

# INTERNATIONAL ACCOUNTABILITY PROJECT

## **International Accountability Project’s Recommendations to the Intergovernmental Working Group on the Right to Development on a Draft Legally Binding Instrument on the Right to Development** *July 26, 2019*

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The [International Accountability Project](#) (“IAP”) is grateful for the opportunity to provide comments on the proposed draft legally binding instrument on the right to development. IAP provides these comments in its consultative role to the United Nations Economic and Social Council, drawing from our organizational experiences directly supporting communities adversely affected by development projects globally. This submission complements the perspectives and experiences shared by our regional teams during consultations with the United Nations Special Rapporteur on the Right to Development in Kenya, Thailand, and most recently, Senegal, on the practical implications of the right to development.

IAP is a human and environmental rights advocacy organization that works with the certainty that fulfilling the right to development is based on harmonic community priorities, visions and goals. IAP works in solidarity with communities, civil society and social movements to inform and amplify their campaigns, broaden access to information, and create spaces within and outside dominant power systems for communities to lead the development decisions that affect their lives and environment. IAP’s approach puts communities and their priorities first, and strives to shift the current development model by keeping the following question at the core of its work: *What if development were designed and lived by the same people?*

IAP’s work has demonstrated that communities are often not informed, let alone able to participate in plans of development finance institutions that will affect their land, culture and lives. As a result of opaqueness and lack of participation under which these plans are often designed and implemented, violations of human and environmental rights occur with regularity. Large investment amounts that could be used to further true development of those closest to projects have, instead, ended up putting thousands at risk of death in Colombia,<sup>1</sup> forcible removal in Malawi,<sup>2</sup> cultural destruction in Sri Lanka,<sup>3</sup>

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<sup>1</sup>See International Accountability Project (IAP). Comunidades afectadas por represa Hidroituango en Colombia presentan queja ante el BID. June 2018. Available at <https://medium.com/@accountability/comunidades-afectadas-por-represa-hidroituango-en-colombia-presentan-queja-ante-el-bid-68aef5e23f2e>

<sup>2</sup> See International Accountability Project (IAP). In Malawi, prioritize community access to information for real development. March 2016. Available at <https://medium.com/@accountability/in-malawi-prioritize-community-access-to-information-for-real-development-6c0cc06eefd3>

<sup>3</sup> See International Accountability Project (IAP). Communities in Northern Sri Lanka Organize to Protect their Livelihoods from Proposed Asian Development Bank project. August 2018. Available at

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unemployment in Chile,<sup>4</sup> among many other examples.

With this unfortunate background in mind, through our work with partners implementing the [Early Warning System](#), IAP monitors projects proposed for funding by development finance institutions, alerts communities likely to be impacted and, with partners, reinforces community-led responses, ideally before funding is determined. Throughout, IAP works with community organizers to use community-led research to influence projects, as well as development policy and practice. With this work, we hope to at least assist in deterring some of the most appalling violations that occur in the name of development, and support communities in obtaining justice and remedy for harm.

Ultimately, IAP's objective is to advance the right of communities to shape and realize their own visions, goals and priorities towards real development. The creation, adoption and ratification of this legally binding instrument offers an important and sorely needed opening to enable communities to meaningfully pursue their right to development and to hold duty bearers to account. As such, we consider IAP as well-placed to highlight considerations that would assist the Working Group in its goal of ensuring the right to development is respected, protected and fulfilled for all.

IAP's submission provides comments on specific questions circulated in the call for inputs, as referenced by the corresponding headings and indicated in the footnotes. We focus on the importance of addressing development finance institutions directly within the legally binding instrument and ensuring that in its operationalization, the right to development remains community-led. Our comments draw from analyses, case studies and expertise that underscore the role played by development finance institutions in financing or insuring projects that pose significant, and often irreversible, adverse impacts to human rights and the environment, and the opportunities that are possible when the right to development is grounded first and foremost in the voices and rights of communities.

