doc. UNEP/CBD/COP/DEC/VII/16, annex (Feb. 20, 2004) (providing guidance on impact assessments in contexts involving indigenous peoples). On the human right to a healthy environment, *see, e.g.,* Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), Nov. 17, 1988, art. 1, OAS Doc OAS/Ser L/V/14 rev 13; Banjul Charter, *supra* note 89, art. 24 (affirming the “right to a general satisfactory environment”). *See also* Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), ¶ 4, ¶ 15, E/C.12/2000/4 (Aug. 11, 2000); *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR), supra* note 94, ¶¶ 52-54. *See generally* John Knox (Special Rapporteur on Human Rights and the Environment), Overview of the Mandate, U.N. Doc. A/HRC/RES/19/10 (Apr. 19, 2012).

²¹¹ *See* Rep. of the Conference of the Parties on Its Sixteenth Session, Appendix I, *supra* note 207, ¶ 2(c). REDD+ stands for Reducing Emissions from Deforestation and Forest Degradation, and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries.

third, soft-law instruments that promote a holistic understanding of the interplay of land, property and sovereignty. The remainder of this section examines each of these in turn.

B. *Lex Superior and Systemic Integration*

The first set of tools concerns the familiar repertoire of interpretive techniques and conflict-of-norms rules discussed in the International Law Commission's study on fragmentation of international law – namely, *lex specialis*, *lex posterior*, *lex superior* and “systemic integration” based on Article 31(3)(c) of the Vienna Convention on the Law of Treaties.²¹² These techniques and rules are of varying relevance to the issues at stake. For example, there has been controversy about the relevance of the *lex superior* rule. In the case *Sawhoyamaxa v. Paraguay*, discussed earlier, the Inter-American Court of Human Rights effectively drew a hierarchical relationship between human rights and investment treaties, holding that bilateral commercial treaties should be applied consistently with the multilateral, *erga omnes* human rights regime.²¹³ As will be recalled, this case concerned an indigenous people's claim for the restitution of land owned by investors protected under an applicable investment treaty. The judgment of the Inter-American Court found the investment treaty not to preclude expropriation so long as certain conditions were met, and ordered the government to return the land to the indigenous people.

Arbitral tribunals have also sought to interpret human rights and investment treaties in mutually compatible ways, but they have rejected the notion that human rights norms should have primacy.²¹⁴ Instead, arbitral tribunals have held that human rights and investment protection norms “operate on different planes,”²¹⁵ and that a state is “subject to

²¹² Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Rep. of the Study Group of the International Law Commission, U.N. Doc. A/CN.4/L.682 (2006). Article 31(3)(c) of the Vienna Convention on the Law of Treaties requires a tribunal interpreting a treaty to take into account “[a]ny relevant rules of international law applicable in the relations between the parties.” Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), 1155 U.N.T.S. 331.

²¹³ See *Sawhoyamaxa Indigenous Community*, *supra* note 10, ¶ 140. The government of Bolivia referred to this holding in its Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits in the ongoing arbitration, *South American Silver Ltd.*, *supra* note 187, ¶¶ 202-09.

²¹⁴ See Cordes & Bulman, *supra* note 157, at 131.

²¹⁵ *Saur International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, ¶ 331 (June 6, 2012) (“*opèrent sur des plans différents*”, in the French version) (the decision was issued in both French and Spanish). This and several other cases cited in this section do not concern land relations. *Id.*

both international obligations, *i.e.* human rights *and* treaty obligation, and must respect both of them equally.”²¹⁶ This “different planes” doctrine may affect the parameters that state conduct must observe when pursuing human rights goals, and how the cost of measures to realize human rights should be distributed between public and private actors. Depending on the circumstances, for example, complying with both human rights and investment treaty obligations could require governments to fully compensate investors for losses caused by action pursuing human rights goals – including land restitution or redistribution. As a result, the “different planes” doctrine would not ease the concerns discussed earlier about a possible chilling effect on public action to advance human rights: states would have the right to take such action, but they would have to compensate investors based on applicable investment law requirements – which typically emphasize full market value. Where public finances are under strain, this solution could create practical – if not necessarily legal – constraints on the ability of states to act in the public interest.

While *lex superior* operates as a conflict-of-norms rule identifying which norm should prevail in case of conflict, systemic integration is an interpretive technique involving consideration of other substantive rules that are both relevant to the subject matter and applicable between the parties. Systemic integration has been widely applied including by the ICJ,²¹⁷ and by human rights courts.²¹⁸ For example, the Inter-American Court of Human Rights has applied systemic integration when interpreting Article 21 of the American Convention on Human Rights in light of ILO Convention No. 169, in order to determine the parameters of the collective human right to property of indigenous peoples.²¹⁹ Human rights courts are yet to apply systemic integration to the relationship between human rights and investment treaties. Investor-

²¹⁶ *Suez v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 262 (July 30, 2010) (emphasis in the original).

²¹⁷ See Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, 2003 I.C.J. ¶41 (Nov. 6).

²¹⁸ See, e.g., Vassilis P. Tzevelekos, *The Use of Article 31(3)(c) of the VCLT in the Case law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?*, 31 MICH. J. OF INT'L L. 621 (2010).

