Latin America, indigenous peoples, and investments: Resistance and accommodation

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Introduction

Latin America is home to a 44 million-strong indigenous population,[1] distributed in 650 recognized and many non-recognized peoples.[2] These are the peoples who survived the massacres inflicted upon the natives of Latin America since the early days of European "colonization."[3] Millions of individuals have been decimated, and the surviving peoples have suffered the loss of lives, lands, cultures, and languages – much on account of the exploitation of minerals in their territories by domestic and foreign actors, including

1 See Joji Carino, "Global Report on the Situation of Lands, Territories and Resources of Indigenous Peoples" (Indigenous Peoples Major Group for Sustainable Development 2019) www.iwgia.org/en/resources/publications/3335-global-report-on-the-situation-of-lands-territories-and-resources-of-indigenous-peoples.html.

2 We adopt the concept of indigenous people enshrined in the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (signed, adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention 169), which is centred on the self-identification as indigenous peoples. Also, United Nations, "United Nations Declaration on the Rights of Indigenous Peoples, Adopted by the General Assembly on 13 September 2007 UN Doc A/61/L.67 and Add.1," article 33; Organization of American States, "American Declaration on the Rights of Indigenous Peoples, Adopted at the Third Plenary Session Held on 15 June 2016, OAS Doc AG/RES.2888 (XLVI-O/16)," article I (2).

3 Nadia M. Rubaii, Lippez-De Castro and Susan Appe, "Pueblos Indígenas Como Víctimas de Los Genocidios Pasados y Actuales: Un Tema Esencial Para El Currículo de Administración Pública En América Latina" (2019) 25 *Opera*; Diana Isabel Lenton, "De Genocidio En Genocidio. Notas Sobre El Registro de La Represión a La Militancia Indígena" (2018) 13 *Revista de Estudios sobre genocidio* 47; Richard Gott, "América Latina Como Una Sociedad de Colonización Blanca" (2007) 5 *Estudios Avanzados* 7; Giulio Girardi, "Capitalismo, Ecocidio, Genocidio: El Clamor de Los Pueblos Indígenas" [1994] *Realidad: Revista de Ciencias Sociales y Humanidades* 669; Mónica L Espinosa Arango, "Memoria Cultural y El Continuo Del Genocidio: Lo Indígena En Colombia" [2007] *Antípoda. Revista de antropología y arqueología* 53; Marcia Esparza, "Algunos Factores a Considerar En El Análisis de Un Genocidio Latinoamericano: El Papel de Los Estados Unidos, Colonialismo Interno, Legados de Silencios Sociales" 1 *Revista Contenciosa*; Ignacio Aguilera

foreign investors.[4] Local governments, first as agents of the metropoles and later as organs of the newly independently states,[5] either inflicted the losses directly on these indigenous peoples or legitimized, through law and policies, the infliction of losses by private actors.

Throughout the history of Latin America, indigenous peoples have been invisible to governments and societies, notably in terms of participation in the decision-making respecting the economic exploitation of natural resources in their lands. Indigenous people have also suffered from high levels of inequality, bearing the full costs of the too often unsustainable exploitation of such resources and governments often justified these costs as necessary for the development of the "nation."[6] As resistance erupts,[7] governments argue it is put up by some individuals who either "are stupid, do not know what they say, or are liars";[8] or who are simply manipulated by some hidden forces interested in jeopardizing the development of indigenous peoples.[9] Yet, resistance, either civil or violent, has been the last resort mechanism to counter what indigenous peoples see as illegitimate incursions into their lands and illegitimate attacks on their ways of life.[10] Here, as in other parts of the world, resistance becomes a mechanism for the affirmation, not only of rights, but of identities.[11] Often, governments have responded with accommodation in the form of empty promises and affirmation of rights in law but not in practice. Even the recent achievements in terms of civil and political rights, which are crucial in terms of gaining

Encina and Daniela Torres Araya, "El Estado-Nación Paraguayo En La Dictadura de Alfredo Stroessner y Su Relación Con El Genocidio Aché"; Miguel Alberto Bartolomé, "Los Pobladores Del 'Desierto'. Genocidio, Etnocidio y Etnogénesis En La Argentina" [2004] *Amérique Latine Histoire et Mémoire*. Les Cahiers ALHIM. Les Cahiers ALHIM; Fernando Báez, "El Saqueo Cultural de América Latina" [2008] De la conquista a la globalización. Serie Debates. Venezuela: Melvin.

4 Eduardo Galeano, *Las Venas Abiertas de América Latina* (Siglo xxi 2004) http://adizesca.com/site/assets/e-las_venas_abiertas_de_al-eg.pdf.

5 For instance, Esparza (n 3) (on internal colonialism); Gott (n 3) (proposing that there is a white colonization of Latin America).

6 For a recent telling example, Barbora Valiková, "Análisis de La Posición Ideológica Del Gobierno Ecuatoriano En El Contexto de La Movilización Indígena Antiextractiva" (2016) 33 *Cuadernos del Cendes* 65, 74–5.

7 Ana Cecilia Betancur J (ed), *Movimientos Indígenas En América Latina. Resistencia y Nuevos Modelos de Integración* (IWGIA 2011).

8 Reportedly, this is how Rafael Correa explained the resistance put up by indigenous people against the mining project that his government adopted for Ecuador ("o son tontos, o no saben, o están mintiendo") (cited in Valiková (n 6) 78.)

9 Presidente da República do Brasil, "Speech at the Opening of the 74th United Nations General Assembly, New York" http://funag.gov.br/index.php/en/component/content/article?id=3004 accessed 26 May 2020.

10 Betancur J (n 7); Campaña continental 500 años de resistencia indígena y popular, "Quinientos Años de Resistencia Indígena y Popular En América Latina".

11 Girardi (n 3).

visibility, are not accompanied by effective procedures and institutions.[12] Enjoyment of economic, cultural, and social rights, fundamental in addressing both invisibility and inequality, lags further behind.[13]

In the late twentieth century a new globalization dynamic emerges. Many Latin American governments break with the Calvo tradition,[14] and they embrace with arms open, a wonderful new world – and one of the wonders that this new world offers are (for the most part, bilateral) investment treaties. For indigenous people, investment treaties perpetuate invisibility because these agreements are strongly attached to the traditional concept of statehood, to the principle that the government is the legitimate representative of all the peoples in the territory of the state. Consequently, the government, who has enabled and legitimized the losses inflicted on indigenous peoples by foreign investors, becomes the actor responsible for defending the interests of indigenous peoples in the negotiations of these treaties, and in disputes involving foreign investors. The regime that emerges from investment treaties also aggravates inequality because it fiercely protects the rights of investors.[15] Because indigenous peoples have finally managed to gain some political presence in several countries in the region, in countries which had entered into bilateral investment treaties, the straight-jacket and regulatory chill, which these treaties create,[16] acquire a more sinister contour: they jeopardize the indigenous peoples' fight for equality in political, civil, economic, social, and cultural terms.

From this perspective, two questions arise for the international investment lawyer: what to do when the facts of a situation, for instance mounting resistance towards a project, a policy, or a treaty,[17] make it clear that the local government does not legitimately represent indigenous peoples; and

12 Deborah J. Yashar, "Indigenous Politics and Democracy: Contesting Citizenship in Latin America" (Kellogg Institute 1997) Working Paper 238; Deborah J Yashar, "Resistance and Identity Politics in an Age of Globalization" (2007) 610 The ANNALS of the American Academy of Political and Social Science 160. (Describing very complex social developments that enabled the organization of indigenous movements, but jeopardized political participation.)

13 For instance, The World Bank, "Indigenous Latin America in the Twenty-First Century" (The World Bank 2015) 13 https://documents.worldbank.org/en/publication/documents-reports/documentdetail/145891467991974540/indigenous-latin-america-in-the-twenty-first-century-the-first-decade.

14 Carlos Calvo, *Derecho Internacional Teórico y Práctico de Europa y América. Tomo Primero* (D'Amyot, Durant et Pedone-Lauriel 1868) para 91 (intervention), 191 (jurisdiction) and 294 (full doctrine). See the excellent Chapter 1 by Phillip Burton in this volume.

15 For a definition of the international investment regime, see Chapter 2 by Magdalena Bas in this volume.

16 See Chapters 5 Luciana Ghiotto, 8 by Adoración Guamán, and 12 by Javier Echaide in this volume.

17 For instance, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012–2 (Award, 15 March 2016) (*Copper Mesa v Ecuador* (Award 2016)); *Chevron*

what to do when the promotion of sustainable development for indigenous peoples clashes with the protection of investors.[18] This chapter addresses these questions through the deconstruction of the mainstream concept of statehood and of the neoliberal belief that the protection of investors reverts to continuous development for all. This chapter draws on critical statehood scholarship,[19] on critical development theories,[20] and on energy justice studies[21] to bring visibility and justice to indigenous peoples and to affirm them

Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II), PCA Case No. 2009–23 (Second Partial Award on Track II, 30 August 2018) (*Chevron v Ecuador (II)* (Second Partial Award 2018)); *Bear Creek Mining Corporation v. Republic of Peru,* ICSID Case No. ARB/14/21 (Award, 30 November 2017) (*Bear Creek v Peru* (Award 2017)).

18 We understand sustainable development as a framework that enables communities to participate in decision-making relating to the intersection of developmental, social, and environmental concerns. Sustainable development has considerations about ecological integrity at the centre of decision-making processes. The Inter-American Court of Human Rights affirms the right to the environment as an autonomous right of universal interest that protects the components of the environment as a juridical interest in itself. This interest exists despite the absence of risk for individuals and thus, the right to the environment entails the protection of nature due to its significance for other organisms with which humans share the planet, as opposed to considerations merely about the utility of the environment for humans. Corte Interamericana de Derechos Humanos, "Medio Ambiente y Derechos Humanos (Obligaciones Estatales En Relación Con El Medio Ambiente En El Marco de La Protección y Garantía de Los Derechos a La Vida y a La Integridad Personal – Interpretación y Alcance de Los Artículos 4.1 y 5.1, En Relación Con Los Artículos 1.1 y 2 de La Convención Americana Sobre Derechos Humanos). Opinión Consultiva OC-23/17." See John C. Dernbach and Federico Cheever, "Sustainable Development and Its Discontents" (2015) 4 *Transnational Environmental Law* 247.

19 Jean d'Aspremont, "The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society" (2013) 29 *Connecticut Journal of International Law* 201.

20 We draw on Latin American scholars, such as Luiz Carlos Bresser-Pereira, "Do ISEB e Da CEPAL à Teoria Da Dependencia" [2005] Intelectuais e Política no Brasil: A Experiência do ISEB. Rio de Janeiro: Editor a Revan 201; Fernando Henrique Cardoso and Enzo Faletto, *Dependency and Development in Latin America* (University of California Press 1979). We also draw on recent inequality studies, Thomas Piketty, *Capital and Ideology* (Arthur Goldhammer tr, Harvard University Press 2020); Joseph Stiglitz, *Globalization and Its Discontents Revisited: Anti-Globalization in the Era of Trump* (1st edition, Penguin 2017).

