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Mechanisms for Consultation and Free, Prior and Informed Consent in the Negotiation of Investment Contracts

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Cover Page Footnote

This article is the subject of extensive and sustained research and collaboration by a range of actors to whom the authors would like to express their sincere gratitude. We would like to re-extend our deep thanks to the Indigenous and civil society representatives who participated in the Columbia Center on Sustainable Investment and Middlesex University London workshop on “The politics and practice of FPIC: Understanding power, interests and what they mean for inclusive and effective investment-related decision-making,” which was held in New York on April 25, 2019, co-organized with Tehtena Mebratu-Tsegaye and Cathal Doyle, and implemented with support from the Ford Foundation. We are extremely grateful to Cathal Doyle, Federica Violi and Lara Wallis for their immensely helpful and probing peer reviews of an earlier version of this article. We also benefited from research assistance from CCSI interns Alex Lutz, Inès Rejraji, Aarthi Sridharan, and Jo Wu, and from research conducted by Jesse Coleman for a 2017 working paper entitled “Articulating a Rights-Based Argument for Land Contract Disclosure.” Jodi Liss also provided helpful comments. Sam Szoke-Burke presented an earlier version of this article at the 2017 World Bank Land and Poverty Conference.

Mechanisms for Consultation and Free, Prior and Informed Consent in the Negotiation of Investment Contracts

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Abstract

Investor-state contracts are regularly used in low- and middle-income countries to grant concessions for land-based and natural resource investments, such as agricultural, extractive industry, forestry, or renewable energy projects. These contracts are rarely negotiated in the presence of, or with meaningful input from, the people who risk being adversely affected by the project. This practice will usually risk violating requirements for meaningful consultation, and, where applicable, free, prior and informed consent (FPIC), and is particularly concerning when the investor-state contract gives the investor company rights to lands or resources over which local communities have legitimate claims.

This article explores how consultation and FPIC processes can be practically integrated into investor-state contract negotiations to better safeguard the land rights and human rights of members of project-affected communities. Based on a review of relevant international law standards and guidance documents, a close analysis of typical investor-state negotiations and of consultation and consent processes in other contexts, and a workshop with Indigenous and civil society representatives, the article provides three options for integrating consultation and consent processes into contract negotiations, the appropriateness of which will vary depending on local contexts and communities' resources and decision-making structures.

Key words:

Consent, Consultation, Contracts, Investment, Negotiations

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I. INTRODUCTION

Large-scale natural resource investments can pose significant threats to the land rights and human rights of local communities and their members. International law and guidance documents require meaningful consultation with—and in some cases, the free, prior and informed consent (FPIC) of—project-affected communities, and much work has been done to articulate how this can be implemented in the context of resource investments. Yet one area that is less explored is whether, and if so, how, consultation and FPIC processes can be built into negotiations of the investor-state contracts that grant concessions or lease land to investor companies.⁴ Contract negotiations are an important stage of the investment for community participation, as the signing of an investment contract will usually have the effect of limiting the right to give or withhold FPIC to the proposed project, if a community has not initially provided its FPIC. Adequately operationalizing meaningful consultation and FPIC at the contract negotiation stage thus becomes a crucial means of protecting community rights for later stages of the investment lifecycle.

Investor-state contracts are regularly used in low- and middle-income countries to grant concessions or provide leases for land-based and natural resource investments, including agricultural, forestry, extractive industry, and renewable energy projects.⁵ These contracts, which are negotiated between host governments and investor companies, typically allocate rights to access, occupy, and develop land and/or resources for the investment project, in exchange for revenue (through land rents, taxes, and other fees) and other potential rents to the host government, such as infrastructure development or employment creation. Investment contracts are rarely negotiated in the presence of, or with meaningful input from, the people who risk being adversely affected by the project, including those with legitimate claims to lands or resources underlying the project. (Soft law instruments like the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (“VGGT”) call for the respect of *all* legitimate tenure rights, whether or not they are legally recognized.⁶) In

⁴ This article also uses the term “investors” to refer to proponent companies who seek to establish, or actually carry out, a natural resource project in a host country. Investor-state contracts are also referred to as “investment contracts.”