²¹⁹ See *Yakye Axa Indigenous Community v. Paraguay*, *supra* note 10, ¶¶ 142-131; *Sawhoyamaya Indigenous Community v. Paraguay*, *supra* note 10, ¶ 117; *Kichwa Indigenous People of Sarayaku v. Ecuador*, *supra* note 102, ¶¶ 161, 163-164. This line of jurisprudence partly draws on Article 29(b) of the American Convention on Human Rights, which reads: “No provision of this Convention shall be interpreted as: [...] b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.”

state arbitral tribunals have also long recognized that investment treaties are part of the wider body of international law,²²⁰ and have applied systemic integration in a number of cases.²²¹ Systemic integration may allow an investor-state arbitral tribunal interpreting an investment treaty to consider applicable international human rights or environmental law obligations.²²² A respondent state explicitly invoked systemic integration in an ongoing investor-state arbitration concerning a mining investment, with its defence strategy partly relying on human rights law arguments.²²³

The starting point of systemic integration remains the text of the relevant treaty,²²⁴ and the jurisdiction of human rights courts and investor-state tribunals is typically tied to different treaties (human rights treaties, investment treaties). But systemic integration would enable tribunals to consider the different norms at play. In a frictionless world, it would also be expected to result in different tribunals reaching consistent conclusions on disputes rooted in the same factual circumstances, promoting coherence in the ways international law frames the relationship between land, property and sovereignty. And by allowing human rights norms to have a bearing on the interpretation of investment treaties, systemic integration could mitigate some of the practical tensions that the “different planes” doctrine leaves unaddressed. In the example discussed earlier about a legitimate expectations claim based on representations the government may have made without consulting communities, systemic integration could enable the arbitral tribunal to consider the human rights dimension

²²⁰ In *Asian Agricultural Products Ltd (APPL) v. Sri Lanka*, Award, ICSID Case No. ARB/87/3 (June 27, 1990), the tribunal stated: “it should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.”

²²¹ See, e.g., *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, ¶ 24 and n. 6, UNCITRAL (Mar. 17, 2006). See also Campbell McLachlan, *Investment Treaties and General International Law*, 57 INT'L & COMP. L.Q. 361 (2008) (discussing the necessity defence under customary international law in several arbitrations concerning gas utility concessions in Argentina); Elizabeth Martinez, *Understanding the Debate over Necessity: Unanswered Questions and Future Implications of the Argentine Gas Cases*, 23 DUKE J. OF COMP. & INT'L L. 149 (2012); Kelley Chubb, *The State of Necessity Defense: A Burden, not a Blessing to the International Investment Arbitration System*, 14 CARDOZO J. OF CONFLICT RESOL. 531 (2013).

²²² Simma, *supra* note 157, at 584-86, 591-92.

²²³ See *South American Silver Ltd.*, *supra* note 182, ¶¶ 193-201.

²²⁴ Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 287 (2005).

when assessing the legitimacy of the investors' expectations.

In practice, these outcomes cannot be taken for granted. Systemic integration leaves considerable discretion to international judges and arbitrators, for instance on which rules of international law are deemed "relevant" to the dispute, and on how a rule is "taken into account" in treaty interpretation. Investor-state arbitral tribunals have been ready to apply systemic integration in relation to general principles of law, but they have been more cautious about possible linkages with other specialized areas of international law, including human rights law.²²⁵ This is particularly so where human rights arguments were developed by respondent states or *amicus curiae* petitioners.²²⁶ For example, in the land reform case *Von Pezold and Others v. Zimbabwe* – a case briefly discussed earlier – the arbitral tribunal deemed the human rights arguments developed by *amicus curiae* petitioners not to be relevant to the investment dispute.²²⁷ And in the mining case *Pac Rim Cayman LLC v. The Republic of El Salvador*, also discussed earlier, the tribunal deemed it "unnecessary," and thus "inappropriate," to consider the human rights arguments developed in *amicus curiae* submissions.²²⁸

However, this is an evolving arena. In the recent investor-state arbitral award *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, the tribunal applied systemic integration in relation to a human rights counterclaim made by the respondent state. The dispute stemmed from a water supply concession, and as such it did not concern land relations; but the tribunal's reasoning provides relevant insights on the interface between human rights and investment protection norms. In this particular case, the investor claimed that the state had breached several investment treaty standards, while the state argued that the claimant's alleged failure to honour contractual commitments to invest in water infrastructure violated the human right to water. Whether the arbitral tribunal could hear human rights arguments, and how those arguments would intersect with investment treaty claims, could have a significant

²²⁵ Hervé Ascensio, *Article 31 of the Vienna Convention on the Law of Treaties and International Investment Law*, 31(2) ICSID REVIEW 366, 381 (2016).

²²⁶ For an arbitral award that relied extensively on human rights arguments articulated by the claimant, see *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Final Award, UNCITRAL (Dec. 15, 2014). The arbitral tribunal interpreted fair and equitable treatment in light of the right to a fair trial. The case does not concern land relations. On this arbitration, see Lorenzo Cotula, *Human Rights and Investor Obligations in Investor-State Arbitration: Hesham Talaat M. Al-Warraq v. The Republic of Indonesia* 17(1) J. WORLD INVEST. & TRADE 148, 148-157 (2016).

²²⁷ See *Von Pezold & Others*, *supra* note 186, ¶ 57-60.

²²⁸ *Pac Rim Cayman LLC*, *supra* note 192, ¶ 3.30.

bearing on the outcome of this dispute.