21 Kirsten Jenkins and others, "Energy Justice: A Conceptual Review" (2016) 11 *Energy Research & Social Science* 174; Darren A McCauley and others, "Advancing Energy Justice: The Triumvirate of Tenets" (2013) 32 *International Energy Law Review* 107; Raphael J. Heffron and Darren McCauley, "The Concept of Energy Justice across the Disciplines" (2017) 105 *Energy Policy* 658; Raphael J. Heffron, "The Role of Justice in Developing Critical Minerals" (2020) In Press *The Extractive Industries and Society* https://doi.org/10.1016/j.exis.2020.06.018; Sufyan Droubi and Raphael Heffron, "Politics' Continued Erosion of Sustainable Development for Brazil's Indigenous Peoples" (2020) 5 *Peripheries Journal* www.revistaperiferias.org.

as full participants, on their own terms, in international investment law.[22] On a theoretical level, this is a conceptual chapter that falls within socially informed critiques to international law.[23] In the following two sections, we describe the problem of invisibility, and *then*, the problem of inequality. We offer a conceptual framework which tackles these problems in a systematic manner: *first*, we return to invisibility, when we call for the affirmation of the indigenous peoples' right to be consulted and to participate in the decsionmaking leading to, implementing and enforcing investment treaties; and *then*, we turn to inequality, when we draw on the energy justice literature, to call for the respect and enforcement of certain international law principles and rules as necessary for ensuring justice for indigenous peoples. In the ensuing section, we draw on our theory to articulate a critical reflection of international investment law practice, when we discuss the EU-Mercosur Trade Agreement which also provides for investment regulation, and investor-state arbitration procedures with focus placed on third party intervention and *ius standi*, before concluding with some final remarks.

Indigenous peoples: invisible in bilateral investment treaties

Already has the invisibility of indigenous peoples been affirmed as a problem in international investment law, having the imposition of obligations on investors been proposed as a manner to increase their visibility.[24] Tackling the same problem, without however framing it in terms of visibility,[25] some

22 We draw on the concept of "participants" articulated by Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995).

23 For instance, Balakrishnan Rajagopal, *International Law from below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003).

24 Nicolás M. Perrone, "The 'Invisible' Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime" (2019) 113 AJIL Unbound 16. Too often, state policies aimed at the protection of indigenous peoples depend on the prior recognition of their status as indigenous peoples, which evidently increases invisibility of non-recognized indigenous peoples. The present chapter refers to indigenous peoples irrespectively of the formal recognition of their status by local governments. See Ravi de Costa, "Descent, Culture, and Self-Determination: States and the Definition of Indigenous Peoples" (2014) 3 *Aboriginal Policy Studies*.

25 Invisibility is a widespread problem that affects different populations – indigenous, sexual minorities, drug addicts among others – which is usually caused by discrimination, stigma and fear, and which works in two manners, by rendering authorities blind to the specific characteristics of the population, and by preventing individuals from these populations from identifying themselves; it emerges as *absence* in census and data collection and in decision-making processes. See Sara L. M. Davis, "The Uncounted: Politics of Data and Visibility in Global Health" (2017) 21 *The*

authors propose changes to the procedure of investor–state arbitration, to enhance the participation of local communities.[26] We argue that it is the attachment of international investment law to a nineteenth-century concept of statehood embedded in exclusionary development ideologies which perpetuates invisibility. The procedural shortcomings of investor–state arbitration surely reinforce invisibility, but it is not the main culprit. Investors' lack of obligations aggravate inequality between these two participants in the international processes – investors and indigenous communities. In this section, we address invisibility and, in the next, inequality.

Only by attending to the history and current dynamics of the relationship between indigenous people and their governments in Latin American, and the actual standing of indigenous peoples as participants in the international investment processes, can we understand the problem of invisibility in the investment treaty regime. This problem emerges domestically and is perpetuated in international legal processes. Often, it emerges as *demographic* invisibility in data collection and censuses,[27] but the real cause is *identity* invisibility, that is, the invisibility of indigenous people's social, cultural, and economic conditions, which distinguish them from the rest of society.[28] While the causes of *identity* invisibility are complex, discrimination is certainly a major triggering factor. Systemic, ingrained, widespread discrimination causes the government and other actors to deny to indigenous peoples, and fear of discrimination may cause individuals within these peoples not to affirm, their identities.[29] It has been observed that the very idea of

International Journal of Human Rights 1144; Adrian Little and Mark McMillan, "Invisibility and the Politics of Reconciliation in Australia: Keeping Conflict in View" (2017) 16 *Ethnopolitics* 519; Michal Pitoňák, "Mental Health in Non-Heterosexuals: Minority Stress Theory and Related Explanation Frameworks Review" (2017) 5 *Mental Health & Prevention* 63; Genevieve Howse and Judith Dwyer, "Legally Invisible: Stewardship for Aboriginal and Torres Strait Islander Health" (2016) 40 *Australian and New Zealand Journal of Public Health* S14; Evelyn Peters, "Still Invisible: Enumeration of Indigenous Peoples in Census Questionnaires Internationally" (2011) 1 *Aboriginal Policy Studies*.

26 For instance, Lorenzo Cotula and Mika Schöder, "Community Perspectives in Investor-State Arbitration" (International Institute for Environment and Development 2017) https://pubs.iied.org/pdfs/12603IIED.pdf; Jesse Coleman and others, "Third Party Rights in Investor-State Dispute Settlement: Options for Reform" https://uncitral.un.org/en/library/online_resources/investor-state_dispute; Farouk El-Hosseny, *Civil Society in Investment Treaty Arbitration: Status and Prospects* (Brill | Nijhoff 2018).

27 Permanent Forum on Indigenous Peoples, "State of the World's Indigenous Peoples" (United Nations 2009) ST/ESA/328 165.

28 The World Bank (n 13) 18. ("In most cases, however, the main challenge to determine the precise number and distribution of indigenous people is political, related to the legal or implicit definitions of indigeneity that prevail in the region.")

29 Peters (n 25).

"indigenous" arises out of discrimination: a Eurocentrism impregnates the ideas of modernity and progress since the early days of the Latin American nations, leading to the construction of an ideal type of "national," against which the image of "indigenous" is built – as someone who is primitive and who has to be integrated into the national society. Hence, the definition of "indigenous" owes to the colonial period and is reproduced thereafter.[30]

Another triggering factor is ideologies that define development in exclusionary terms. Throughout the history of Latin America, the main development models have been supported by such ideologies. The early liberal-conservatism of the nineteenth and early twentieth centuries emerged from the regional incapacity of the Latin American governments to affirm themselves against Europe, and was content in seeking development for an elite formed by land owners and those in power.[31] Later, the "import substitution industrialization" policies of the 1950s–1980s emerged in a new post-war world of a diminished Europe, and sought uniform development for the nation, bringing development but in very unequal terms.[32] Finally, the neoliberal project of the 1990s and 2000s emerged from the collapse of the Latin American economies, who had to accede to the Washington Consensus to access international funds, and a certain belief that economic openness would lead to economic growth, again leading to an increase in inequality.[33] These models are exclusionary because they seek uniform development for the national society,[34] from which indigenous peoples have historically been excluded.[35] Although more recently indigenous peoples

30 Aníbal Quijano, "El 'Movimiento Indígena' Y Las Cuestiones Pendientes En America Latina" (2005) 119 *Tareas* 31.

31 Amado Luiz Cervo, "Política exterior e relações internacionais do Brasil: enfoque paradigmático" (2003) 46 *Revista Brasileira de Política Internacional* 5, 11.

32 Werner Baer, "Import Substitution and Industrialization in Latin America: Experiences and Interpretations" (1972) 7 *Latin American Research Review* 95.

33 Luiz Alberto Moniz Bandeira, "As políticas neoliberais e a crise na América do Sul" (2002) 45 *Revista Brasileira de Política Internacional* 135. On the Washington Consensus, see Chapter 2 by Magdalena Bas in this volume.

34 For the centrality of the "national" in CEPAL's approach, see Bresser-Pereira (n 20). For the centrality of the "citizen" in the neoliberal approach, see Patricia Richards, *Race and the Chilean Miracle: Neoliberalism, Democracy, and Indigenous Rights* (University of Pittsburgh Press 2013).

35 For instance, indigenous people were considered "categories in transition" for most of the Brazilian history, and all the six first constitutions sought to "integrate" them into society. Danielle Bastos Lopes, "O Direito dos Índios no Brasil: A Trajetória dos Grupos Indígenas nas Constituições do País" (2014) 8 *Espaço Ameríndio* 83; Luana Soncini, "Nem Cidadãos, Nem Brasileiros: Indígenas Na Formação Do Estado Nacional Brasileiro e Conflitos Na Província de São Paulo (1822–1845)" (2013) 9 *Perseu: História, Memória e Política*. Note how this emerges in contrast with the ideas of a "Creole legal conscience" and "Mestizo International Law" as explained in Chapters 1 by Philip Burton, and Chapter 14 by Fabian Cardenas and Jean d'Aspremont in this volume.

acquire civil and political rights, notably with the wave of the 1990s–2000s Latin America constitutions, in practice, they remain absent in decision-making processes.[36] Invisibility continues to be a problem because of the lack of proper procedures and institutions.

Likewise, indigenous peoples' standing as participants in international investment processes is extremely weak – notably when contrasted with investors. The regime of investment treaties creates another level of decision-making processes (governance) that can and does affect the lives of indigenous peoples without providing the latter with effective mechanisms of participation. On itself, this is a serious shortcoming of the regime. But the real problem lies deeper: because of its design, i.e., bilateral or multilateral relationships between states, and bilateral relationships between investors and states, with the government representing the state and all its peoples; and because of the ideology that sustains them, the investment treaty regime is unable to see beyond the veil of the state, to see the indigenous peoples as a legitimate participant in international investment processes.

Actually, that a government represents all the peoples in its territory is a crucial element in the traditional concept of statehood.[37] This principle is the necessary implication of the requirement that a government has "control" and "administration" over the territory,[38] and capacity to enter into relations with other states;[39] in other words, as a corollary of both internal and external effectiveness. Context is fundamental: Latin American countries have embraced the principle that effectiveness is crucial for statehood from the early days of their independence, back in the nineteenth century.[40]

36 Bruna Muriel, "Os Povos Indígenas Na América Do Sul: Entre a IIRSA e o Buen Vivir" [2017] Cadernos do CEAS: Revista crítica de humanidades 327, 330.

37 United Nations General Assembly, "Resolution 2625 (XXV). Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations. 1883rd Pl Mtg. 24 October 1970." ("…a *government representing the whole people belonging to the territory without distinction as to race, creed or colour*").

38 "Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question Report" (1920) 3 LNOJ SS [vi], 9 (a sovereign State does not emerge "until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops").

39 "Convention on Rights and Duties of States Adopted by the Seventh International Conference of American States" (1936) 165 United Nations Treaty Series 19, article 1; "Vienna Convention on the Law of Treaties" (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, articles 7, 8, 46, and 47.

40 Calvo (n 14) para 44 (definition of state). Thomas D. Grant, "Defining Statehood: The Montevideo Convention and Its Discontents" (1998) 37 *Columbia Journal of Transnational Law* 403 (explaining that effectiveness is one of the cruxes of the Montevideo Convention).

Both external (vis-à-vis other countries) and internal (vis-à-vis indigenous peoples, communities formed by run-away slaves, secessionists, and others) effectiveness has historical pedigree, being fundamental in the consolidation and development of the Latin American state.[41] Effectiveness has a clear role in the consolidation and development of Latin American countries within and outside their borders: governments would promote homogeneity internally so as to build and strengthen a nation-state;[42] and externally, so as to become an equal among equals in the international sphere.[43]

Investment treaties would hardly match the Latin American typical government's impetus to self-affirmation as the builder of the national state, because these treaties seriously constrain the government's "regulatory space," if it were not for two factors. First, in the 1980s–90s, there is the dramatic context of the financial crises that affected the region, and also the pull felt by many Latin American governments to emulate the more developed nations, which led these governments to embrace a neoliberal vision of the state.[44] This vision de-emphasizes the role of the government as a direct promoter of development at the same time as it emphasizes its role as an enabler of free movements of capital, products, and investments. For many Latin American decision-makers, demonstrating to their peers in advanced economies that they have established an environment that is favorable to receiving businesses, that they were as "normal" as their

41 In fact, Latin American governments have relied *both* on the principle of effectiveness, notably among themselves in the consolidation of the South American borders (Fábio Aristimunho Vargas, *Formação Da Fronteiras Latino-Americanas* (Fundação Alexandre Gusmão 2017) 100) *and* on the formal recognition of their independence by the former metropoles.