⁵ See, e.g., Kaitlin Y. Cordes et al., *At the Intersection of Land Grievances and Legal Liability: The Need to Reconsider Contract Rights and Expectations at the Supranational Level*, 49 LOY. U. CHI. L.J., 515, 536 (2017); DAVID KIENZLER ET AL., COLUM. CTR. ON SUSTAINABLE INV., NATURAL RESOURCE CONTRACTS AS A TOOL FOR MANAGING THE MINING SECTOR 5 (2015).

⁶ See Food and Agriculture Organization of the United Nations [FAO], Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security [hereinafter VGGT], Principle 3, ¶¶ 3.1(1) and 3.2 (calling on states to “[r]ecognize and respect all legitimate tenure right holders and their rights,” whether such rights are “formally recorded or not,” and stating that “business

such scenarios, relevant requirements for meaningful consultation and, where applicable, FPIC—whether under international law, domestic law, or industry or finance-related standards—are arguably not satisfied.

While investor-state contracts are commonly used for agricultural, forestry and extractive industry investments in the many parts of the global south, some countries' domestic laws require that companies seeking access to land or resources negotiate directly with community representatives or local authorities, rather than with the host government. This is more common for agricultural and forestry concessions than for extractive projects, as domestic laws usually set out that governments hold ownership rights over sub-surface minerals, regardless of who has legal title to the area in which such minerals are located. Jurisdictions and scenarios where companies must negotiate directly with community representatives or local authorities are outside the scope of this article. That said, it should not be taken for granted that having a community representative or local authority as a contractual party means that the government has fulfilled its obligations regarding consultation or FPIC. On the contrary, such negotiations can concentrate power into the hands of local leaders who are not always incentivized to act in the interests of the community, or to ensure the community remains abreast of developments and provides its FPIC.⁷

Of course, respect for FPIC goes far beyond simply inserting consent processes into an anticipated or ongoing negotiation between a host government and investor. FPIC, distilled to its essence, is about the right of Indigenous people, and at times other communities,⁸ to decide for themselves how their lands and resources are used and managed. To the extent that FPIC is required, communities must be able to access and understand relevant information, interact with relevant stakeholders, and influence project proposals, including before the government decides on, or grants any authorizations for, a proposed investment project.⁹ Similarly, for

enterprises have a responsibility to respect human rights and legitimate tenure rights”).

⁷ See, e.g., Tom Lavers & Festus Boamah, *The Impact of Agricultural Investments on State Capacity: A Comparative Analysis of Ethiopia and Ghana*, 72 GEOFORUM 94, 102 (2016) (“[I]n Ghana politically powerful chiefs have sought to re-assert their authority over land and the local population by allocating community land to investors, based on investors’ demands rather than the priorities of the state. This strategy has been employed to strengthen chiefs’ territorial claims with respect to neighbouring authorities and to cultivate patron-client networks as both local citizens and migrants in biofuel project areas are increasingly dependent on personal ties with chiefs and other local political elites to maintain their livelihoods.”).

⁸ While most commonly associated with Indigenous and tribal peoples, FPIC rights have been ascribed to other communities. See *infra* Part II (2), for a discussion of FPIC rights and the many industry and multi-stakeholder initiative standards that require the FPIC of all, and not only Indigenous, communities.

⁹ See, e.g., *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*, ¶ 46(i), U.N. Doc. E/C.19/2005/3

consultation to be meaningful, communities must have the opportunity to influence decision-making on projects that will affect them. This, too, requires more than the passive transfer of information¹⁰ or simply meeting with communities to discuss a proposed project in general terms. Sufficient time and opportunity must be provided for community perspectives to be incorporated into any decision-making regarding the proposed project, through culturally appropriate processes designed in line with the community's customary decision-making processes where applicable, rather than those imposed by the government or company. This article thus considers that incorporating rights to consultation and FPIC into contract negotiations can help meet those rights' requirements for iterative and ongoing respect; we do not advocate for such processes being the first or only opportunity for community input into decision-making.