Relying on the specific wording of the applicable investment treaty, the arbitral tribunal found that it had jurisdiction to hear the counterclaim.²²⁹ On the merits, the tribunal applied systemic integration and held that the investment treaty must “be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.”²³⁰ The tribunal referred to several international human rights instruments, including the UDHR and the ICESCR; it assessed the implications of the water supply concession contract for the investor’s role in realizing the internationally recognized human right to water; and ultimately it rejected the counterclaim as it could not identify breaches of legal obligations the investor could be held accountable for.²³¹

This award highlights the potential relevance of systemic integration to addressing tensions in the interplay of land, property and sovereignty, by opening up opportunities for human rights arguments to influence the outcome of investor-state arbitration. Ultimately, however, much depends on how international tribunals will exercise the significant discretion that is intrinsic to applying systemic integration. The international jurisprudence illustrates the diverse outcomes this discretion can lead to. The contrasting approaches followed by arbitral tribunals in applying systemic integration in relation to investment disputes rooted in similar facts,²³² and at a more general level the different conclusions reached by human rights courts and investor-state arbitral tribunals in framing the relationship between human rights and investment protection norms, discussed earlier, point to the limits of systemic integration in promoting consistent international jurisprudence.

²²⁹ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, Award, ICSID Case No. ARB/07/26, ¶¶ 1143, 1150, 1155 (Dec. 8, 2016). Unlike some other investment treaties, the wording of the applicable treaty appears to enable either party to the dispute to request an arbitration.

²³⁰ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ¶ 1200. For other explicit references to systemic integration, see ¶¶ 1190, 1204.

²³¹ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ¶¶ 1193-1221. For a critique of some of the human rights arguments developed by the tribunal, see Edward Guntrip, *Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?*, EJIL:TALK! (Feb. 10, 2016), <https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/>.

²³² On the Argentine gas cases, see, e.g., McLachlan, *supra* note 221, at 385-91; Martinez, *supra* note 221; Chubb, *supra* note 221.

C. Procedural Tools: *Amicus Curiae* Submissions

The second set of operational tools to address potential tensions in the interplay of land, property and sovereignty concerns procedural aspects – an issue that received surprisingly little attention in the International Law Commission's study on fragmentation of international law. The institution of *amicus curiae* submissions in investor-state arbitration is a case in point. Following various reforms since the mid-2000s and depending on applicable rules, third parties may be able to make submissions to the arbitral tribunal. While conditions for making submissions vary, they generally require petitioners to have a significant interest in the dispute and to be able to assist the tribunal to decide on a legal or factual issue — for example, by offering a different perspective on disputed facts or on the interpretation of the relevant law.²³³

Amicus curiae submissions respond to a pluralist logic in political authority and legal representation. Arbitral tribunals typically decide cases based on the facts presented and the arguments made by the parties. In principle, the state has the mandate to represent the interests of its population, and would be expected to represent the interests of indigenous peoples and local communities in arbitral proceedings. In practice, states do not necessarily argue community issues in effective ways, which would provide limited opportunity for the tribunal to consider those issues. This may be because the government's legal team lack expertise in relevant areas of law, particularly human rights law. More fundamentally, governments may have a different viewpoint from communities. Failure on the part of the authorities to consider the rights of indigenous peoples and local communities can be among the root causes of a dispute, for example where authorities approved an investment without prior consultation, triggering protests and ultimately resulting in the investor-state arbitration – as in the *Sarayaku / Burlington* dispute, discussed earlier. In cases involving tensions or even human rights litigation between local communities and public

²³³ There is a vast literature on *amicus curiae* submissions in investor-state arbitration. See, e.g., Kyla Tienhaara, *Third Party Participation in Investment-Environment Disputes: Recent Developments*, 16(2) REV. EUR. COMP. & INT'L L. 220, 220-42 (2007); J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681, 681-723 (2007); James Harrison, *Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?*, in PIERRE-MARIE DUPUY ET AL., HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Oxford Univ. Press, 2009), 396; Eric De Brabandere, *NGOs and the 'Public Interest': The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12(1) CHI. J. INT'L L. 85, 85-113 (2011).

authorities, it cannot be assumed that the government will effectively articulate community perspectives or human rights arguments in the arbitral proceedings. As pointed out by one *amicus curiae* petitioner in a pending arbitration, “the legal representatives of the disputing Parties have a vested interest in presenting the perspectives of the Parties themselves, which likely do not cover the full breadth of perspectives regarding the facts or legal issues in dispute.”²³⁴

Amicus curiae submissions provide an opportunity for third parties – including indigenous peoples and local communities, and organizations supporting them – to articulate their perspectives to the arbitral tribunal. In practice, resource and expertise requirements can act as powerful obstacles for the ability of indigenous peoples and local communities to make *amicus curiae* submissions,²³⁵ and the significant barriers that vulnerable communities face in accessing remedies have been widely documented.²³⁶ That said, there is growing experience with *amicus curiae* submissions, including from groups in low- and middle-income countries. In several investor-state arbitrations relevant to land relations, non-disputing parties including indigenous peoples and non-governmental organizations supporting them have made *amicus curiae* submissions to raise human rights issues and/or highlight the spiritual or socio-cultural dimensions of the land at stake.²³⁷

By bringing to the attention of arbitral tribunals issues that the parties to the disputes may not have fully articulated, *amicus curiae* submissions could enable fuller consideration of the multiple facets of the land-property-sovereignty nexus. In turn, this could promote greater coherence in international law. To return to the example of a legitimate expectations claim based on representations the government made without consultation, *amicus curiae* submissions could provide a vehicle for communities to raise their concerns by contributing factual elements on the lack of consultation and/or legal arguments on the legitimacy or otherwise of the investor’s expectations in light of human rights considerations. In this sense, *amicus curiae* submissions could facilitate application of interpretive techniques such as systemic

²³⁴ Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, [Columbia Center on Sustainable Investment’s] Response to Procedural Order No. 6, p. 2 (Aug. 3, 2016).