42 Calvo draws on Wheaton to clearly distinguish between nation and state, and to affirm the possibility of existence of different nations within the same state. Calvo (n 14) 82 ff. But the point here is different. Exactly because even a quick look at any Latin American country would confirm the existence of multiple and complex nations (indigenous and otherwise), that the building of a "national" state became so important. This intent is clear in educational policies, affirming the European language (Spanish, Portuguese, French, English) as mandatory – see María Odette Canivell, "Nation Building, Utopia, and the Latin American Writer/Intellectual" (2008) 10 *CLCWeb: Comparative Literature and Culture* 4; Michiel Baud, "State-Building and Borderlands" (2000) 87 *Latin American Studies-Centre for Latin American Research and Documentation* 41. On the importance of the promotion of homogeneity for the development model that prevailed in the region in the 1940s–80s, Luiz Carlos Bresser-Pereira, "O Conceito Histórico de Desenvolvimento Econômico"; Bresser-Pereira (n 20).

43 Again, Calvo provides an important example, as his doctrine is articulated within the framework of the principle of equality of states. See Calvo (n 14) para 294.

44 Bandeira (n 33).

"developed" peers,[45] becomes critical. Evidently, this new vision of the role of the state was not uniformly adopted across the region or across individual countries – or even across the same government.[46] But this vision became strong enough to justify the adoption of bilateral investment treaties in countries that have done so.

Second, the governments of these countries do not see the treaties as a threat to their statehood (but some will come to see the treaties as an issue for their sovereignty). The historical need to affirm their statehood had long gone. In fact, the regime of bilateral investment treaties reinforces the principle of effectiveness because governments continue to be the promoters of what is now a neoliberal model of development by imposing this model to diverse actors who oppose it.[47] Often, dissenters were side-lined, marginalized, and silenced.[48] Ensuring internal homogeneity remains as important as seeking external homogeneity. Thus, it could be said that bilateral investment treaties rest on the concept of the state as a homogeneous unit that should be represented by a government – which perpetuates the invisibility of minorities such as indigenous peoples.

There have always been situations in which the interests of the government clash with those of other national actors,[49] notably in respect to economic activities. Generally, in international law practice, the clashes between the interests of a government and those of other national actors do not create a serious challenge to the principle of the state as a unit represented by a government. Moreover, in democracies at least, and most of Latin American states are democracies,[50] processes should exist at the national level to enable

45 Cervo (n 31) 16.

46 The history of the failed attempt carried out by the 1990s' Brazilian government to have the country ratifying bilateral investment treaties illustrates the point. See Fábio Costa Morosini and Ely Caetano Xavier Junior, "Regulação do investimento estrangeiro direto no Brasi: da resistência aos tratados bilaterais de investimento à emergência de um novo modelo regulatório" (2015) 12 *Revista de Direito Internacional* (UNICEUB) 421. See Chapter 4 by Leonardo V P de Oliveira and Marcus Spangenberger in this volume.

47 The complexity of this move can be illustrated with the establishment of the Ministry for De-bureaucratisation in Brazil. Helio Beltrão, "Desburocratização, Descentralização e Liberdade: A Aterrissagem No Brasil Real" (2016) 273 *Revista de Direito Administrativo* 491.

48 C.f. note 8 and accompanying text.

49 For an interesting and provoking analysis, Guillermo J. Garcia Sanchez, "To Speak with One Voice: The Political Effects of Centralizing the International Legal Defense of the State" (2017) 34 *Arizona Journal of International and Comparative Law* 557.

50 Organization of American States, "Inter-American Democratic Charter, Adopted by the General Assembly at Its Special Session Held in Lima, Peru, on September 11, 2001" www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm accessed 7 August 2020.

national actors to weigh in on their governments, for instance, through parliaments and courts. Only in rare situations, clashes between the government and the population or parts of it rebound on the international sphere, leading to the disqualification of a government.[51] These are situations in which the clash of interests is so intense, its implications to the affected national actors are so severe, and domestic procedures are so deficient that the government in question has its legitimacy denounced and is ultimately disqualified as a representative of the state.[52]

Within the regime of investment treaties, a situation that is so critical as to justify the disqualification of a government as a legitimate partner by another state, or to disqualify it as a legitimate representative of the state-party in a dispute before an investor–state tribunal, has rarely, if ever, emerged.[53] Nevertheless, for the reasons described above, the government fails to properly represent indigenous peoples, while the regime of bilateral investment treaties fails to see the indigenous peoples in question. This failure of the regime arises clearly in investor–state arbitration awards settling disputes in which the impact of investments on indigenous peoples has been raised. No attention whatsoever is paid to the special conditions that make the indigenous populations in question what they are, and which explain their resistance to mining and other projects that are inside or close to their lands.

In Copper Mesa, for instance, a complex population formed by mestizos, Afro-descendants, and indigenous people,[54] is defined as "anti-miners."[55] In other words, the definition is investor-centered, is articulated with the reference placed on the investor: exactly the opposite of what should have been done, i.e., the definition of the peoples on their own terms, to properly explain their behavior. The attempts of the investor to create division

51 For instance, Organization of American States, "OAS Permanent Council Agrees 'to Not Recognize the Legitimacy of Nicolas Maduro's New Term'" www.oas.org/en/media_center/press_release.asp?sCodigo=E-001/19 accessed 7 August 2020.

52 For all, see Jean D'Aspremont, "Legitimacy of Governments in the Age of Democracy Note" (2005) 38 *New York University Journal of International Law and Politics* 877; Jean d'Aspremont and Eric De Brabandere, "The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise" (2010) 34 *Fordham International Law Journal* 190.

53 But there are situations in which an investment or trade agreement comes under fire because one of its parties' behavior, as the Mercosur–EU trade agreement. "France Threatens to Block Trade over Amazon Fires" *BBC News* (23 August 2019) www.bbc.com/news/world-latin-america-49450495 accessed 12 July 2020.

54 Duygu Avcı and Consuelo Fernández-Salvador, "Territorial Dynamics and Local Resistance: Two Mining Conflicts in Ecuador Compared" (2016) 3 *The Extractive Industries and Society* 912, 915.

55 *Copper Mesa v Ecuador* (Award 2016) (n 17) para 4.45.

in the populations,[56] and its behavior that at times is criminal,[57] are narrowly defined in terms of contributory fault.[58] With this, the true meaning of the investor's behavior for the indigenous (and in this case, local) populations,[59] is ignored; as is the true meaning of the government behavior; in other words, the roots of the discontentment, grievance, resistance are lost. Emblematically, the tribunal "notes a regrettable feature of this controversy: a fear and mistrust by anti-miners of all mining, based in part on, the World Bank Inspection Panel's phrase, 'misinformation.' "[60] In other words, relying on a third party report, rather than on the account of the communities themselves, the tribunal laments the communities' resistance, and attributes such resistance to "misinformation," without ever asking whether the communities had legitimate reasons, based not on misinformation, but on their own experience, to justify their stance.

The role that the government of Ecuador played in all this, and the role the tribunal ascribes to it, deserves some thoughts. As the award acknowledges, the powers of the Ecuadorean government in the region had always been weak;[61] and local resistance to the investor has built up forcing the government to change its position towards the investor, from supportive to unsupportive up to a moment when, finally, the government terminates the licenses.[62] But none of this is enough for the tribunal to fully understand the real meaning of the resistance that was put up against the investor and the government, and to acknowledge that mining should never occur while the local population opposed it. Instead, the tribunal has its eyes on the state of Ecuador, and on the government:

> [S]hould the Respondent have *imposed* its will on the anti-miners, acting with all the powers and forces available to a sovereign State, so as to ensure that the Claimant, as the concessionaire under concessions granted by the Respondent, could gain access to the Junín concessions in order to carry out the required consultations and other activities required for its EIS?[63]

56 Ibid. 4.292. On the tactics that the investor used, see *Under Rich Earth* (2017) www.youtube.com/watch?v=QRinnhejBIw accessed 7 July 2020.
57 *Copper Mesa v Ecuador* (Award 2016) (n 17) para 6.100.
58 For further discussions on this case, see Chapters 11 by Farouk El-Hosseny, Patrick Devine, and Ilan Brun-Vargas and 13 by Sebastián Preller-Bórquez in this volume.
59 See, for instance, Movimiento Regional por la Tierra, "Intag, historia de una luz" https://porlatierra.org/casos/127/georeferencial accessed 16 July 2020.
60 *Copper Mesa v Ecuador* (Award 2016) (n 17) para 4.45.
61 Ibid. *4.97, 6.83.*
62 Ibid. 6.101, 6.124.
63 Ibid. 6.82. (Emphasis added)

To what the tribunal answers:

> [R]ather than giving legal force to the factual effect of the *anti-miners*' physical blockade of the Junín concessions, the Respondent should have attempted *something* to *assist* the Claimant in completing its consultations and other requirements for the EIS. It is of course difficult to say now what it should have done to resolve all the Claimant' difficulties and, still more so, whether what anything it could have done would have changed the Claimant's position for the better. Plainly, the Government in Quito could hardly have declared war on its own people. Yet, in the Tribunal's view, *it could not do nothing*.[64]

In other words, the wishes of the local populations are a matter for the government, not for the tribunal, to address. What is more, the tribunal expects the government to reign in the situation, to be effective in the region – even after acknowledging that the government had always been weak. In fact, given the design of the regime of bilateral investment treaties, it is difficult to entertain how the tribunal could have done differently.[65] In strict legal terms, the total reliance of the regime of bilateral investment treaties on the traditional definition of statehood, i.e. the state as a unit which is represented by its government, is what makes the regime blind to indigenous people, perpetuating the invisibility at the domestic level.

Indigenous peoples: inequality in investment treaties

Besides, it is safe to affirm that the regime of investment treaties also perpetuates inequality – not only between countries, which is of a lesser concern here, but between the two non-state participants which this chapter addresses (investors and indigenous people). Although legal research looking at the impact of the design and implementation of these treaties

64 Ibid. 6.83. (Emphasis added)

65 An interesting aspect is that one of the members of the tribunal, Bruno Simma, when serving as *ad hoc* judge in Kosovo, saw it fit to distance himself from the "nineteenth-century positivism" to make his now famous distinction between "degrees of non-prohibition, ranging from 'tolerated' to 'permissible' to 'desirable.' " *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ 141, 2010 ICJ Reports 403 Declaration of Judge Simma [8]. However, no such distinction is made in the present case, with the right of the investor being defined in absolute terms. One would be excused to ask whether the mining project, while not prohibited in international law, was, in the circumstances, desirable, permissible or merely tolerated – and to ask about the implications arising therefrom. In any case, on the further developments of the mining activities in the Intag area, and for some important insights into the changing, and increasingly strong role that the central government is playing in promoting these activities. See Avcı and Fernández-Salvador (n 54).

on the levels of inequality that affect indigenous peoples is lacking, it is possible to draw some conclusions from the inequality studies,[66] and on topical studies.[67] Many legal scholars have denounced the regime of investment agreements for promoting a misconception – that the protection of investors attracts investments.[68] But the real misconception lies deeper in the regime: it consists in the again neo-liberal belief that an increase in the inflows of investments into a country automatically rebounds in development for the country. With varying language, the texts of bilateral investment treaties suggest this misconception.[69] There is clear evidence that the individuals negotiating treaties on behalf of states share this belief.[70]

The idea that higher inflows of investments result in more development is based on what Stiglitz calls trickle-down economics: the belief that economic growth results in development for all.[71] Yet, as Stiglitz demonstrates, factors such as corruption involving investors and authorities; cheating by investors; imbalance in the governments' and investors' powers of negotiation; high rents for investors; inappropriate privatization projects that do not remunerate the state for the real value of the lands and resources – all these promote inequality, with investors and local elites capturing most of

66 Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (Penguin Books 2013); Stiglitz, *Globalization and Its Discontents Revisited* (n 20); Thomas Piketty, *Capital in the Twenty-First Century* (Reprint edition, Harvard UP 2017); Piketty (n 20).