Investor interest in land and resource investments is often cyclical. For instance, dramatically increased food prices caused a spike in the negotiation of investment contracts concluded between companies and host governments for agricultural projects in 2005; this global "rush for land" slowed, without stopping, by 2012.¹¹ Similarly, development of new projects in the extractive industries slowed in response to dramatic drops in commodities prices that began midway through 2014, following the "commodity supercycle".¹² While subject to change in the immediate future, the economic impact of the Covid-19 crisis has seen a further dramatic drop in many commodity prices.¹³ Financiers and other investors are also increasingly factoring environmental and social impacts into risk analyses and decision-making, including on issues such as climate change and land grabs. This creates a window of opportunity for developing better

(Feb. 17, 2005) [hereinafter *International Workshop on Methodologies*]; Christian Courtis, *Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples*, 18 INT'L J. ON MINORITY & GROUP RTS. 433, 447 (2011); INTERNATIONAL LABOUR ORGANIZATION, *Part 2: Domestic Courts – Costa Rica 5*, in APPLICATION OF CONVENTION NO. 169 BY DOMESTIC AND INTERNATIONAL COURTS IN LATIN AMERICA: A CASEBOOK 136, 136 (2009), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_123946.pdf.

¹⁰ JOYCE B. MBONGO ENDELEY & FONDO SIKUD, *THE SOCIAL IMPACT OF THE CHAD-CAMEROON OIL PIPELINE: HOW INDUSTRIAL DEVELOPMENT AFFECTS GENDER RELATIONS, LAND TENURE, AND LOCAL CULTURE* 76 (2007).

¹¹ KERSTIN NOLTE ET AL., *INTERNATIONAL LAND DEALS FOR AGRICULTURE: FRESH INSIGHTS FROM THE LAND MATRIX: ANALYTICAL REPORT II* 12 (2016).

¹² Lisa Sachs & Nicolas Maennling, *Resource Resilience: How to Break the Commodities Cycle*, WORLD POL. REV. (May 26, 2015), <http://www.worldpoliticsreview.com/articles/15848/resource-resilience-how-to-break-the-commodities-cycle>; See Thomas Lassourd & David Manley, *Guest Post: 10 Consequences of the Commodity Crash*, FIN. TIMES (Feb. 4, 2015), <https://www.ft.com/content/a635b463-b19f-36ef-8a81-c4c332bfe14e>.

¹³ See John Baffes & Peter Nagle, *The Outlook for Commodity Markets, and the Effects of Coronavirus, in Six Charts*, WORLD BANK BLOGS, (Apr. 23, 2020), https://blogs.worldbank.org/voices/outlook-commodity-markets-and-effects-coronavirus-six-charts?cid=SHR_BlogSiteShare_EN_EXT.

consultation and FPIC practices in relation to investment contract negotiations between companies and governments. Further, given the increasing criticism of investor-state dispute settlement and recent calls for a moratorium of investor-initiated treaty claims against host governments,¹⁴ investment contracts may become even more central in the governance of investment projects, and thus merit particularly close scrutiny. This article does not endorse investment contracts as an optimal means of regulating resource investments; rather, it acknowledges the prevalence of such contracts in current practices, and the need to ensure that governments continuing to use such contracts also comply with their consultation and FPIC obligations at the contract negotiation stage.

This article provides suggestions to assist stakeholders involved in or affected by natural resource investments, including project-affected communities, companies, and host governments, as well as civil society organizations and other actors working to make such investments more responsible. It seeks to have a practical impact by articulating options for building consultation and FPIC processes into investment contract negotiations, and by analyzing their feasibility and the degree to which they allow for meaningful community participation. Underlying the consideration of these options is an assumption that current levels of community involvement at the contract negotiation stage are usually inadequate, and that, as mentioned above, community participation at this stage cannot constitute the earliest or full extent of consultation and FPIC processes that a government must carry out.