Recognizing and respecting the local expertise and stewardship of communities is the necessary first step to realizing the right to development, as understood in the *United Nations Declaration on the Right to Development* ("Declaration"). Beyond this, the development priorities of communities must lead any project or plan. The norms that govern development must ensure access to information and participation in national, regional and international development agendas, and facilitate communities to implement their vision of development with dignity and respect for their self agency.

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<https://medium.com/@accountability/fisherfolk-communities-in-northern-sri-lanka-organize-to-protect-their-livelihoods-from-proposed-e28d780de16c>

<sup>4</sup> See International Accountability Project (IAP). *Guardianes del Mar: Cómo Pescadorxs Chilenxs Nos Intentan Proteger del Sacrificio Ambiental y Social*. February 2019. Available at <https://medium.com/@accountability/guardianes-del-mar-c%C3%B3mo-pescadorxs-chilenxs-nos-intentan-proteger-del-sacrificio-ambiental-y-2a92bb5d35c5>

IAP urges the Working Group to anchor the draft legally binding instrument in a vision of development that respects the legitimacy, dignity and self-agency of communities as the primary leaders, stakeholders and beneficiaries of development, instead of further facilitating the current exclusionary and top-down model. By anchoring the instrument in such a vision, the Working Group would contribute to desperately needed paradigmatic change, and ensure that realizing the right to development respects, protects and fulfills human rights for all.

## **Content of the Instrument**

### ***Preamble***<sup>5</sup>

At its core, the new legally binding instrument should embed the provisions and interpretation of the right to development as articulated under the *Declaration*, and expand upon its Articles to actualize the obligations requisite to fulfilling the right to development. As conveyed in Article 1 of the *Declaration*, the right to development is a composite right, necessitating the concurrent fulfillment of fundamental human rights and freedoms:

*The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.*<sup>6</sup>

The *Preamble* of the new instrument should thus refer to all core human rights treaties, including but not limited to the *International Bill of Rights*, the *Convention on the Rights of the Child (CRC)*, the *International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)*, and the *Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)*. In addition, we recommend that special attention be afforded to newer instruments that have been developed since the adoption of the *Declaration*, including but not limited to the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* and the *Convention on the Rights of Persons with Disabilities (CRPD)*, as well as regional instruments which focus explicitly on safeguarding the rights of people and the environment in the context of development, including the *UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*, and the *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement)*.

Within the *Preamble*, the application of these instruments to the right to development should be articulated and understood in conjunction with the realities of the impacts of today's development model,

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<sup>5</sup> Please note, this section addresses questions 2 and 3 under "Content of the instrument" within the call for inputs.

<sup>6</sup> See United Nations. Declaration on the Right to Development. December 1986. Article 1. Available at <https://www.un.org/documents/ga/res/41/a41r128.htm>

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in order to provide the necessary framing to ensure the fulfillment of all rights central to the right to development.

The current design of the development model suffers from fundamental flaws that privilege a select few, while shifting harms onto some of the world's poorest and marginalized communities, excluding many in the decision-making process.<sup>7</sup> In reality, by the time communities and civil society learn about the impacts of a development project, it can be too late. The project contractors have already been hired, the environmental and social impact scoping and assessments have been drafted, consultation in whatever form that may be—adequate or inadequate, meaningful or superficial, inclusive or exclusive—has happened, and ground may have already been broken. The right to development brings to the fore the indispensable issue of agency and choice - namely, the inalienable right of every individual to participate in and contribute to the enjoyment of their economic, social, cultural, and political development.

Further compounding existing barriers to participation in decision-making processes, communities increasingly face retaliation and harassment for openly criticizing development projects and for even requesting additional information from authorities.<sup>8</sup> Around the world, the space for civil society to access information, organize and participate in decisions that affect them is closed or is shrinking, and reprisals are often experienced in response to top-down imposed development agendas.