67 For instance, Henry Veltmeyer, "Extractive Capital, the State and the Resistance in Latin America" (2016) 4 *Sociology and Anthropology* 774; Matthew Fry and Elvin Delgado, "Petro-Geographies and Hydrocarbon Realities in Latin America" (2018) 17 *Journal of Latin American Geography* 10; Saturnino M. Borras Jr, Jennifer C. Franco, Cristobal Kay, and Max Spoor, "Chapter II: Land Grabbing in Latin America and the Caribbean, Viewed from a Broader International Perspective" (2014) *The land market in Latin America and the Caribbean: concentration and foreignization* 21.

68 For all, Muthucumaraswamy Sornarajah (ed), "Bilateral Investment Treaties," *The International Law on Foreign Investment* (4th edn, Cambridge University Press 2017).

69 To illustrate, the 1996 Canada–Ecuador BIT opens affirming "the purpose of creating favourable conditions for the investments of an investor of one Contracting Party in the territory of the other Contracting Party" before "acknowledging that the promotion and protection of such investments on the basis of a convention will be conducive to stimulating private economic initiatives and will *increase the prosperity of both states.*"

70 Guillermo Aguilar Alvarez and William W. Park, "The New Face of Investment Arbitration: NAFTA Chapter 11" (2003) 28 *Yale Journal of International Law* 365; Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press 2015) 118 ff.

71 Stiglitz, *The Price of Inequality* (n 66) 8–9.

the riches from the extraction of minerals and other resources, while the majority of the population bears the burdens of environmental degradation, social, and economic losses.[72] It is only by looking at who benefits from such hypothetical growth that one realizes that economic growth does not necessarily rebound into development, notably, into development for the most vulnerable. As many economists argue, the disaggregation of data is important for understanding the specific dynamics of development in different parts of the population.[73] The fact that indigenous people have remained invisible in data collection carried out by both national and international authorities aggravates the misunderstanding about growth leading to development for all.[74] Figure 9.1 illustrates this.

The "elephant curve" clearly suggests that inequality increased globally in the period 1980–2018, with the top centile of the global population capturing 27 percent of the total growth. But we should attend to the situation of the bottom centile and decile, who have not captured the same growth as the second and third bottom deciles. The question that arises is where in the curve Latin American indigenous should be placed? Studies suggest that they occupy the bottom edge of the curve.[75] To be sure, indigenous peoples

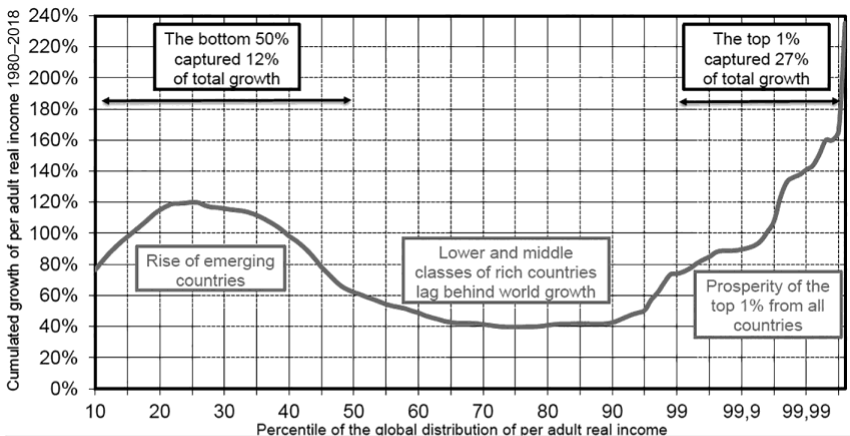

Figure 9.1 The "elephant curve"

72 Joseph Stiglitz, *Making Globalization Work: The Next Steps to Global Justice* (Allen Lane 2006) ch 5 Lifting the Resource Curse.
73 Piketty (n 20) 670–679.
74 The World Bank (n 13) 14, 15.
75 For all, The World Bank (n 13).

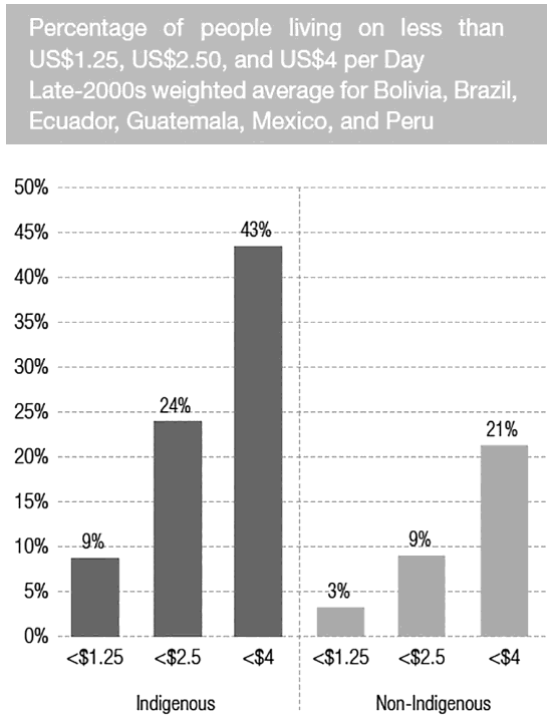

Figure 9.2 Poverty inequality

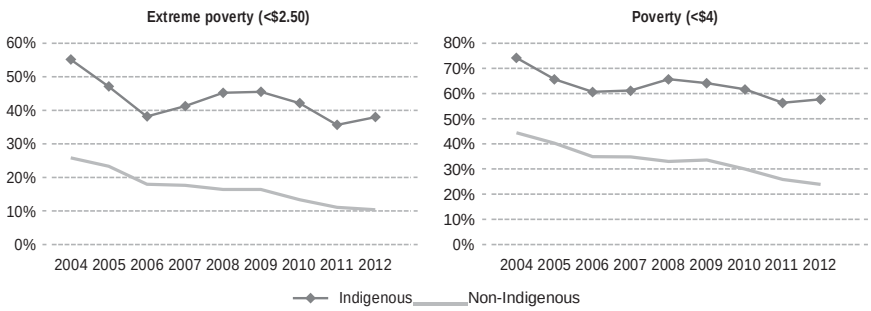

Figure 9.3 Indigenous people and inequality in Ecuador

have been disproportionately affected by poverty and extreme poverty, in contrast with other segments of Latin American societies.

To remain in the example of Ecuador, the growth of inequality, notably to the prejudice of indigenous people, is particularly concerning. Figures 9.2 and 9.3 illustrate this.

The regime of investment treaties perpetuates inequality in two manners. First, the treaties and the manner they are enforced cement the rights of investors – who occupy the top echelons of the "elephant curve" – so as to protect these rights against changes that local parliaments may introduce. In many decisions, the enforcement of the standards of protection is "automatic," with arbitrators rejecting the reasons that lead governments to adopt the decisions subject of the investors' complaints. For instance, with much difficulty arbitrators recognize that the resistance to an investment project, put up by indigenous peoples, is reason enough for the decision that the government makes to cancel licenses.[76] For indigenous peoples, the automatic enforcement of the standards of protection means that, ultimately, the status quo is frozen. This insight is crucial because in many Latin American countries, such as Ecuador, indigenous peoples succeeded in gaining participation in political processes in the late 1990s and in the 2000s.[77] So it becomes clear that this is a problem of inequality – even if invisibility is addressed, there remains the problem of the type of development that can be delivered by the state when designing investment policies. Second, the regime may be fostering inequality domestically; for instance, foreign investments in mining activities in indigenous lands often benefit national (non-indigenous) elites, who are at top tiers of the wealth and income pyramid.[78] Again, the regime offers an immediate, formal solution to the dispute, but it leaves the real problem – perpetuation of inequality – untouched.

It is in this sense – cementing ideologies about growth and investments and establishing rules and procedures that further these ideologies – that the regime of bilateral investment treaties perpetuate inequality. The regime plays a not insignificant role in the maintenance of what Piketty defines as neo-proprietarianism, an ideology that "relies on grand narratives and solid

76 See the different manners that the *Copper Mesa*, *Bear Creek* and *South American Silver* tribunals addressed the point. *Copper Mesa v Ecuador* (Award 2016) (n 17); *Bear Creek v Peru* (Award 2017) (n 17); *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013–15 (Award, 30 August 2018).

77 The World Bank (n 13) 8.

78 Sometimes, this leads to very questionable outcomes, with the elites employing violence to repress indigenous peoples' resistance against mining and other projects. In Copper Mesa, the question arose, being quickly disposed of, as to the propriety of making Ecuador pay for costs that the investor incurred when some of these costs were salaries paid for individuals that behaved criminally towards the local populations. *Copper Mesa v Ecuador (Award 2016)* (n 17) para 7.30.

institutions."[79] In analyzing the European Union, Piketty offers insights that may be applied to the regime of bilateral investment treaties. Piketty recalls that ordoliberalism requires the state to "guarantee free and undistorted competition" and that, in the hands of von Hayek, ordoliberalism calls for "automatic rules" so as to circumvent democratic decision-making.[80] The regime of bilateral investment treaties establishes "automatic rules" in the form of legal entitlements to a class of actors that already occupy the high echelons of the world and regional wealth and income pyramid – not only with treaty provisions on indirect expropriation, full security, fair and equitable treatment etc. but also with decisions adopting approaches to the payment of compensation that are entirely favorable to investors.[81] These entitlements have the potential to aggravate inequality. While the impact of the regime on the government is well-known ("regulatory straight-jacket," "regulatory chill" etc.), the impact on indigenous peoples has not received proper attention. This problem cannot be addressed solely with the affirmation of self-determination and the indigenous peoples' right to participate in the decision-making respecting their lives. The role of participation is much reduced within an environment of automatic rules. Addressing this problem requires a renewed concept of justice and, in this chapter, we show that the concept of energy justice has much to offer in rethinking the type of development that investments should promote.

Insofar as the definition of international investment law remains grounded on the rigid and formalist regime of bilateral investment treaties, the chances for substantial gains in terms of participation and justice are insignificant. But as Piketty clearly demonstrates, inequality regimes are never completely stable and consistent, and they often carry the elements for their own transformation. Once freed of the bounds that narrow it down to the regime of investment treaties, international investment law may offer the conditions for its own renewal. The next sections places sustainable development and justice at the heart of international investment law, to articulate a theory of participation grounded on the self-determination of indigenous peoples, before drawing some conclusions.

Ensuring visibility for indigenous peoples

In the previous section, we argued that the invisibility of indigenous peoples emerges at the domestic level of Latin American countries, only to be perpetuated by the regime of bilateral investment treaties. We identified this regime's attachment to a strong concept of statehood (state as a

79 Piketty (n 20) 705. On narratives, see Chapter 1 by Philip Burton in this volume.
80 Ibid. 706.
81 Heffron (n 21).

unit, represented by a government) which is embedded in ideologies that are exclusionary (state as a homogenous unit, with the government expected to impose itself on dissidents, to promote free movement of capital and ensure the rights of investors) as a problem.

We start by noting that indigenous peoples have become participants in the international sphere,[82] participating in UN procedures,[83] and bringing claims before the Inter-American Court of Human Rights.[84] Only the practice of international investment law, because it is centered on the regime of investment treaties, lags behind. In international investment law, the problem of invisibility can be addressed by reformulating the concept of statehood, if only to attenuate the role that government plays in it and to acknowledge that, today, this concept must reflect a more complex reality of the state than the one that prevailed at the time the concept was fully articulated.[85] Indigenous peoples have been increasingly more present in international processes and progressively better equipped to influence decision-making, as the literature clearly confirms.[86] As mentioned above, indigenous peoples have actively participated in the UN procedures; have brought claims before the Inter-American and African systems of human rights, and US tribes have entered into international agreements.[87]

Progressively, the understanding that indigenous peoples enjoy a higher status than other non-state actors including corporations,[88] has emerged,[89]

82 Russel Lawrence Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law" (1994) 7 *Harvard Human Rights Journal* 33. Ibid; Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Intersentia nv 2001); Lillian Aponte Miranda, "Indigenous People as International Lawmakers" (2010) 32 *University of Pennsylvania Journal of International Law* 203.