The article starts by examining international legal standards and best practices for informed community participation in decision-making regarding resource investments, as well as the steps that some communities have taken in practice to organize and democratize decision-making around land and resource use. It then considers investment contract negotiation processes, which generally lack adequate community involvement, and the potential advantages for communities of being more directly involved. After exploring factors that affect the feasibility of greater inclusion of community perspectives, the article then sets out three options for community participation in what have typically been investor-state negotiations, considering the opportunities and challenges of each option in ensuring an inclusive and participatory negotiation process.

¹⁴ See Phil Bloomer et al., *Call for ISDS Moratorium During COVID-19 Crisis and Response*, COLUM. CTR. ON SUSTAINABLE INV. (May 6, 2020), <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/>.

1. A proviso: Consultation and FPIC processes must take place before authorization, and should be iterative

While this article focuses on modes of consultation and FPIC at the investment contract negotiation stage of a project, it does not intend for such measures to constitute the full extent of consultation and FPIC processes attached to an investment. Such an approach would undermine two key attributes regarding the timing of consultation and consent processes.

First, only seeking to consult or obtain consent when an investment contract is being negotiated would be too late in the investment process to comply with legal standards and best practices. Rather, consultation and FPIC processes should commence prior to *any* authorization, including before governments or local authorities grant or execute instruments such as permits, licenses, term sheets or memoranda of understanding.¹⁵ In practice, a meaningfully consultative and participatory process will entail informing and consulting with affected communities, and when relevant, obtaining their FPIC, before any permits are granted as well as before the negotiation of any investment contract. There are also practical reasons why this is important. As time passes, and companies spend more money on preparations for a project, governments will face increasing pressure to approve the project, and may find it difficult to require alterations or cessation of the project where local and public interests may be at risk. In addition, communities who are only brought in at the stage of contract negotiations may lack sufficient time to acquaint themselves with the project's implications and to access funding, information, skill-building, and technical support to meaningfully participate in and influence negotiations. Thus, not engaging with the community from the earliest point feasible in a project's conceptualization may cause delays and create barriers to building consensus, managing expectations, and obtaining the community's social license to operate.¹⁶

Second, obtaining consent and consulting communities is not an obligation that can be fully and finally satisfied at any one point in time; instead, consent and consultation processes should take place regularly as part of "a continuous, iterative process of communication and negotiation spanning the entire planning and project cycles."¹⁷ Given the on-going nature of the consultation and FPIC standards, a government's obligations do not expire as soon as consent is obtained.¹⁸ Continuous consultation and consent ensure a greater degree of participation and influence for

¹⁵ See sources cited *supra* note 9.

¹⁶ S. James Anaya & Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, 67 U. TORONTO L.J. 435, 447 (2017).

¹⁷ WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING 281 (2000).

¹⁸ Anaya & Puig, *supra* note 16, at 450.

communities, and improve communication between them and government and company representatives; this helps to safeguard the human rights that underlie consultation and FPIC requirements,¹⁹ potentially including rights to self-determination, water, health, and food, among others.

This article's consideration of consultation and FPIC at the contract negotiation stage will thus mainly be relevant where: (i) the community has provided its initial FPIC to the proposed project or to being relocated sufficiently prior to contract negotiations; or (ii) where the government permissibly determines that consent is not required, and discharges the burden of demonstrating that no rights are being limited or affected or, if they are, that the limitation is permissible under established international human rights law and is an "exceptional measure"²⁰ that "compl[ies] with certain standards of necessity and proportionality with regard to a valid public purpose."²¹ The instances in which a government can make such a determination is a matter of unsettled debate and is not considered further in this article. It is worth noting that where such a determination is permissibly made, best practices still require robust consultation processes prior to any authorization or commencement of activities; the options explored in this article may therefore still be relevant in such scenarios.

II. CONSULTATION AND FPIC – IN STANDARDS AND IN PRACTICE

1. Rights underpinning the need for consultation

Human rights principles set out various entitlements to information and participation for communities and community members who may

¹⁹ *Id.* at 449-50.

²⁰ International Labour Organization, Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, art. 16, ¶ 2, *opened for signature* June 27, 1989, 1650 U.N.T.S. 383 (entered into force Sept. 5, 1991) [hereinafter ILO C169].