In setting the context for the draft legally binding instrument, the *Preamble* should acknowledge and seek to address the obstacles and challenges faced by communities in claiming the right to development, in addition to clearly reinforcing the existing normative framework underlying this right.

### ***Duty Bearers***<sup>9</sup>

On the topic of duty bearers, IAP recommends that the binding instrument on the right to development explicitly address and elaborate the role of and standards for development finance institutions in relation to the right to development.

The experiences and work of IAP and our partners have demonstrated that development finance institutions are important actors that play a key role in influencing whether the right to development is realized, given their power and resources. However these institutions, composed by their shareholding and member States, have time and again violated rights of communities impacted by their projects and

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<sup>7</sup> See International Accountability Project (IAP). We need prior, informed consent! Listen to community voices. March 2019. Available at

<https://medium.com/@accountability/we-need-prior-informed-consent-listen-to-community-voices-5439b2b8d090>

<sup>8</sup> See Coalition for Human Rights in Development. Uncalculated Risks: Threats and Attacks against Human Rights Defenders and the Role of Development Financiers. May 2019. Available at

<https://rightsindevelopment.org/wp-content/uploads/2019/06/Uncalculated-Risks-Full-report-cmpr-h.pdf>

<sup>9</sup> Please note, this section addresses question 5 under “Content of the instrument” within the call for inputs.

plans.<sup>10</sup> Development finance institutions themselves, in addition to their shareholding and member States, have been historically unaccountable and free from providing enforceable remedies for the violations they cause. In effect these institutions have created a platform for States to direct and receive significant investment amounts while ignoring their responsibility to follow international human and environmental best standards, practices and law.

As the primary duty bearers under the right to development, States should be obligated to meet their international human and environmental rights obligations when they act within their capacity as shareholders and member States of development finance institutions, such as the World Bank and others. Development finance institutions, and therefore the States that control them, are one of the major facilitators of the current development model, shaping national and regional policies, priorities, and regulatory frameworks through their lending and advisory support. Beyond this, they play a normative role for both public and private development finance, thus shaping development governance globally.

Operationalizing the right to development therefore requires not only lifting the corporate veil and ensuring that shareholder and member States are held accountable, but also explicitly clarifying the role and obligations of these institutions themselves, so that their operations are no longer immune from, but grounded in international human and environmental rights framework and principles. For the reasons noted throughout this submission, development finance institutions should be considered duty bearers within this instrument and lead by example in ensuring that communities are informed, active participants in shaping true development.

### ***Obligations of Duty Bearers<sup>11</sup>***

*The human person is the central subject of development and should be the active participant and beneficiary of the right to development.<sup>12</sup>*

The right to development is centered around people as both beneficiaries and active participants in development decisions and projects affecting them. As a composite right, all of the constituent rights and duties embedded within the right to development should therefore be concretized in the form of obligations as part of the legally binding instrument.

However, in light of the current development model, we recommend that the new legally binding instrument explicitly address the obligations of duty bearers to ensure that the human-centered - as

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<sup>10</sup> See International Consortium of Investigative Journalists (ICIJ). Evicted and Abandoned: The World Bank's Broken Promise to the Poor. 2015. Available at <https://www.icij.org/investigations/world-bank/>

<sup>11</sup> Please note, this section addresses question 7 under "Content of the instrument" within the call for inputs.

<sup>12</sup> See United Nations. Declaration on the Right to Development. December 1986. Article 2. Available at <https://www.un.org/documents/ga/res/41/a41r128.htm>

opposed to profit-centered - approach to development embedded in the *Declaration* is not only preserved, but can be fully realized by all people. Given the seminal role played by specific rights in safeguarding the fulfillment of the right to development, IAP recommends the new instrument specifically articulate obligations around respecting, protecting and fulfilling the rights to information, participation, and associated freedoms, including expression, assembly and association. The provisions of the legally binding instrument should also be constructed in a way that ensures that duty-bearers, including development finance institutions a) proactively take measures to fulfill these rights; b) institute remedial procedures to correct existing practices that continue to violate these rights; and c) fulfill their obligation to ensure justice and remedy for violations.