²³⁵ Iboronke T. Odumosu, *Locating Third World Resistance in the International Law on Foreign Investment*, 9 INT’L COMMUNITY L. REV. 427, 427–444 (2007).

²³⁶ See, e.g., Cathal Doyle, *Business and Human Rights: Indigenous peoples’ Experiences with Access to Remedy. Case Studies from Africa, Asia and Latin America* (AIPP, ALMÁCIGA AND IWGIA, 2015).

²³⁷ See, e.g., *Glamis Gold Ltd.*, *supra* note 190; *Von Pezold & Others*, *supra* note 186; *Pac Rim Cayman LLC*, *supra* note 195, section iii(iv).

integration.

In practice, the extent to which *amicus curiae* submissions influence arbitration outcomes is yet to be systematically assessed. Arbitral tribunals enjoy considerable discretion in deciding whether to accept the submissions, and what use, if any, to make of the arguments contained in those submissions. In the *Von Pezold* arbitration, mentioned above, the tribunal declined to accept an *amicus curiae* submission partly because it deemed human rights arguments to be outside the scope of the investment dispute, and petitioners not to be sufficiently independent of the parties.²³⁸ Compared to other arbitrations, this decision appears to have taken a narrower interpretation of the independence criterion, one that could arguably restrict opportunities for organizations representing community interests to make submissions. As some commentators noted, in real-life situations petitioners with a significant interest in the case are unlikely to ever be a completely impartial “friend of the court.”²³⁹ And from a human rights perspective, some alignment between state and *amicus curiae* positions should in fact be expected, because the state has a legal duty to protect the rights of people affected by commercial investments.

Some mining arbitrations also point to the limited influence of *amicus curiae* submissions in arbitral proceedings. In the ongoing case *Bear Creek Mining Corporation v. Republic of Peru*, the arbitral tribunal accepted one *amicus curiae* submission containing human rights arguments and rejected another one, on the ground that it deemed the former but not the latter capable of bringing a perspective different from that of the disputing parties.²⁴⁰ In *Pac Rim Cayman LLC v. The Republic of El Salvador*, the tribunal accepted *amicus curiae* submissions but did not engage with the human rights arguments contained therein.²⁴¹ Even in the *Glamis* award, the arbitral tribunal referred in the sympathetic terms to the *amicus curiae* submission made by a native tribe and to the spiritual value of the lands at stake, but it ultimately fell short of elaborating on the human rights dimensions.²⁴² A concern about exceeding the tribunal’s jurisdiction could underlie this attitude, at least in part, and some awards explicitly mention concerns

²³⁸ *Von Pezold & Others*, *supra* note 186, ¶¶ 54-60.

²³⁹ Sarah Schadendorf, *Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations*, 10(1) TRANSNATIONAL DISP. MGMT (2013).

²⁴⁰ *Bear Creek Mining Corp. v. Republic of Peru*, *supra* note 234, Procedural Orders No. 5, 6 (July 21, 2016). See particularly Procedural Order No. 6, ¶ 38.

²⁴¹ See *Pac Rim Cayman LLC*, *supra* note 192, ¶ 3.30

²⁴² *Glamis Gold Ltd.*, *supra* note 188, ¶¶ 83-84, 90-110, 167, 176, 285.

about sticking to the specific mandate of the arbitral tribunal.²⁴³

In procedural terms, making a written submission does not amount to full-fledged participation in arbitral proceedings, and petitioners face significant restrictions when drafting submissions. Even where tribunals had accepted submissions, the *amicus curiae* petitioners may have no or limited access to case documents or the hearings. This can affect their ability to make informed submissions and ultimately the willingness of tribunals to consider those submissions. For example, in deeming it “unnecessary” to engage with the key arguments contained in an *amicus curiae* submission, the tribunal in *Pac Rim Cayman LLC v. The Republic of El Salvador* noted that the petitioners were “not privy to the mass of factual evidence adduced in this arbitration’s third phase, including the hearing.”²⁴⁴ Ultimately, in none of the land-related arbitrations reviewed in this article did an *amicus curiae* submission have an apparent effect on the final outcome of the dispute. Additional research covering a larger pool of arbitrations, including in sectors that do not affect land relations, would be warranted before reaching firm conclusions on the effectiveness of *amicus curiae* submissions. However, the evidence reviewed in this article provides a cautionary tale about the reach and impact of this procedural arrangement.²⁴⁵

D. Soft-law Instruments

The third set of possible operational tools to reconcile competing claims and normative values in the land-property-sovereignty nexus concerns international non-binding instruments that provide holistic guidance on that nexus. In 2012, the Committee on World Food Security (CFS) – the top United Nations body in food security matters – formally endorsed the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.²⁴⁶ The VGGT were developed through multi-stakeholder consultations that the Food and Agriculture Organization of the United Nations conducted over a period of two years, followed by one year of inter-governmental negotiations with multi-stakeholder

²⁴³ *Glamis Gold Ltd.*, *supra* note 188, ¶ 8. On this jurisdictional concern, *see also* Cordes & Bulman, *supra* note 157, at 130.