83 S. James Anaya, "Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law Access to Justice: The Social Responsibility of Lawyers" (2006) 22 *Washington University Journal of Law & Policy* 107, 118–119.

84 For instance, *Sawhoyamaxa Indigenous Community v Paraguay*, Merits, reparations and costs, Inter-American Court of Human Rights Series C No 146 (29 March 2006); *Saramaka People v Suriname*, Interpretation of the judgment on preliminary objections, merits, reparations and costs, Inter-American Court of Human Rights Series C No 185 (12 August 2008); *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and reparations, Inter-American Court of Human Rights Series C No 245 (27 June 2012).

85 "Convention on Rights and Duties of States Adopted by the Seventh International Conference of American States" (n 39).

86 Barsh (n 82) 58–59; Clare Boronow, "Closing the Accountability Gap for Indian Tribes: Balancing the Right to Self-Determination with the Right to a Remedy" [2012] *Virginia Law Review* 1373, 1413–1414.

87 Boronow (n 86) 1414.

88 Ibid. 1377.

89 Anaya, "Indian Givers" (n 83) 119. Barsh (n 82) 58 ff.

which makes international investment law even more idiosyncratic. While one of the early reasons that led indigenous people to seek participation in international processes was to enhance visibility at the national level,[90] today it is clear that they seek the affirmation and recognition of rights both at the international and at the national levels.[91] Thus, their participation in international processes, and their enjoyment of a special status, are facts – the issue is whether there is a right to participation in international processes that could be extended to international investment law.

The right to participation can be defined as a corollary of different rights. In the first place, it can be affirmed as an expression of the right to self-determination.[92] Indigenous peoples' right to self-determination has an interesting history. Technically, their right to self-determination is not a new reality in international law: already in the late nineteenth century, Calvo provides a lengthy explanation of the reasons why self-governance (in fact, he speaks of "semi-sovereignty") of North American indigenous peoples does not jeopardize US statehood.[93] An important aspect that Calvo underlines is

90 Alison Brysk, "Turning Weakness into Strength: The Internationalization of Indian Rights" (1996) 23 *Latin American Perspectives* 38. (Arguing that indigenous peoples resorted to the international system because of domestic powerlessness.) Affirming this to be the case also for US indigenous peoples, Curtis G. Berkey, "International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples" (1992) 5 *Harvard Human Rights Journal* 65, 75. For a more cautious approach, which argues that, in some cases, internationalization strengthened Latin American indigenous movements' struggle for the affirmation of their identities, see Yashar, "Resistance and Identity Politics in an Age of Globalization" (n 12).

91 Boronow goes much further to argue that indigenous peoples may be held internationally responsible for violations of human rights. Boronow (n 86).

92 United Nations (n 2), articles 3 and 4. Organization of American States, "American Declaration on the Rights of Indigenous Peoples, Adopted at the Third Plenary Session Held on June 15, 2016, OAS Doc AG/RES.2888 (XLVI-O/16)" (n 2), article III. Both the UNDRIP and the ADRIP are soft law instruments, but enjoy relatively strong support by states. The preparatory works that led to the adoption of the UNDRIP suggest that consensus began to emerge that the right to self-determination applied to indigenous peoples; see Alexandra Xanthaki, "Indigenous Rights in International Law over the Last 10 Years and Future Developments Feature: Reflections on a Decade of International Law" (2009) 10 *Melbourne Journal of International Law* 27. Indigenous peoples participating in the works that preceded and led to the adoption of the UNDRIP argued that the customary international law right to self-determination applied to them – see Megan Davis, "The United Nations Declaration on the Rights of Indigenous Peoples Commentary" (2007) 11 *Australian Indigenous Law Review* 55. Affirming the customary law character of the right to self-determination, Berkey (n 90) 81.

93 Calvo (n 14) 104–105 para 59. Note that the term "quasi-sovereignty" resonates with the term "quasi-state actors" that appears in Boronow (n 86) 1382 (claiming that indigenous peoples are "not non-state actors" and that they "are more accurately quasi-state actors in that they exercise inherent governmental powers").

that England and, later the US, would not interfere with indigenous people's affairs except to prevent their entering into agreements with enemy or rival nations.[94] Calvo's account is reinforced by Berkey, who offers a solid description of the historical development of the manner that US indigenous peoples' right to self-determination has been reduced to internal self-determination, that is, self-governance.[95]

Nevertheless, much more recently, when indigenous peoples made the case for being recognized as enjoying the right to self-determination at the UN debates that preceded the adoption of the UNDRIP, the right to self-determination became a thorny issue.[96] The interpretations of the nature and extension of the right, as affirmed by the UNDRIP and later by the ADRIP, vary.[97] In our view, the best interpretation is that both instruments acknowledge that the right to self-determination that exists in international law applies also to indigenous peoples, as indigenous peoples have defended.[98]

As to the scope, the right should not be formally divided into internal and external self-determination,[99] but it should be defined as a continuum

94 Calvo (n 14) 104–105.

95 Berkey (n 90).

96 Robert T. Coulter, "The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples" (2010) 15 *UCLA Journal of International Law and Foreign Affairs* 1.

97 Benedict Kingsbury and William S. Grodinsky, "Self-Determination and 'Indigenous Peoples' " (1992) 86 Proceedings of the Annual Meeting (American Society of International Law) 383; Berkey (n 90); Bartolome Clavero, "The Indigenous Rights of Participation and International Development Policies" (2005) 22 *Arizona Journal of International and Comparative Law* 41; Davis (n 92); 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" (2005) 22 *Arizona Journal of International and Comparative Law* 7; Xanthaki (n 92); Sarah Nykolaishen, "Customary International Law and the Declaration on the Rights of Indigenous Peoples" (2012) 17 *Appeal: Review of Current Law and Law Reform* 111; Ricardo Pereira and Orla Gough, "Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law" (2013) 14 *Melbourne Journal of International Law* 451; Coulter (n 96); Siegfried Wiessner, "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous People" (2008) 41 *Vanderbilt Journal of Transnational Law* 1141.

98 Against this view, differentiating between the right to self-determination acknowledged in the preamble of the UNDRIP and the right to self-determination affirmed in articles 3 and 4 of the same UNDRIP, see Coulter (n 96).

99 Indeed, the US attempt to qualify the right to self-determination as internal self-determination in the UNDRIP had not been successful, and the US has come to support the UNDRIP. See ibid. 21–22.

or plexus of rights,[100] which ultimately would include the right to secession had this not been expressly rejected.[101] Indigenous peoples' right to participate in international processes can be read into this plexus or continuum of rights,[102] but it is also important to note that the right to self-determination has always encompassed participation in decision-making.[103] Moreover, and in second place, whenever participation in international processes is crucial for the protection of other rights, such as the right to property, to cultural heritage or to development,[104] it seems unavoidable that the right to participation must be affirmed in the international sphere.[105]

But the problem of invisibility should also be addressed at the political level. As seen, international investment law rests on an exclusionary development model (trickle-down economics). For indigenous peoples, development has a more nuanced meaning when contrasted with the models that have prevailed in the region, and the model that permeates the regime of

100 Jan Klabbers, "The Right to Be Taken Seriously: Self-Determination in International Law" (2006) 28 *Human Rights Quarterly* 186; Coulter (n 96) 15–16.

101 United Nations (n 2), article 46 (1); Organization of American States, "American Declaration on the Rights of Indigenous Peoples, Adopted at the Third Plenary Session Held on June 15, 2016, OAS Doc AG/RES.2888 (XLVI-O/16)" (n 2), article IV. ("Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States"). On this point, S. James Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims Essays" (1989) 75 *Iowa Law Review* 837. Some authors argue that the right to self-determination continues to include the right to secession as a last resort mechanism; however, this is beyond the scope of the present work. See Coulter (n 96); Pereira and Gough (n 97) 470.

102 Coulter (n 96) 16.

103 Klabbers (n 100) 203. ("Here the importance of political participation comes in. A right to participate enables everyone to take part in political decision making, however small the part may be. It is no coincidence that Hannah Arendt referred to the right to participate (in the context of citizenship) as 'the right to have rights,' indicating that all other possible rights presuppose membership in a political community").

104 Respectively, article 31 UNDRIP and article XXVIII ADRIP; and article 23 UNDRIP and article XXIX ADRIP. United Nations (n 2); Organization of American States, "American Declaration on the Rights of Indigenous Peoples, Adopted at the Third Plenary Session Held on June 15, 2016, OAS Doc AG/RES.2888 (XLVI-O/16)" (n 2).

105 Indeed, UNDRIP Article 40 states that "Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights." United Nations (n 2). Similarly, Boronow (n 86) 1414.

investment agreements. For indigenous peoples, development must occur with the preservation of their identities.[106] The communities themselves are responsible for setting the goals for their development.[107] Because of the role indigenous people play in, for instance, the protection of the environment,[108] because of the importance of their traditional knowledge for the preservation of ecosystems and for addressing the effects of climate change, the lack of sustainable development for indigenous peoples rebounds in the lack of sustainable development for other members of the society.[109]

The discussions about international investment law and sustainable development are not new.[110] However, these discussions do not go far enough in terms of the inclusion of indigenous peoples, essentially because the discussions tend to reinforce – rather than question – the role of the government vis-à-vis investors, calling for the strengthening on the regulatory powers of the government and the restricting of the rights of investors. This approach (strengthening of government; weakening of investors) is understandable – also Stiglitz calls for the reaffirmation of the regulatory powers of the government.[111] While this approach tackles inequality in important ways, it fails to address the problem of invisibility that affects indigenous peoples. Consequently, it is necessary to reformulate the concept of sustainable development in international investment law, to affirm the need for indigenous peoples to actively participate in defining the matters affecting their development.

The participation of indigenous people in decision-making ought to be embedded in meaningful consultation procedures in certain treaty

106 Organization of American States, "American Declaration on the Rights of Indigenous Peoples, Adopted at the Third Plenary Session Held on June 15, 2016, OAS Doc AG/RES.2888 (XLVI-O/16)" (n 2), article XXIX.

107 The World Bank (n 13) 14. ("…this report acknowledges that these indicators offer only a partial view of the obstacles preventing many indigenous peoples from achieving their chosen paths of development").

108 Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, "Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services" (Zenodo 2019) https://zenodo.org/record/3553579 accessed 14 May 2020.

109 Droubi and Heffron (n 21).

110 Andrew Newcombe, "Sustainable Development and Investment Treaty Law" (2007) 8 *The Journal of World Investment & Trade* 357; Howard Mann, "Reconceptualizing International Investment Law: Its Role in Sustainable Development Business Law Forum: Balancing Investor Protections, the Environment, and Human Rights" (2013) 17 *Lewis & Clark Law Review* 521; Kathryn Gordon, Joachim Pohl, and Marie Bouchard, "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey" (OECD 2014) 2014/01 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2469662 accessed 10 June 2020.

111 Stiglitz, *Making Globalization Work* (n 72).

negotiations that, if ratified, would affect their lives. The right to participation emanates from indigenous peoples' rights to self-determination, as well as from other rights such as the right to property, acting as a limitation to state sovereignty.[112] In this regard, a meaningful consultation process requires states to obtain the "free, prior and informed consent" of indigenous peoples; further, states ought to ensure that indigenous peoples participate in determining the direction of the proposed development, considering the social and environmental implications to those communities.[113] Thus, meaningful consultations should not be overridden by an "after the fact" reparation or compensation, a point to which we come back later when addressing justice.