²¹ G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 46 (Oct. 2, 2007) [hereinafter UNDRIP]; S. James Anaya (Former Special Rapporteur on the Rights of Indigenous Peoples), *Extractive Industries and Indigenous Peoples*, ¶¶ 31–36, U.N. Doc. A/HRC/24/41 (July 1, 2013); Anaya & Puig, *supra* note 16, at 462. Such a determination may also need to be subject to independent judicial review. U.N. Doc. A/HRC/24/41, ¶¶ 39, 87; VGGT, ¶ 16.1 (2012). For examples of such limitations on consent and consultation requirements, *see* ILO C169, art. 16, ¶ 2, and UNDRIP, art. 46, ¶ 2. Doyle notes that "[i]f the State genuinely balances the rights and interests of others against those of indigenous peoples in the context of proposed mining in their territories, the outcome would, in almost all cases, require the State to respect the decision of indigenous peoples. In general, however, where consent is withheld, genuine rights-balancing exercises are not performed on the basis of strict necessity and proportionality within a framework which guarantees respect for indigenous peoples' rights. This leads to a general presumption that the outcome of FPIC processes must be respected by corporate actors if they are to comply with the corporate responsibility to respect human rights." CATHAL M. DOYLE, *INDIGENOUS PEOPLES, TITLE TO TERRITORY, RIGHTS, AND RESOURCES: THE TRANSFORMATIVE ROLE OF FREE PRIOR AND INFORMED CONSENT* (2014).

potentially be affected by a natural resource investment. These and other rights can be interpreted as requiring governments to meaningfully consult with such communities. Key elements of consultation for communities in the context of a natural resource project that risks affecting them include: having access to all relevant information regarding the project in an understandable format and at the earliest point feasible in the proposed project's conceptualization; having the opportunity to deliberate internally and communicate community priorities to the government and investor; and being able to participate in and influence relevant decisions regarding the project to the extent that such decisions will affect the community's rights or lands or resources.

All community members have a right to information; this is found in the protection of freedom of expression, which includes the freedom to seek and receive information.²² The Inter-American Court of Human Rights has held that this right establishes a positive obligation on states to provide information of public interest upon request,²³ which can include information regarding foreign investment contracts.²⁴ In the context of a natural resource investment, the right to information has been authoritatively interpreted to include information regarding the project's impacts on the environment,²⁵ the fulfillment of mandates by public bodies concerned with investment,²⁶ and the project's health impacts.²⁷

Potentially affected community members also have a right to take part in public affairs.²⁸ The International Covenant on the Elimination of All Forms of Racial Discrimination extends this right beyond voting and standing for election to include the participation of members of ethnic minorities in "the conduct of public affairs at any level."²⁹ The UN High Commissioner for Human Rights, while not a source of binding

²² International Covenant on Civil and Political Rights, art. 19, ¶ 2, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. Many domestic constitutions also include a fundamental right of access to information.

²³ *Reyes v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 41* (Sept. 19, 2006) (applying Art 9(1) of the American Convention on Human Rights, which uses identical language, namely that "[e]very individual shall have the right to receive information").

²⁴ *Id.* ¶ 73.

²⁵ *Id.*; Fatma Zohra Ksentini (Special Rapporteur to the Commission on Human Rights), *Human Rights and the Environment*, ¶¶ 180, 203–16, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994).

²⁶ *Reyes*, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 73.

²⁷ Committee on Economic, Social, and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, ¶¶ 8, 11, 44, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

²⁸ ICCPR, *supra* note 22, at art. 25.