²⁴⁴ *Pac Rim Cayman LLC*, *supra* note 192, ¶ 3.30.

²⁴⁵ *See also* Cordes & Bulman, *supra* note 157; Harrison, *supra* note 233; Wieland, *supra* note 180.

²⁴⁶ *See generally* VGGT, *supra* note 9. On the vision, role, composition and functioning of the CFS, *see* Comm. on World Food Security, Reform of the Committee on World Food Security – Final Version, U.N. Doc. CFS:2009/2 Rev. 2 (2009); *see generally* Committee on World Food Security (CFS), <http://www.fao.org/cfs/en/>.

participation at the CFS. As such, the VGGT are one example of what some scholars have termed “informal international law making” – that is, forms of international cooperation that depart from the traditional international law canon in terms of process (multi-stakeholder consultations; final “endorsement” of the resulting instrument, rather than formal adoption and ratification), actors (even the inter-governmental negotiation phase involved the participation of private sector and “civil society” actors represented at the CFS through devoted “mechanisms”) and outputs (non-binding, voluntary guidelines, rather than a treaty creating legal obligations).²⁴⁷

Compared to the traditional tools of international law, the VGGT reflect a different “theory of change” for promoting reform in national law and governance. Rather than establishing binding (but not necessarily enforceable or honoured) obligations, the VGGT seek to promote change by embodying political consensus among states and non-state actors, and providing authoritative guidance based on international best practice. Recent years have witnessed growing use of such voluntary instruments to tackle some of the world’s most pressing challenges, such as promoting food security, governing financial transfers and responding to public pandemics, as part of cooperative multilateral diplomacy including processes convened by UN specialized agencies.²⁴⁸ These soft-law instruments create challenges for international jurists anchored to positivist perspectives; but there is little doubt that they form part of contemporary international governance. Soft-law instruments can also produce indirect legal effects, for example by providing authoritative standards that judges and arbitrators can refer to.²⁴⁹ While as a voluntary instrument the VGGT do not create binding norms, they nonetheless offer pointers on how to mediate difficult situations at the interface between land, property and sovereignty.

The VGGT provide comprehensive guidance on the governance of

²⁴⁷ Joost Pauwelyn et al., *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT’L L. 733, 734 (2014). The title of the VGGT (*Voluntary Guidelines*) and their consistent wording (“should” rather than “shall”) make their non-binding nature very clear; the VGGT dispel any remaining doubts by expressly stating that they are voluntary. See VGGT, *supra* note 9, ¶ 2.1.

²⁴⁸ Daniel Bethlehem, *The End of Geography: The Changing Nature of the International System and the Challenge to International Law*, 25(1) EUR. J. INT’L L. 9, 9-24 (2014).

²⁴⁹ Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT’L L. 420, 420-435 (1991). In *Kichwa Indigenous People of Sarayaku v. Ecuador*, *supra* note 102, the Inter-American Court of Human Rights referred to the UNDRIP and to several soft-law instruments related to cultural heritage when interpreting the provisions of the American Convention on Human Rights.

tenure of land, tie tenure rights to human rights and food security,²⁵⁰ recognize the social, cultural, economic and environmental significance of land,²⁵¹ promote legal frameworks that reflect these multiple dimensions,²⁵² and call on states to act consistently with all their international obligations.²⁵³ The VGGT also provide that, “[w]hen conflicts arise, States and other parties should strive to respect and protect existing legitimate tenure rights.”²⁵⁴ Remarkably given the topics covered, the VGGT mention neither property nor sovereignty. However, property and sovereignty are arguably at the heart of the VGGT. As the first and by far most detailed global instrument on land governance, the VGGT address a wide range of property issues long deemed to fall within the exclusive remit of national jurisdiction – even though the VGGT use the politically less sensitive concept of “tenure” instead of property. And while sovereignty is never mentioned, the preference for a voluntary instrument seems to reflect a concern about preserving sovereign space in a politically sensitive policy area. Yet, the very fact that states agreed to negotiate international guidance on land governance, and the numerous statements of high-level political support for the VGGT,²⁵⁵ are a reflection of how perceptions about the appropriate frontier of international regulation in land matters have shifted in recent years.

While located outside the realm of binding international law, the VGGT present significant convergence with international human rights norms. For example, their calling on states to recognize, respect and protect all socially “legitimate tenure rights,”²⁵⁶ including rights that are “not currently protected by law,”²⁵⁷ resonates with the human rights jurisprudence, discussed earlier, that has afforded protection to indigenous peoples’ collective right to property in relation to their ancestral lands even where national law did not recognize their claims. In

²⁵⁰ VGGT, *supra* note 9, ¶¶ 1, 8.1, 8.7, 9.1.

²⁵¹ *Id.* ¶¶ 1, 8.1, 8.7, 9.1.

²⁵² *Id.* ¶ 5.3.

²⁵³ *Id.* ¶¶ 4.2, 9.3, 25.2, 25.4.

²⁵⁴ *Id.* ¶ 25.4.

²⁵⁵ See, e.g., G.A. Res. 67/228, ¶ 31 (Dec. 21 2012); U.N. Rio +20 Conference on Sustainable Development, *The Future We Want - Outcome Document*, U.N. Doc. A/CONF.216/L.1, ¶ 115 (June 22, 2012); G20 Los Cabos Summit, *G20 Leaders Declaration*, ¶ 58 (June 19, 2012).