In this vein, the interpretation of human rights provisions have given rise to procedural obligations that are indispensable for respecting and protecting substantive human rights, notably, access to information, consultation, and public participation.[114] Thus, human rights are pivotal for resisting unsustainable development,[115] and the involvement of indigenous peoples is key in such endeavor. However, these procedural rights emerge from human rights instruments as well as from international environmental agreements, as opposed to international investment law and agreements themselves, thus limiting the visibility (and affecting the equality) of indigenous peoples

112 Lorenzo Cotula, "Land, Property and Sovereignty in International Law" (2017) 25 *Cardozo Journal of International and Comparative Law* 219. (In relation to property rights, Cotula argues that there is a reconfiguration of the material dimension of the relationships between land, property, and sovereignty, which have been transformed by human rights, international investment law, and environmental law. This reconfiguration has limited the spaces in which the states can lawfully exercise their sovereignty in relation to property rights in their jurisdiction. Cotula recognises that property rights need to be taken into consideration along with the right to self-determination of indigenous peoples; otherwise, investors and indigenous peoples would be at the same level); John Agnew and Ulrich Ostender, "Territorialidades Superpuestas, Soberanía En Disputa: Lecciones Empíricas Desde América Latina" (2009) 13 *Tabula Rasa.* (Recognizing in debates in political geography the existence of "overlapping territorialities," in which the territorialities of the state and indigenous peoples overlap, creating spaces for the impugnation of sovereignty. This plurality of territories, where diverse sources of authority emanate, do not necessarily exclude each other).

113 Cotula (n 112); Organization of American States, "American Declaration on the Rights of Indigenous Peoples, Adopted at the Third Plenary Session Held on June 15, 2016, OAS Doc AG/RES.2888 (XLVI-O/16)."

114 Francesco Francioni, "Natural Resources and Human Rights," *International Law and Natural Resources* (Elisa Morgera and Kati Kulovesi (eds.), Research Handbook on International Law and Natural Resources, Edward Elgar Publishing Limited 2016).

115 Ibid.

vis-à-vis foreign investors.[116] Indeed, some authors argue for the reformation of substantive standards to embed human rights obligations into norms for the protection of foreign investment, and ultimately, into investment treaty clauses.[117] Moreover, indigenous peoples' right to participation should also be extended to dispute settlement, specifically, investor–state arbitral tribunals. Amicus curiae is insufficient to guarantee the right to be heard because the acceptance and consideration of amici depends on the discretion of the arbitral tribunals.[118] Thus, there are increasing calls to give indigenous peoples the right to intervene as third parties in cases in which their interest have been affected.[119]

Nevertheless, increasing the visibility and equality of indigenous peoples entails much more than the right to participation in decision-making processes and arbitral tribunals. There is a need to revisit the concept of justice in order to address the systemic issues of international investment law, and in this chapter, we propose energy justice as a framework to rethink the development and the processes promoted by the regime of foreign investments.

Fostering equality for indigenous peoples

Investor–state disputes, in which issues of inequality emerge, constitute a challenge also to arbitrators. For instance, even if (and this is a big if)

116 Jorge E. Viñuales, "Foreign Direct Investment: International Investment Law and Natural Resource Governance," in Elisa Morgera and Kati Kulovesi (eds) *Research Handbook on International Law and Natural Resources* (Edward Elgar Publishing 2016) (in relation to the tensions between what he has called the "State-Investor-Population" Triangle, i.e. the misalignment of the interest between foreign investors, the host sate and its population in the context of the use of natural resources); Julio Faundez, "The Governance of Natural Resources in Latin America: The Commodities Consensus and the Policy Space Conundrum," *Natural Resources and Sustainable Development* (Celine Tan and Julio Faundez, Edward Elgar Publishing Limited 2017)(arguing that developing countries face difficulties in the reconciliation and management of the clashes between the rules for the protection of foreign investment and conventions for the protection of human rights and the environment. Faundez attributes the efficiency of the former to the distinction between hard and soft law, in which international human rights and international environmental instruments are considered soft law due to their imprecision or lack of enforceability. However, Faundez recognises that human rights and environmental obligations are hard law in the context of some Latin American countries as these obligations have been incorporated into their domestic legislations.

117 Cotula (n 112). C.f. Chapter 10 by Rodrigo Polanco Lazo and Felipe Ferreira Catalán (arguing that "the human rights dimension can be recognised in international investment law," the latter evolving to introduce protections in human rights instruments into some international investment agreements).

118 See for example: *Bear Creek v Peru* (Award 2017) (n 17).

119 El-Hosseny (n 26). See below the case study on the right to participation in arbitral proceedings.

arbitrators may see that, in a case at hand, the enforcement of certain standards of protection (fair and equitable treatment, full security) clearly perpetuates inequality on the ground – arbitrators may see no other way but by enforcing the standards, which leads to the automatic enforcement of these standards – unless very high threshold exceptions and defenses (for instance, necessity, contributory fault) are present. The reasons for their seeing no alternative are beyond the present scope – but their background, their overall highly fragmentary approach to law, and the fact that investor lawyers constitute a somewhat insulated epistemic community are certainly some of the reasons. But it could be argued that the clearer the inequalities are, the more reasons the arbitrators may have to change their approach. This is evidenced by decisions which have to deal with strong resistance put up by indigenous peoples and local communities, and which resort to certain concepts (such as contributory fault) in an attempt to address the linkages between the investor's behavior, the resistance, and the government's actions.[120]

At this moment, two facts are important. On the one hand, mounting resistance by indigenous and local populations becomes a factor that cannot be ignored by the arbitrator insofar as the defendant government invokes it to justify the actions of which the investor complains. So, resistance constitutes a reason for both the government to change its policy and the arbitrators to seek new approaches in deciding the case. On the other hand, it is possible to see that the regime of investment treaties contains certain elements that are leading to its own transformation from inside – elements that offer to arbitrators, for instance, solid grounds for new approaches to cases involving issues of inequality. Examples are the change in the language of certain treaties so as to ensure the promotion of sustainable development;[121] the attempt that arbitrators make to bring rules and principles from other fields (for instance, human rights) to weigh in on their decisions;[122] as well as the attempt of investment law scholars to propose theories accommodating these moves into a renewed notion of investment law.

The literature on energy justice falls into a fourth category – the attempt by scholars and practitioners dedicated to the sectors of energy and extractive industries, to reform the field so as to promote equality. Because the concept of energy justice is truly interdisciplinary (drawing on different legal and

120 See Chapters 11 by Farouk El-Hosseny, Patrick Devine, and Ilan Brun-Vargas and Chapter 13 by Sebastián Preller-Bórquez in this volume.

121 See Chapter 11 by Farouk El-Hosseny, Patrick Devine, and Ilan Brun-Vargas in this volume.

122 See Chapters 10 by Rodrigo Polanco Lazo and Felipe Ferreira Catalán and 11 by Farouk El-Hosseny, Patrick Devine, and Ilan Brun-Vargas in this volume.

non-legal fields),[123] it helps overcoming the fragmentation of international law and the insulation of investment lawyers from other fields. Because it defines inequality as a problem in terms of justice and argues that respect to certain principles and rules (access to justice, due process, meaningful participation, respect to human rights) is a corollary of justice, it provides solid grounds for the application of such principles and rules within international investment law, and even by investment tribunals. But the concept is also important because it originated in the energy (and energy law) literature. This is a characteristic of the concept that makes it relevant for the present analysis. It is not by chance that the cases before international arbitration tribunals, which affect Latin American indigenous peoples, are in extractive and energy sectors. First, the sectors are very important for the Latin American economy. Second, the nature of the energy sector is one that is centered around risk, and a poor record of environmental, social, and governance issues. Third, because of the geography of the region, the impact of the sector on indigenous peoples has been significant – which is transparent in the pollution of lands and waters.[124] In this manner, proposals for the reform of the energy sector, to foster equality, have the potential to reverberate in international investment law, as they call for the application of principles of international law, and as the call is embedded in a narrative that directly targets, among others, lawyers dedicated to investment law. The epistemic community of investment lawyers cannot ignore this, and formal fragmentation can be overcome with the emphasis on principles of law and on justice.

At its simplest, energy justice is about ensuring respect to fundamental human rights across the so-called energy life cycle, from extraction to production to operation (and supply) to consumption to waste management (including decommissioning). Energy justice provides a comprehensive framework for action as it moves us towards five dimensions of justice.[125] Procedural justice affirms the principles of equality and non-discrimination, due process and the need to comply with legal procedures at local, national, and international levels. Recognition justice is concerned with the

123 Jenkins and others (n 21); Heffron and McCauley (n 21); Heffron (n 21); Raphael J Heffron and Darren McCauley, "What Is the 'Just Transition'?" (2018) 88 *Geoforum* 74; Raphael J Heffron, 'The Role of Justice in Developing Critical Minerals' (2020) In Press *The Extractive Industries and Society* https://doi.org/10.1016/j.exis.2020.06.018.

124 Several cases show the impact of foreign investments into the oil and gas sector on indigenous peoples (mostly in the form of pollution). *Copper Mesa v Ecuador* (Award 2016) (n 17); *Chevron v Ecuador (II)* (Second Partial Award 2018) (n 17); *Bear Creek v Peru* (Award 2017) (n 17).

125 Raphael J. Heffron and Darren McCauley, "The Concept of Energy Justice across the Disciplines" (2017) 105 *Energy Policy* 658

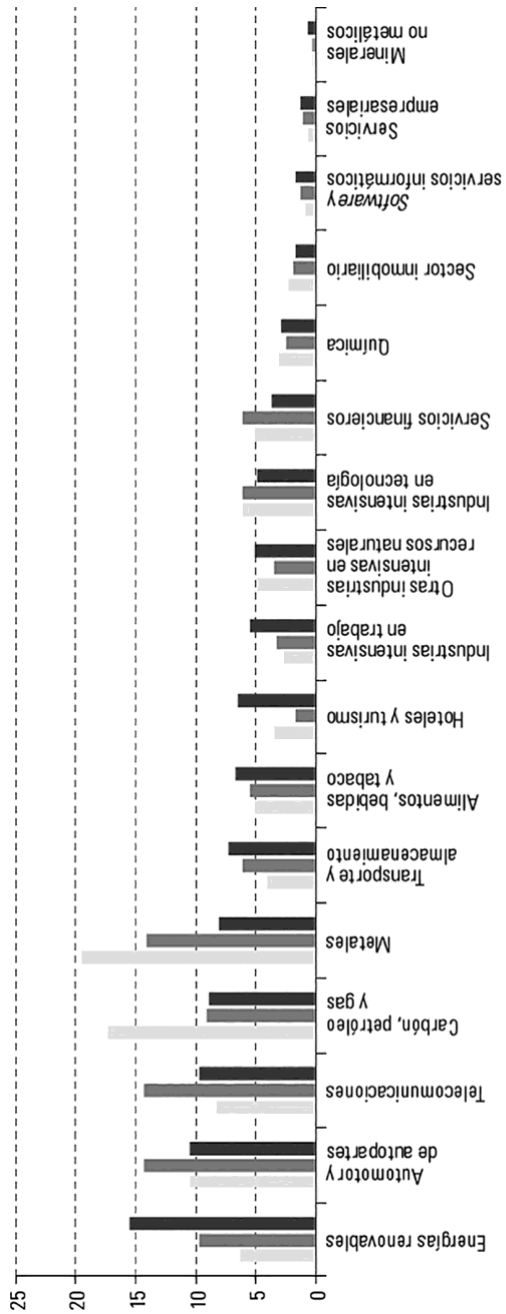

Figure 9.4 Announcements of new projects by sector

recognition of rights of different groups as a (mineral, oil, and gas etc.) project development happens. The concern is whether the rights of indigenous peoples are properly recognized. Distributive justice concerns the distribution of benefits from the energy sector and also the negatives. The main questions that arise are whether (for instance, oil and gas) revenues are shared sufficiently and who bears the costs of the environmental and social damages. Cosmopolitanism justice stems from the belief that we are all citizens of the world. The question is whether transborder and global effects of a project have been considered: the world is defined as one global industry and therefore there will be cross-border effects from energy activities. In terms of indigenous peoples, cosmopolitanism concerns, for instance, the role of indigenous peoples, and the significance of their traditional knowledge, for the preservation of eco-regimes, which affect whole regions or the whole world. Finally, restorative justice requires that any injustice caused by the energy sector should be rectified and it focuses on the need for enforcement of particular laws (i.e., energy sites should be returned to former use, hence waste management policy and decommissioning should be properly done).