²⁹ International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(c), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 5, 1991) [hereinafter ICERD].

jurisprudence, has interpreted the right to take part in public affairs as including entitlements “to be fully involved in and to effectively influence public decision-making processes that affect them,”³⁰ and “to be consulted and to be provided with equal and effective opportunities to be involved in decision-making processes on all matters of public concern.”³¹ The Inter-American Court has also upheld rights of communities with a “special relationship” to the land, such as those who draw spiritual or cultural importance from the land, to effectively participate in decisions affecting their lands and resources.³² The Revised African Convention on the Conservation of Nature and Natural Resources also requires states parties to “adopt legislative and regulatory measures necessary to ensure timely and appropriate . . . participation of the public in decision-making with a potentially significant environmental impact.”³³ Likewise, the African Commission on Human and Peoples’ Rights has called upon states parties to the African Charter on Human and Peoples’ Rights to:

”[c]onfirm that all necessary measures must be taken by the State to ensure participation, including the free, prior and informed consent of communities, in decision-making related to natural resource governance; . . . [and] to promote natural resources legislation that respect human rights of all and require **transparent, maximum and effective community participation in a) decision-making about, b) prioritization and scale of, and c) benefits from any development on their land or other resources**, or that affects them in any substantial way.”³⁴

2. FPIC requirements

The FPIC standard features all of the elements discussed under consultation, above, while also placing additional control in the hands of relevant communities by focusing on the provision of their consent. This

³⁰ Office of the U.N. High Commissioner for Human Rights, *Report on the Promotion, Protection, and Implementation of the Right to Participate in Public Affairs in the Context of the Existing Human Rights Law: Best Practices, Experiences, Challenges, and Ways to Overcome Them*, ¶ 9, U.N. Doc. A/HRC/30/26 (July 23, 2015).

³¹ Office of the U.N. High Commissioner for Human Rights, *Report on Factors that Impede Equal Political Participation and Steps to Overcome Those Challenges*, ¶ 89, U.N. Doc. A/HRC/27/29 (June 30, 2014).

³² *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 131–34 (June 15, 2005); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 82–86 (Nov. 28, 2007).

³³ African Union, *African Convention on the Conservation of Nature and Natural Resources (Revised Version)*, art. XVI(1)(c), A.U. Doc. CAB/LEG/24.1 (Jul. 11, 2003). See also *id.* at art. XVII(3).

³⁴ African Commission on Human and Peoples’ Rights, *Resolution on a Human Rights-Based Approach to Natural Resources Governance*, A.U. Doc. ACHPR/Res.224 (May 2, 2012) (emphasis added).

element can change power dynamics with governments or companies, increasing the community's prospects of being heard and realizing its demands. Requiring governments to obtain community consent also encourages consultations to be conducted with a view to reaching consensus; this reorientation can lead to more meaningful consultations, the incorporation of community perspectives into the design of proposed projects, and, ultimately, more stable community-company relations and working environments that increase the chances that projects will be successfully implemented.

Governments' legal obligations regarding FPIC often extend far beyond what is commonly acknowledged by governments themselves. Obligations to obtain the FPIC of Indigenous and tribal communities in the context of projects that stand to affect their access to lands, territories, and resources are contained, explicitly and through interpretation, in various treaties, UN declarations, and guidelines. The consent requirement for governments contemplating relocation of an Indigenous people in the ILO's Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries³⁵ is the only legally binding international treaty provision that explicitly discusses consent as it may apply in the context of natural resource-based investments. However, most states have ratified at least one, and often many more, treaties that have been authoritatively interpreted to require FPIC. These include the International Covenant on Civil and Political Rights,³⁶ the American Convention on Human Rights,³⁷ and the African Charter on Human and Peoples' Rights,³⁸ among others. Rights that have been regarded as forming a basis for FPIC include minority rights to enjoy culture,³⁹ rights to property and resources,⁴⁰ development,⁴¹ and self-

³⁵ ILO C169, *supra* note 20, at art. 16, ¶ 2. The article goes on to set out alternative requirements for when such consent cannot be obtained.

³⁶ U.N. Human Rights Comm., Communication No. 1457/2006, *Poma Poma v. Peru*, ¶ 7.6, U.N. Doc. CCPR/C/95/D/1457/2006 (Mar. 27, 2009) [Hereinafter *Poma Poma*].

³⁷ *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 129.

³⁸ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Communication No. 276/2003, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 291 (Feb. 4, 2010).

³⁹ *Poma Poma*, *supra* note 36 at ¶¶ 7.6-7.7. See also *Endorois Welfare Council*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, ¶¶ 243, 248, 249, 251 (noting that a "lack of participation in decisions affecting the lives of the communities" and forced eviction (i.e. evictions taking place without community consent) can impermissibly infringe on the right to culture).