²⁵⁶ VGGT, *supra* note 9, ¶¶ 3.1, 4.4, 4.5, 5.3, 7.1, 8.2, 8.4, 8.7, 9.4, 9.5, 11.6, 12.4, 12.6, 12.10, 12.15, 14.1, 16.1.

²⁵⁷ See e.g., VGGT, *supra* note 9, ¶¶ 4.4, 5.3 and 7.1. On the policy rationale underlying this approach, see David Palmer et al., *Towards Improved Land Governance*, at 8 (FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, 2009), <http://www.fao.org/3/a-ak999e.pdf>.

affirming the ecological significance of land and the importance of environmental objectives in land governance, and in calling for environmental safeguards in land-based investments, the VGGT also present convergence with international environmental instruments.²⁵⁸

On the other hand, the relationship with international investment protection norms seems more complex. Several measures called for in the VGGT could adversely affect commercial investments, particularly if they are applied to both new and ongoing ventures. For example, extending legal recognition to “legitimate tenure rights not currently protected by law”²⁵⁹ could increase costs for investments that involve significant land acquisition. Introducing ceilings on permissible land transactions,²⁶⁰ more stringent standards of local consultation and participation,²⁶¹ or more robust impact assessment studies²⁶² could affect or delay the implementation of investment projects. Applying free, prior and informed consent²⁶³ could stall project implementation. In principle, the VGGT could also have a bearing on the ways in which investment protection standards are applied. To return to the example of the legitimate expectations doctrine, discussed above, the existence of international consensus on the notion that community consultation should form part of investment approval processes – a consensus embodied in the VGGT – would cast serious doubt on whether an investor could reasonably claim to have a legitimate expectation that the project will go ahead unimpeded based on government representations made in the absence of community consultation.

At present, however, it is unclear whether an arbitral tribunal would be prepared to consider VGGT guidance on consultation when applying the legitimate expectations doctrine. Further, the VGGT emphasize that any measures to implement their provisions should respect international obligations, which would include the obligation to uphold applicable investment protection standards.²⁶⁴ These VGGT provisions merely state the obvious, because a soft-law instrument cannot alter obligations under binding international law; but they also highlight that the tensions that may arise in the application of different international norms run through the VGGT themselves. Coupled with the non-binding nature of the VGGT, with the lack of a clear definition

²⁵⁸ *Id.* ¶¶ 1.1, 4.3, 5.3, 8.1, 8.7, 9.1, 12.1, 12.10, 23.

²⁵⁹ *Id.* ¶¶ 4.4, 5.3.

²⁶⁰ *Id.* ¶ 12.6.

²⁶¹ *Id.* ¶ 12.9.

²⁶² *Id.* ¶ 12.10.

²⁶³ *Id.* ¶¶ 9.9, 12.7.

²⁶⁴ *See, e.g., id.* ¶¶ 4.2, 9.3, 15.9, 25.2, 25.4. *See also id.* ¶¶ 14.1, 15.4.

of what constitutes “legitimate” tenure rights beyond some broad procedural parameters,²⁶⁵ and with the limited scope for applying the VGGT to extractive industry projects,²⁶⁶ these features establish outer boundaries to the effectiveness of the VGGT in mediating tensions in the land-property-sovereignty interface.

E. To Sum Up

The historical development of international norms in the areas of human rights, foreign investment and environmental protection has reconfigured the relationship between space for the lawful exercise of sovereignty in land matters on the one hand, and the international protection of property on the other. This “internal” reconfiguration of the relationship between land, property and sovereignty can affect diverse sovereign acts such as awarding commercial land or resource concessions, redistributing or returning land, and tightening environmental standards applicable to land-based investments. The reconfiguration raises complex legal issues, which disputes linked to increased commercial pressures on resources have brought to the fore: for example, whether land relations should be framed exclusively or even primarily in terms of property, or leave space for non-proprietary foundations that link land to life, culture, food and self-determination; how property itself should be conceptualized – in commercial terms, and/or as a basis for social, cultural, ecological and spiritual value – and how these multiple dimensions can be reconciled; and whose property claims the law should protect and how.

These issues are accompanied by questions interrogating the contours and exercise of sovereignty. What safeguards should states uphold when allocating natural resource concessions, including both substantive rights and procedural arrangements such as consultation or consent requirements? Conversely, what safeguards should states abide by when taking action that can adversely affect commercial investments – from land restitution or redistribution, to the renegotiation or termination of natural resource projects? Evolutions in international law have provided important pointers on these questions. The resulting norms have established safeguards both for foreign investment and for

²⁶⁵ *Id.* ¶¶ 3A.1, 4.4, 5.3, 9.4.

²⁶⁶ Mining and petroleum projects can have significant land footprints, and VGGT provisions on issues such as consultation and transparency would seem to resonate strongly with the challenges that extractive industry investments raise. However, the VGGT refer to investments in land, fisheries and forests, and to the agriculture sector (e.g., ¶ 12.1). This focus reflects the institutional mandates of the CFS and the Food and Agriculture Organization.

indigenous peoples and local communities. However, these norms present imbalances: broadly speaking, international law tends to provide more effective safeguards to land claims associated with foreign capital – particularly in circumstances where regional human rights systems or international instruments on indigenous peoples do not apply.