As we noted, the language that some of the literature adopts is clearly directed to practitioners in the sectors. For instance, a key practitioner guide written on energy justice identifies a framework for applying energy justice theory to practice (see Figure 9.5).[126]

There is not space to go into details of the five dimensions here, but it is worth calling the attention to the aspects of recognition and procedural justice, since we have been dealing with these aspects in this piece. Energy justice calls for proper recognition of the different social actors that are affected by an energy project. It highlights the need to attend "arguments, feelings and values" of these actors.[127] Further, energy justice calls for recognition of the indigenous peoples on their own terms rather than in the terms of the majority of the population.[128] So, it is not only a question of recognizing those indigenous peoples, who are often ignored in decision-making processes, but it is equally a question of understanding how they should be recognized.[129] Crucially, drawing on Convention 169, energy justice reaffirms that recognition of a people as indigenous people is based on the self-identification of the people in question; second, the social, cultural, religious, and spiritual values and practices of these peoples must be protected and

126 Initiative for Energy Justice, *The Energy Justice Workbook* (2019) Available at: https://iejusa.org/wp-content/uploads/2019/12/The-Energy-Justice-Workbook-2019-web.pdf accessed 29 November 2020.

127 McCauley et al. (n 21).

128 Droubi and Heffron (n 21).

129 Jenkins et al. (n 21).

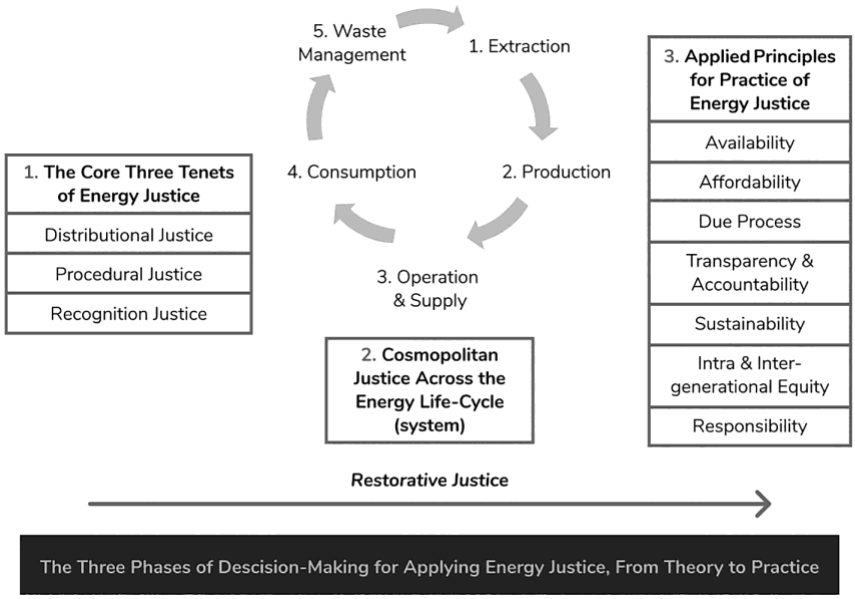

Figure 9.5 Energy justice from theory to practice

the integrity of their values, practices, and institutions must be respected in national development and individual projects. Note how principles of international human rights law become standards of conduct for the industry (for instance, they are grounds for a strong defense of the social license to operate)[130] – but also become principles that must be observed to ensure justice for indigenous peoples.

Procedural justice calls for compliance with legal processes from start to finish of a project, but emphasizes equality and non-discrimination, making certain links that are valuable for the discussion.[131] Heffron argues that "community engagement in decision-making touches upon the democratic ideal of procedural due process,"[132] recalls that scholars affirm that public participation may have the character of customary international law,[133] and

130 Heffron (n 21). Also see Chapter 13 by Sebastián Preller-Bórquez in this volume.

131 Jenkins and others (n 21).

132 Raphael J. Heffron, Lauren Downes, Oscar M. Ramirez Rodriguez, and Darren McCauley, "The Emergence of the 'Social Licence to Operate' in the Extractive Industries?" (2018) Resources Policy.

133 Ibid.; Chilenye Nwapi, "Can the Concept of Social Licence to Operate Find Its Way into the Formal Legal System Special Issue: Based on Papers from the 2015 Law and Society Association of Australia and New Zealand (LSAANZ) Conference" (2016) 18 *Flinders Law Journal* 349.

notes the affirmation of the principle in international conventions.[134] It is not necessary to go further in the analysis to demonstrate the point: with the reframing of rules and principles of international (human rights) law in terms of justice, in accessible language for non-specialists, the literature on energy justice promotes a change on the ground, progressively, it promotes diffusion and acceptance of these rules and principles. With its call for the enforcement of these principles as necessary to ensure justice, the literature strengthens the principles. In this manner, energy justice helps pave the way for their application by arbitrators.

In the following section, we explore two situations which elucidate that practice in international economic law, including international investment law, is progressively recognizing the need to acknowledge indigenous peoples and sustainable development, but that there is a long way to go to ensure justice for indigenous peoples.

A critical reflection on international investment law practice

Based on the above, a new concept of international investment law could be articulated. On the one hand, the flexibilization of statehood allows for the affirmation of the right of indigenous peoples to participate in all levels of the decision-making affecting their lives, from treaty negotiation to the decision about specific investment projects to the settling of disputes. On the other hand, the emphasis on sustainable development, human rights, and justice, allows the affirmation of their right to participate in the riches derived from the exploitation and exploration of natural resources in their lands. In this manner, international investment law is "freed" from the current practice under investment treaties and redefined as the law regulating the relationships arising from the international flows of investment, the relationship among investors, states, indigenous peoples – and potentially other participants in the international sphere. One should note that this renewed concept only indirectly leads to the imposition of responsibilities and obligations on investors because, as the focus is placed on indigenous people as an international actor, the main concern is that of reaffirming indigenous peoples' rights. In any case, the topic of corporate social responsibility is outside the scope of the present chapter. In this section, we draw on this renewed concept to provide a reflection on the current practice, in the form of negotiation of treaties and investor–state arbitration.

As the negotiation of the EU–MERCOSUR Trade Agreement, which also regulates investments, illustrates, the participation of indigenous peoples in international investment agreements, and ultimately, in defining sustainable

134 Heffron et al. (n 132).

development in their territories remains very limited. After 20 years of negotiations, the EU and the MERCOSUR bloc (Brazil, Argentina, Paraguay, and Uruguay) agreed on the trade pillar of the EU–MERCOSUR Association – the EU–MERCOSUR Trade Agreement.[135] The EU–MERCOSUR Trade Agreement states that the Parties should "facilitate the movement of goods and services from and within the regions." Notably, the Trade Agreement includes a chapter on "Trade and Sustainable Development" for the integration of sustainable development into trade and investment relationships (article 1 of the chapter), specifically concerning labor and environmental issues, recognizing its economic, social, and environmental elements. Subjecting the enhancement of trade and investment to sustainable development is a step forward in the negotiation of trade agreements. This also reflects a growing investment treaty practice of incorporating sustainable development- an important example being the Brazilian cooperation and facilitation investment agreement, as discussed at length in the first part of this volume.

The Trade Agreement states that the Parties will integrate sustainable development by "developing trade and economic relations with the view of achieving the Sustainable Development Goals," particularly in relation to labor standards and the environment, by respecting multilateral commitments on labor and the environment, and by increasing cooperation amongst the Parties.[136] However, the agreement promotes provisions on trade that seem at odds with the objective of sustainable development, given the emphasis on increasing the export of commodities linked to deforestation in the region such as sugar, palm oil, beef, and soy.[137] Furthermore, indigenous peoples remain significantly invisible in the development of the conception of sustainable development. Indeed, the "Trade and Sustainable Development" chapter only "promotes", when appropriate and with their

135 EU–Mercosur Trade Agreement: The Agreement in Principle and its Texts (2019) (*EU–Mercosur Agreement in Principle*). The Trade Agreement has been agreed only in principle and its final text would have to be subjected to a process of ratification as part of the association agreement. Also, the text of the association agreement has not yet made public by the parties, although a non-governmental organization – Greenpeace Germany – has published in its website a leaked version of the text. Greenpeace European Unit, "EU-Mercosur: Leaked Treaty Has No Climate Protection, Undermines Democracy" (9 October 2020) www.greenpeace.org/eu-unit/issues/democracy-europe/45133/eu-mercosur-leaked-treaty-has-no-climate-protection-undermines-democracy/ accessed 17 December 2020.

136 *EU–Mercosur Agreement in Principle* (n 135).

137 Julian Burger, "Challenges for Environmental and Indigenous Peoples' Rights in the Amazon Region" (European Parliament 2020) Policy Department for External Relations, Directorate General for External Policies of the Union PE 603.488; "What's behind the EU-MERCOSUR Trade Agreement" (*Climate Alliance*) www.climatealliance.org/activities/european-policy/eu-mercosur.html.

prior informed consent, the involvement of indigenous peoples in relation to the sustainable management of forest for the supply chains of timber and non-timber products.[138] Even more so, the hallmark for trade in products from sustainable managed forests is the law of the country of harvest.[139] At a time when members of MERCOSUR, specifically Brazil, are weakening protections to explore and exploit indigenous peoples' territories,[140] these provisions fall short of ensuring the participation of indigenous peoples in meaningful consultations and in defining sustainable development. Without a meaningful participation, the provision of cosmopolitanism justice is at risk, despite the recognition of indigenous peoples' role in the management of forests. Only when a meaningful participation is ensured, as opposed to merely promoted, the benefits of indigenous peoples' traditional knowledge on the protection of ecosystems can further expand to the whole world.

The EU–MERCOSUR Trade Agreement includes a dispute resolution mechanism in the "Trade and Sustainable Development" chapter, but separate from the general dispute settlement mechanism, and limited in scope. As such, one of the Parties can request the establishment of a Panel of Experts to examine the issue at stake and draft a report with the view of exerting pressure through the publication of the report, thus reducing the enforceability of the measures.[141] However, these dispute resolution mechanisms would not alleviate the invisibility and inequality of indigenous peoples because this would necessitate the state Party, whose interests and understanding of sustainable development may differ from those of indigenous peoples, to lodge a complaint. To ensure justice, in all its dimensions, there needs to be an effective and enforceable system to rectify any injustices concerning the labor and environmental issues that the treaty aims to protect. Burger recommends the establishment of "an effective, affordable and culturally accessible grievance mechanism" at the EU for indigenous peoples to raise allegations of violations by EU corporations relating to the right to participation in decision-making in development projects.[142] This mechanism would certainly increase the visibility of indigenous people if

138 *EU–Mercosur Agreement in Principle* (n 135).

139 Ibid.

140 "What's behind the EU-MERCOSUR Trade Agreement" (n 137). Sufyan Droubi, Letícia M Osório and Luiz Eloy Terena, 'The Brazilian Federal Supreme Court Comes to the Protection of Indigenous People's Right to Health in the Face of Covid-19' (*EJIL: Talk!*, 23 December 2020) <https://www.ejiltalk.org/the-brazilian-federal-supreme-court-comes-to-the-protection-of-indigenous-peoples-right-to-health-in-the-face-of-covid-19/> accessed 23 December 2020.

141 *EU-Mercosur Agreement in Principle* (n 135). See also, Chapter 8 by Adoración Guamán in this volume.