The experiences of IAP and our partners have demonstrated that the right to information is the prerequisite to enabling the meaningful fulfillment of the right to participation in development processes, and ultimately for the realization of the right to development that stays true to the *Declaration*.<sup>13</sup> Communities possess legitimacy and local expertise that can improve and inform the design of potential projects and plans, anticipate and mitigate adverse impacts, and ensure they achieve positive impacts that further their development priorities. Micro-level impacts in development planning, construction and operational phases can be prevented, or promptly redressed with the assistance of local expertise, if discussed with those affected via a proper consultation process built on real access to information. Moreover, technical solutions and innovative designs proposed by those that know their territory can avoid these harms, respond to local priorities and ensure that development is community-led. Attesting to this, the results of a recent study conducted by IAP surveying 800 participants in 8 countries affected by projects funded by development finance institutions demonstrate that 65% believed that projects affecting their communities could have been modified to achieve the same goals while causing less damages.<sup>14</sup> For communities to meaningfully participate in development decisions that affect their lives, accessible, adequate and timely information is paramount, in conjunction with a safe environment for people to freely ask questions, express their opinions and propose alternate visions and plans.

Unfortunately, current practice in development finance repeatedly fails to meet the expectations of this right. Strikingly, 84% of the 800 people that participated in the study affirmed that they did not have access to the necessary information to offer an informed opinion about projects affecting their communities.<sup>15</sup> 64% of the respondents did not even know where they could obtain this information.<sup>16</sup>

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<sup>13</sup> See International Accountability Project (IAP). “Earlier access to information will make development better: here’s why.” December 2018. Available at <https://medium.com/@accountability/earlier-access-to-information-will-make-development-better-heres-why-facf48744de5>

<sup>14</sup> See International Accountability Project (IAP) and the Global Advocacy Team. *Back to Development: A Call for What Development Could Be*. March 2015, p.83. Available at <https://accountabilityproject.org/wp-content/uploads/2017/09/IAP-Back-to-Development-Report.pdf>

<sup>15</sup> *Idem*, p.82

<sup>16</sup> *Idem*.

**In order to rectify the current opacity of the development model, the new legally binding instrument must emphasize the obligations of duty-bearers to fulfill the right to information.**

Realizing the right to development is a journey that must start from within communities themselves, and meaningful fulfillment of the right to participation is required in order to ensure that development is led by the visions and priorities of people.<sup>17</sup> Strikingly, 82% of the respondents in IAP's study made clear that their development priorities were different from the priorities of their governments.<sup>18</sup> 88% of the people surveyed were not consulted during the planning phase of projects affecting their communities, and 94% stated that they were never consulted about their priorities for regional or national development plans.<sup>19</sup> Only 10% of those surveyed believed the projects would benefit their communities, and only 14% believed projects would benefit the country population.<sup>20</sup>

These statistics illuminate the reality that national and regional plans for development projects largely do not correspond to the priorities of those most affected by them. Overwhelmingly, communities are excluded from the decision-making processes that establish priorities and decide impacts.

The current development model offers few entry points for people to safely and meaningfully participate. Compounding these challenges, consultations that do take place also lack good faith, attesting to their irregularity. For the right to participation to be meaningfully met, a dialogue with affected communities must take place throughout the lifecycle of a given project, and negotiations must have mutual agreement as their goal. In other words, good faith consultations cannot be informational sessions about decisions already taken, and the right to free, prior and informed consultation and consent for Indigenous peoples must be respected. 85% of the people surveyed by IAP did not believe that their opinions and ideas were incorporated in project plans they were consulted upon.<sup>21</sup>