These issues are particularly pressing where different claims to land come directly into contest. The articulation between different claims and norms raises difficult questions. This is not due to inherent inconsistencies between different norms of international law – those protecting the rights of indigenous peoples and local communities, and those protecting commercial assets. Rather, tensions can arise in the practical application of these norms, because state action to advance one set of rights can adversely affect the other. In the context of legal proceedings, this situation calls for mechanisms to arbitrate between the multiple rights and interests at stake. In the example of legitimate expectations, discussed above, it calls for mechanisms to ensure that government representations made in breach of internationally recognized parameters of community consultation do not establish expectations protected under international law.

The international system offers both substantive and procedural tools to address these issues, including interpretive techniques and conflict-of-norms rules, procedural arrangements to enable third parties to raise neglected issues in legal proceedings, and soft-law instruments that provide comprehensive international guidance on land relations. Ultimately, however, these tools present some limitations and ultimately embody “soft” rules, because they leave considerable scope for discretion and diverging outcomes, they are established in non-binding instruments, or – in the case of *amicus curiae* submissions – they have so far displayed limited effectiveness in influencing dispute settlement outcomes. And while this discussion has focused on situations where commercial activities within a state bring into contest different land claims or normative values, related disputes between states – the external dimensions of the land-property-sovereignty interplay – can add a further layer of complexity.

As discussed in Section II, inter-state disputes over territorial control remain an important source of international conflict and jurisprudence, and commercially valuable natural resources can be a significant driver of these disputes. In such situations, competing property claims may be entangled with territorial disputes,²⁶⁷ and

²⁶⁷ The Abyei Boundary Commission tasked with delimiting the frontier in an oil-rich territory contested between the government of Sudan and the Sudan People's Liberation Movement /

investment disputes with tensions between sovereign states.²⁶⁸ These features illustrate the interlinkages that can emerge between disputes affecting land with social and cultural significance, commercial interests in the exploitation of natural resources, contestation over the exercise of political authority within national jurisdiction, and territorial control in relations between sovereign states. International law can provide important contributions to tackling these complex issues, by clearly framing the multiple disputes and their interlinkages, and offering effective means to address them on the basis of proper consideration of their multi-faceted dimensions. Rising to the challenge is likely to require sharpening the substantive and – even more so – procedural tools for the integrated interpretation and application of international law.

VI. CONCLUSION

As the frontier of natural resource extraction expands and intensifies, land features increasingly prominently in international law. This trend is reflected in recent legal and jurisprudential developments in the areas of human rights, foreign investment and environmental protection. It is also reflected in the emergence of international soft-law instruments that provide guidance on land governance in unprecedented detail, and in the enduring significance of territorial disputes between

Army relied extensively on evidence of customary land rights and occupation, due to the limited available historical evidence of administrative borders. In this sense, property dimensions had a bearing on the outcome of a territorial dispute. An international arbitral tribunal subsequently established to determine whether the commission had exceeded its powers found the commission's approach to be reasonable in the circumstances, though it also annulled some of the commission's conclusions due to failure to state reasons. *Abyei Arbitration*, *supra* note 62, ¶¶ 124-131, 571-599, 711, 745-746.

²⁶⁸ After South Sudan became an independent state, it adopted measures to take control of the petroleum industry within its jurisdiction. In this context, Sudan's state-owned oil company, Sudapet, initiated an investor-state arbitration against the government of South Sudan. While the details of this dispute are not publicly known and the award is not in the public domain, the case is understood to relate to the seizure by the government of South Sudan of Sudapet's interests in petroleum contracts now falling within the territory of South Sudan; see *South Sudan Hit with ICSID Claim from the North*, GLOB. ARBITRATION REVIEW (Sept. 3, 2012), <http://globalarbitrationreview.com/article/1031578/south-sudan-hit-with-icsid-claim-from-the-north>. It has been commented that, in effect, the arbitration involved the deployment of investment protection norms in relation to the division of spoils after the break-up of Sudan; see *Arbitration Scorecard 2013*, THE AMERICAN LAWYER (June 24, 2013), <http://www.americanlawyer.com/id=1202608198051?slreturn=20170230094826>. These basic parameters of the dispute appear to illustrate (another side of) the intersection between the internal and external dimensions of the interface between the protection of property (here, concerning the oil interests) and territorial sovereignty.

states. The trend vindicates the important role that land issues played since the very beginnings of international law, epitomized in modern times by juristic concerns about territorial sovereignty and land ownership during successive waves of European colonization – a key juncture in the historical transition from localized arrangements governing relations among geographically close polities to the contemporary worldwide system of international law.

The important place of land throughout the history of international law reflects its close connections to issues of territory and sovereignty, with concerns about territorial control having been a major engine of international legal developments. But while traditional accounts of international law have placed inter-state relations and public authority at centre-stage, the relationship between land, property and sovereignty highlights that private ordering has been an important feature since the early days of modern international law. In expanding the reach of international law to dimensions that unfold primarily within national jurisdiction, legal evolutions since the 20th century have further entrenched the coexistence of private rights and public authority in the framing of international law. These evolutions have reconfigured the internal foundations of state sovereignty, and they have redesigned important aspects of property – for example, by establishing substantive and procedural safeguards for the collective property of indigenous peoples and local communities, and by protecting foreign landholdings through investment protection arrangements that are decoupled from claims of territorial sovereignty.