142 Burger (n 137).

established. However, we argue that steps should be taken not only to "promote" or "encourage" consultations with indigenous peoples in limited cases, but to "ensure" their participation in decision-making through meaningful consultations in the negotiation of treaties that impact their livelihoods, as well as during the lifespan of any project that is agreed with the participation of indigenous peoples. Only then, international investment law would enable the provision of procedural justice. Participating in defining the kind of development that is warranted from foreign investments (and the distribution of burdens and benefits therefrom) will enable indigenous people to share the benefits from investments, a requisite for distributive justice.

Indeed, the EU Commission has established "Civil Society Dialogues" in order to consult all parts of EU civil society;[143] thus, the negotiation of the EU–MERCOSUR Trade Agreement included dialogues with EU civil society. Furthermore, the Sustainability Impact Assessment Report for the EU–MERCOSUR Trade Agreement included a consultation process with stakeholders and civil society.[144] However, the participation of indigenous peoples either directly or through civil society organizations seemed mostly absent. The Sustainability Impact Assessment Report recommends MERCOSUR members to strengthen their institutional frameworks to protect indigenous rights, and the EU, to encourage European corporations to engage in consultations with indigenous peoples prior to investing in MERCOSUR states.[145] Noticeably, the recommendation focuses on preventing land disputes after planning investment in the area, rather than on the protection of indigenous peoples' rights. Moreover, the recommendations center on strengthening the participation of indigenous peoples at the domestic level, as opposed to increasing their right to participation at the

143 European Commission, "EU Trade Meetings with Civil Society" (*Dialogues*) https://trade.ec.europa.eu/civilsoc/. See Chapter 8 by Adoracin Guamán (explaining that the term civil society is used broadly in the EU context and thus, civil society encompasses corporations, as well as discussing the synergies and cross-fertilizations between social movements in LA and Europe).

144 "Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and MERCOSUR" (London School of Economics and Political Science 2020); London School of Economics and Political Science, "Sustainability Impact Assessment in Support of the Association between the European Union and MERCOSUR" (2019) Draft Interim Report. The interim report was published after the EU–MERCOSUR Trade Agreement had been agreed in principle and therefore, the recommendations were not incorporated into the agreement.

145 "Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and MERCOSUR" (n 144).

international level. Hence, these dialogues, and the recommendations therefrom, fail to meaningfully increase the visibility of indigenous peoples and to promote fairness by ensuring their meaningful consultation in the negotiation of the EU–MERCOSUR Trade Agreement.

Besides the participation of indigenous peoples in certain treaty negotiation, debates about the right to participation extend to dispute settlement, in particular, investor–state arbitral tribunals. Currently, the only means of participation for civil society in investment arbitral tribunals lies on the submission of amicus curiae.[146] But, as for instance the cases of *Chevron v Ecuador* and *Bear Creek v Peru* suggest, and as evidenced in case law, there is no consistency among tribunals when dealing with non-parties applications to file written submissions.[147] Moreover, as the literature clearly demonstrates, requests to participate more significantly in the proceedings are rejected.[148] In this regards, recent proposals to affirm the participation of civil society in investor–state disputes as third parties gain more substance.[149] Access to arbitral tribunal proceedings is even more relevant in those cases in which foreign investments affects indigenous peoples, without participating in meaningful consultations, where their "free, prior and informed" consent is not obtained during the initial stages of the foreign investment.[150]

However, the implementation of third-party intervention in investor–state disputes face procedural and substantive challenges – from the absence of rules on third-party intervention, to the lack of recognition of third-party intervention in treaties, to the restriction of initiating proceedings to foreign investors.[151] El-Hosseny makes the case for the implementation of 'non-party' third party intervention on the discretion of arbitral tribunals, in which civil society would be able to "raise, assert and defend" the direct interests of affected communities.[152] As allowing civil society to intervene as a non-disputing party would depend on the arbitral tribunal's discretion, the intervention could be adapted to the circumstances of the case to prevent causing prejudice to the disputing parties. Furthermore, non-disputing third-party interveners would have to establish a "direct and substantial

146 El-Hosseny (n 26); Cotula (n 112).

147 *Bear Creek v. Peru (n 17)* (Procedural Order No 5, 21 July 2016) (granting the request for leave); *Chevron v. Ecuador (II) (n 17)* (Procedural Order No 8, 18 April 2011) (rejecting the request for leave).

148 Lucas Bastin, "Amici Curiae in Investor-State Arbitrations: Two Recent Decisions" (2013) 20 *Austl. Int'l LJ* 95; Lucas Bastin, "Amici Curiae in Investor-State Arbitration: Eight Recent Trends" (2014) 30 *Arbitration International* 125.

149 El-Hosseny (n 26).

150 Ibid, 273.

151 Ibid.

152 Ibid, 281.

interest in the outcome of the arbitration," one that has a compelling connection to human rights or the environment.[153] Some authors argue that third-party intervention, even when granted as a 'non-party', will enable civil society to make written and oral submissions to the investor–state arbitral tribunal, i.e. third-party intervention would allow them the right to be heard.[154] However, seemingly, arbitral tribunals would only accept requests for third-party intervention insofar as there are "explicit treaty or arbitration rules" that enable the addition of parties to investor–state disputes, or where both parties to a dispute give their consent.[155] Hence proposals to grant third-party intervention to civil society, even as a 'non-party', would require amending current international investment agreements, or including such provision in new agreements.

The granting of third-party intervention ('non-party') is grounded on the rationale that the only disputing parties in investor–state disputes are the state and the foreign investor, with the foreign investor being the only one with the standing to initiate proceedings. In this regard, third-party intervention concerns "interests" affected, not rights per se. Thus, securing third-party intervention for indigenous people is not the same as having standing.[156] To understand the significance of this point, one only needs to place it in a broader perspective: despite the gains in visibility in Latin America, indigenous peoples continue to face numerous, sometimes insurmountable challenges in access to justice (from language barriers to legal institutional constraints on their ability to come before courts).[157] The granting of a right to intervene to bring their interests before a tribunal, without ensuring proper standing to defend their rights, only perpetuates inequality.

We have previously argued that indigenous peoples cannot be equated to other non-state actors because they have acquired rights in international law. Hence, third-party intervention, especially when granted as a non-party, is arguably insufficient to address the inequality of indigenous peoples *vis-à-vis* foreign investors. This inequality derives from the lack of recognition of indigenous peoples' right to be heard (and arguably to have standing)

153 Ibid.

154 El-Hosseny (n 26). But see: Osgoode Hall Law School, "Public Statement on the International Investment Regime" www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/ accessed 5 November 2020 (arguing that civil society organizations and local communities shall be full and equal participants in investor–state disputes along with foreign investors when their interests are affected; otherwise, procedural fairness would not be satisfied.)

155 El-Hosseny (n 26).

156 Ibid.

157 Droubi et al (140).

in arbitral tribunals (recognition justice), the absence of a fair distribution of the benefits from the regime (distributive justice), and the inadequacy of procedural rights for indigenous peoples (procedural justice). Possibly third-party intervention could increase, at least to some extent, the visibility of indigenous peoples as their claims concerning the direct and substantial interest affected by the arbitration could be heard. However, as securing third-party intervention will depend on the discretion of arbitral tribunals in a case-by-case basis, there is limited scope for intervention to account for a meaningful participation in arbitral processes. Indeed, El-Hosseny concedes that securing intervention would depend on civil society making a coherent and robust argument in the same level of sophistication and complexity as the arbitral tribunal and the disputing parties – usually represented by highly technical and qualified arbitrators and lawyers.[158]

As previously discussed, indigenous peoples have been advancing their rights in international law – from lodging cases in Human Rights courts to signing international treaties. Despite this, indigenous peoples are likely to face many challenges when it comes to effectively participating in negotiations of treaties and in procedures before arbitration tribunals. Indigenous peoples may see their options reduced by a diversity of obstacles such as the lack of funds for legal representation, language barriers, institutions that are not equipped to deal with intercultural factors.[159] Hence, even if indigenous peoples increase their visibility through their participation in certain treaty negotiations and in defining sustainable development, as well as on arbitral tribunals, inequality can persist due to the asymmetry inherent to the regime. Therefore, the right to participation should be accompanied with supporting systems that enable indigenous peoples to exercise their rights. In this chapter, we argue that this is an issue with the type of justice that investment law delivers, and we argue that the energy justice framework has much scope to address some of the systemic issues that perpetuate the invisibility and inequality of indigenous peoples in international investment law.

Conclusion

We began calling the attention to the importance of indigenous peoples in Latin America and the Caribbean, to the history of invisibility and inequality which these peoples experience. We noted how resistance became a last resort mechanism for indigenous people to fight for recognition and

158 El-Hosseny (n 26).
159 Burger (n 137).

for equality. Nevertheless, we argued that much of the systemic failures persist at the state level and that they reproduce the same conditions that lead to invisibility and inequality. We also argued that international investment law should not be reduced to the investment treaty regime. In so doing, we argued that the extant investment treaty regime, because it emphasizes both statehood and the automatic enforcement of the standards of protection of investors, perpetuates both the invisibility and the inequality that affect Latin American indigenous peoples.

Our analysis, which drew from social and economic critiques of the law, developed to demonstrate the argument, explaining how invisibility at the local level becomes invisibility at the international level. Domestically, discrimination and exclusionary development projects lead to the non-recognition of indigenous peoples and, as the investment treaty regime emphasizes a strong principle of statehood, with the government formally representing all of the peoples in its territory, non-recognition is perpetuated at the international level. Then, we moved to the manner that inequality is reproduced at the international level. We came back to national development projects but to emphasize the neoliberal model that took hold of Latin America and the Caribbean as from 1980s – and which called for and justified the entering by the governments into investment agreements. We explained how trickle-down economics, combined with the notion of uniform development, exacerbate inequality of indigenous and vulnerable populations at the local level; and how the automatic enforcement of standards of protection, without proper appreciation to the underlying social factors, cement these inequalities.

To ensure visibility for indigenous peoples, we argued that international law must change its approach to statehood only to fully acknowledge the status of indigenous peoples as actors in the international sphere. We noted how the investment treaty regime exercised such a hold on international investment law that the latter lagged behind other fields in properly recognizing the status of indigenous peoples. We argued for their recognition based on their right to self-determination, but also as a corollary of their role in the protection of the environment and the maintenance of the carrying capacity of ecosystems. Sustainable development – rather than a development model based on trickle-down economics – is a better model that provides the socio, economic, and legal framework for the recognition of indigenous peoples as actors in investment law. As to the scope of the right to participation, we emphasize the need to secure the free, prior, and informed consent of indigenous peoples. Although this analysis also addressed equality, we decided to take on the topic more openly. We first recalled that arbitrators are challenged when they face inequalities, that arbitrators continue to have a propensity to enforce standards of

protection automatically, but that resistance put up by indigenous and local communities can create pressure enough for arbitrators to seek changing their approach. At this moment, we noted that the regime of investment treaties shows elements of transformation, which may offer the grounds for new approaches to be adopted. We emphasised energy justice because it is a truly interdisciplinary concept that originates from within the practice of investments – in the sector that has traditionally created injustices and inequalities for indigenous and vulnerable peoples. We showed how energy justice draws on different fields to reframe rights and obligations as require- ments of justice, promoting a change on the ground; and to affirm suchrights and obligations as general international law, helping pave the way for their application and enforcement.

We closed with a critique to the practice within the investment treaties regime based on our prior analysis – showing some of the shortcomings of the negotiation of investment treaties, when we discussed the EU-MERCOSUR Trade Agreement, and of the investor–state dispute settlement, when we discussed 'non-party' third party intervention and the issue of effective standing. We drew on our analysis to suggest a way forward. We believe that our analysis, though not exhaustive, offers a holistic contribution, by showing how invisibility and inequality leads resistance and how resistance may eventually accomplish visibility and equality. But we emphasized the need for changes to be implemented in treaty negotiation and implementation as well as in the investor-state arbitration procedures. What transpires from the pages above is a tragic history of invisibility and inequality, but it is also an account of how indigenous peoples won a place as actors in international law and how they may help promote deep changes in the investment treaties regime.