Crucially, 78% of the people surveyed by IAP's study affirmed they did not feel safe to ask questions and express their true opinions about projects.<sup>22</sup> The rapidly closing space for civil society to voice their priorities and concerns must be acknowledged by duty bearers and within the legally binding instrument. It is unfortunately not enough to simply recommend that safe spaces be created for individuals and

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<sup>17</sup> See International Accountability Project (IAP). 'The development journey of a community starts from within' – the remarkable potential of community mapping. November 2016. Available at <https://medium.com/@accountability/the-development-journey-of-a-community-starts-from-within-the-remarkable-potential-of-community-1adc839838af#.iz9s5fnjs>.

<sup>18</sup> See International Accountability Project (IAP) and the Global Advocacy Team. Back to Development: A Call for What Development Could Be. March 2015, p.81. Available at <https://accountabilityproject.org/wp-content/uploads/2017/09/IAP-Back-to-Development-Report.pdf>

<sup>19</sup> Idem, p.84

<sup>20</sup> Idem, p.83

<sup>21</sup> Idem, p.84

<sup>22</sup> Idem, p.82

communities to speak; attention must be drawn to the need for governments and financiers to proactively prevent reprisals against human and environmental rights defenders.

**The legally binding instrument on the right to development should identify the obligations of duty bearers to redress and proactively ensure the meaningful realization of communities' right to participate in development processes, and protect the freedoms necessary to ensure a safe space to do so.**

### **Compliance, Monitoring and Enforcement Arrangements**<sup>23</sup>

One of the most acute gaps experienced by communities in the current development model is that of compliance and accountability for environmental and human rights violations that occur in the name of development. The limitations in the accountability framework involving development finance institutions is emblematic of the piecemeal approach to development that the binding instrument should aim to rectify.

IAP's experience working with communities adversely impacted by development finance institutions has shown that, as currently implemented -- for instance, without the necessary suite of powers to enforce solutions upon a finding of non-compliance -- the independent accountability mechanisms (IAMs) of these institutions cannot provide effective and adequate means of remedy or accountability for communities harmed by development projects.<sup>24</sup> Many communities utilize these mechanisms after they have nearly exhausted local avenues for remedy for harms resulting from a project funded by development finance institutions. In this case, IAMs fulfill an important role by providing an avenue for communities to directly share their experience, expertise and grievances, and are empowered to respond by recommending solutions and remedies, facilitating dialogue with senior staff and decision-makers, investigating allegations of non-compliance, and where their mandate allows, engaging in dispute resolution.

Despite this critical role, the current limitations of IAMs mean that communities face numerous difficulties in accessing them,<sup>25</sup> and even when access is possible, further disappointments when attempting to enforce their rights.<sup>26</sup> Among the difficulties faced by communities when accessing these bodies, are their lack of enforcement capabilities of investigative findings and their intrinsic connection with the "development" logic of the institutions they seek to hold to account. At the same time, IAMs

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<sup>23</sup> Please note, this section addresses questions 12(a), 12(b), 12(d), 12(e), and 12(g) under "Compliance, monitoring and enforcement arrangements" within the call for inputs.

<sup>24</sup> See SOMO et al. Glass Half Full: The State of Accountability in Development Finance. Available at <https://www.glass-half-full.org>

<sup>25</sup> *Idem*, p.48

<sup>26</sup> For example, see Accountability Counsel. India: Assam Tea Plantations. Available at <https://www.accountabilitycounsel.org/client-case/india-assam-tea-plantations/#overview>



play a valid role by providing an opportunity for community grievances to be heard, facilitating negotiation processes that could result in the implementation of communities' demands, and conveying lessons learned to management.

Based on this analysis, IAP recommends that the legally binding instrument on the right to development contemplate a combination of procedures in order to seek the implementation of this cornerstone right by duty bearers, including development finance institutions.