In contemporary international law, the relevance of property claims to land is reflected in the growing number of human rights cases and investor-state arbitrations stemming from land disputes that ultimately oppose foreign investors, sovereign states, and indigenous peoples and local communities. Legal proceedings under both human rights and investment treaties typically involve states and scrutiny of public action, in line with the fundamental structures of public international law and with the role of states in creating and mediating land disputes. However, disputes framed as lawsuits against states may belie tensions between the land claims or land-based aspirations of different private actors – from indigenous peoples and local communities to transnational corporations. The rise of *amicus curiae* submissions in investor-state arbitration, and on occasion the filing of parallel human rights and investment proceedings for closely related disputes, are making these dimensions more explicit.

Compared to international law analyses that focus their lens on the

global centres of inter-state diplomacy and dispute settlement, this exploration of land issues presents a more locally grounded perspective, ultimately interrogating the ways different actors mobilize international law to advance their land claims. This perspective provides insights for wider debates about the emancipatory potential, or imperialistic underpinnings, of international law. In recent years, early enthusiasms about the "civilising mission" of international law, and early optimism about the potential for international law to contribute to a more just and peaceful world, have been contrasted by more sceptical analyses that emphasize the strong connection between the development of international law and colonial and postcolonial domination.²⁶⁹ The place of land in international law epitomizes this coexistence of emancipatory potential and legitimization of imperialistic strategies both old and new, with international law conceptualizing land at the same time as a commercial asset, an ecological good, and a resource having socio-economic, cultural and spiritual significance.

On the one hand, the long-term historical trajectory from colonialism to the development of international investment protection norms reflects a reconfiguration of legal arrangements for resource control. While colonialism involved claims of territorial sovereignty as well as land ownership, the acquisition of territory is no longer the sole or even the primary tool to claim control over land and resources. In effect, international legal arrangements have shifted towards facilitating control over resources through economic governance arrangements, with international investment norms protecting the land and resource rights held by foreign investors against interference by independent states.

On the other hand, international law provides new arenas for local-to-global emancipatory struggles to obtain recognition for the land rights of indigenous peoples and local communities. New actors are becoming more involved in the making and implementation of international regulation, including non-governmental organizations and social movements that participate in the development of international guidelines on issues previously left to the exclusive preserve of domestic jurisdiction, and that bring cases to push the boundaries of international human rights treaties. Human rights institutions and proceedings provide important sites for this advocacy, as does the

²⁶⁹ See, e.g., ANGHIE, *supra* note 57; KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL* (Cambridge Univ. Press, 2013); MARTTI KOSKENNIEMI ET AL., *INTERNATIONAL LAW AND EMPIRE: HISTORICAL EXPLORATIONS* (Martti Koskenniemi et al. eds., Oxford Univ. Press, 2017).

emergence of soft-law instruments the legitimacy of which rests, at least in part, on multi-stakeholder processes.

Some of these advances remain confined to international instruments that, while not devoid of legal significance, are not legally binding, or are not assisted by effective enforcement mechanisms. This situation contrasts with the relatively effective legal arrangements developed to protect foreign investment. As growing pressures on land bring competing claims into contest, structural imbalances in legal frameworks raise probing questions about whose rights are being protected and how. Despite these important limitations, however, contemporary international law protects the land rights of the most vulnerable to an extent that is unparalleled by historical standards, reversing a long history of *terra nullius* arguments that exposed indigenous populations to extensive land dispossession.

This coexistence of both “emancipatory” and “imperialistic” elements in the structure of international law, and the fact that the same land may have economic, socio-cultural and ecological significance and may form the object of competing claims, can lead to tensions in the application of international norms. This includes potential tensions in the application of different international instruments, including human rights, investment and environmental treaties. But it could also involve tensions between different human rights – for example, between the right to property and the right to food, in situations where realizing the latter might require ambitious land redistribution. In an increasingly resource-constrained world, the ability of international law to address these tensions becomes particularly important. Interpretive techniques such as systemic integration, procedural arrangements such as *amicus curiae* submissions, and comprehensively framed soft-law instruments provide useful tools for arbitrage. But they also present limitations, leaving considerable room for discretion and conflicting outcomes.

This situation highlights the need to strengthen arrangements for managing the interplay of land, property and sovereignty. Responding to this need may involve reforming substantive standards, for example by strengthening the international protection of the land rights of local communities as a human rights concern, including beyond the specific circumstances of indigenous peoples; and by entrenching human rights obligations and VGGT guidance into the framing of international investment protection norms, including investment treaty clauses. In addition, continued development of international jurisprudence could provide ever more specific pointers for the effective application of interpretive techniques such as systemic integration and possibly the use

of soft-law instruments in dispute settlement contexts. Reform may also target procedural aspects, particularly to more meaningfully enable indigenous peoples and local communities to advance their rights and articulate their perspectives in the settlement of investment-related disputes, beyond the narrow confines of *amicus curiae* submissions.

Ultimately, any reform efforts would need to navigate the decentralized nature of international law making, heightened by the divides between human rights procedures, environmental fora and investment treaty negotiations; by the bilateral or regional nature of prevailing investment treaty making; and by the multiplicity of investor-state arbitration rules. But while reform efforts may need to unfold in diverse policy arenas, effective reform of the parts would require an integrated vision of the whole. Legal scholarship is often confined in neatly defined disciplinary spaces. But the story of land, property and sovereignty highlights the close links that exist between different international instruments when applied to real-life situations, and calls for a more holistic approach to the design and implementation of international law.