- a) **A compliance body with facilitation and enforcement branches** would combine aspects where IAMs might thrive, such as facilitating the implementation of socio-environmental responsibilities of development finance institutions when conversing with project-affected communities, while addressing a key weakness of IAMs - the enforcement of their findings when violations of said socio-environmental responsibilities occur. While IAMs continue to be important bodies of oversight in relation to the safeguard frameworks of development finance institutions, they have consistently failed to take the full set of human and environmental rights standards and norms into consideration in their tasks. An international body with the freedom to apply and implement these standards and norms would play an important role in complementing the work of IAMs. The enforcement branch should ensure that the Boards and management of development finance institutions are not able to prevent or deter the implementation of decisions that seek to hold them accountable, and require remedy to be provided to communities adversely affected by their investments.
- b) **A reporting procedure reviewed by a body of experts** could also create space for discussions within States and development finance institutions, and give communities and civil society the opportunity to participate in discussions concerning the very core of development processes through international standards and oversight.
- c) **A communication and an inquiry procedure** would provide the mechanism with a more direct link to specific situations resulting from the projects and plans of development finance institutions that might require detailed and rapid attention due to possible occurring or future violation of international standards.
- d) **An advisory opinion body** would also serve as a possible preventive mechanism in order to guide development finance institutions and States in the direction of community-centered and community-led development that would prevent violations of international standards and norms, and ensure the realization of the right to development.

Therefore, we recommend that the compliance, monitoring and enforcement mechanism connected to the future instrument on the right to development be a combination of the following: a compliance committee with a facilitation and enforcement branch; a reporting procedure with periodic reports, reviewed by an expert body; a communications procedure; an inquiry procedure; and an advisory opinion procedure. IAP further recommends that this mechanism should work in close coordination with other human and environmental rights procedures and mechanisms, always following the human rights principles that

determine that the most favorable law applies to the human person,<sup>27</sup> and that social justice must be the primary goal of duty bearers, irrespective of structural challenges.<sup>28</sup>

### **Final Provisions**<sup>29</sup>

A range of instruments, in attention to the sovereignty of States, allow for denunciation. However, principles such as the prohibition of regression and obligation of progressive realisation of human and environmental rights require the observation of sovereignty not only from the lens of a right, but also of a responsibility of States in relation to those under its jurisdiction and to the international community. In the words of the International Commission on Intervention and State Sovereignty:

*Thinking of sovereignty as responsibility, in a way that is being increasingly recognized in state practice, has a threefold significance. First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission. The case for thinking of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security.<sup>30</sup>*

Due to the above-mentioned principles, widely recognised as applicable in relation to human rights obligations and the notion of sovereignty as a responsibility, IAP recommends that denunciation of the instrument should not be allowed. The opposite would mean a clear regression of human rights obligations, as it would, among other things, impede communities access to instruments enabling complaint and democratic participation, and also derogate the sovereign responsibility of States in relation to the international community. Such derogation would most likely jeopardize the implementation of obligations necessary to realize the right to development.

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IAP strongly believes in the importance of realizing the right to development as embodied by the *Declaration*, and welcomes the initiation of this process to create a legally binding instrument. Our experiences have demonstrated the urgent need for the current exclusionary and top-down development model to fundamentally shift to embed communities at the center of the projects and plans in order to meaningfully realize the right to development. Key actors enabling the development model, including

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<sup>27</sup> *in dubio pro homine*

<sup>28</sup> *in dubio pro justitia socialis*

<sup>29</sup> Please note, this section addresses question 13(e) under “Final provisions” within the call for inputs.

<sup>30</sup> See International Commission on Intervention and State Sovereignty (ICISS). *The Responsibility to Protect*. December 2001, p.13. Available at <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y>

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States and development finance institutions, should be held accountable to human and environmental norms, and the projects and plans they propose should also abide by the same standards. We hope that the need for this new paradigm centering community experiences, expertise and recommendations at the heart of development, drives the creation and implementation of this legally binding instrument.