⁴⁰ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social, and Cultural Rights in the African Charter on Human and Peoples' Rights, art. 44 (2010), <http://archives.au.int/handle/123456789/2063>. For links between rights to property, land, or natural resources and state obligations for prior consultation and to seek consent, see *Endorois Welfare Council*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, ¶¶ 226, 238, 266-268; African Commission on Human and Peoples' Rights v. Republic of Kenya, No. 006/2012, Judgment,

determination,⁴² among others. The United Nations' Committee on Economic, Social and Cultural Rights and its Committee on the Elimination of Racial Discrimination have also recommended that consent processes apply in the context of non-Indigenous communities, including "local communities,"⁴³ "ethnic groups,"⁴⁴ "Afro-Colombian people,"⁴⁵ and "vulnerable communities, including pastoralist and hunter-gatherer communities."⁴⁶ FPIC requirements for any project affecting an Indigenous people's lands, territories, or other resources are also contained in the United Nations Declaration on the Rights of Indigenous Peoples, which is not technically binding, but is regarded as synthesizing various customary international law principles.⁴⁷ Similar FPIC requirements are echoed by the VGGT, another soft law document. Some domestic laws also impose FPIC rights for all communities; for instance, in Liberia, FPIC is mandated for future "interferences" with customary lands, subject to the government's right to subsurface minerals.⁴⁸

While the implementation of FPIC in practice will vary from case to case, some core components are required. The government is obligated to engage directly with the community through the community's own customary representative decision-making structures, and to make good

African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 131 (May 26, 2017); Maya Indigenous Community of the Toledo District v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at 727 (2004), ¶¶ 142 and 143.

⁴¹ *Endorois Welfare Council*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, ¶¶ 281, 282, 290-292, 298.

⁴² International Law Association, *Resolution No. 5/2012: Rights of Indigenous Peoples*, ¶ 5 (Aug. 30, 2012); Cathal M. Doyle & Jill Cariño, *Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector* (2010), <http://www.ecoesuit.com/wp-content/uploads/2014/09/Making-FPIC-a-Reality-Report.pdf>; Emily Greenspan, *Free, Prior, and Informed Consent in Africa: An Emerging Standard for Extractive Industry Projects*, <https://s3.amazonaws.com/oxfam-us/www/static/media/files/community-consent-in-africa-jan-2014-oxfam-americaAA.PDF>. See also Nathan Yaffe, *Indigenous Consent: A Self-Determination Perspective*, 19 MELB. J. INT'L L. 703, 712 (2018) (interpreting the judgment in *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 137 as "a formulation that adverted to the centrality of self-determined governance," and noting that "the IACtHR held 'the safeguard of effective participation . . . must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs.'")

⁴³ Committee on Economic, Social, and Cultural Rights, *Concluding Observations: Mexico*, ¶ 28, U.N. Doc. E/C.12/MEX/CO/4, (June 9, 2006).

⁴⁴ Committee on the Elimination of Racial Discrimination, *Concluding Observations: Lao People's Democratic Republic*, ¶ 18, U.N. Doc. CERD/C/LAO/CO/15, (Apr. 18, 2005).

⁴⁵ Committee on Economic, Social and Cultural Rights, *Concluding Observations: Colombia*, ¶ 9, U.N. Doc. E/C.12/COL/CO/, (June 7, 2010).

⁴⁶ Comm. on Econ., Soc. and Cultural Rights, *Concluding Observations: United Republic of Tanzania*, ¶ 22, U.N. Doc. E/C.12/TZA/CO/1-3, (Dec. 13, 2012).

⁴⁷ UNDRIP, *supra* note 21, at art. 32, ¶ 2.

⁴⁸ Land Rights Act 2018, c. 8, art. 33(3) (Liber.).

faith efforts to reach agreement on just terms.⁴⁹ The government must also find ways to mitigate power imbalances, both within the community and between the community and other actors, such as companies, to ensure that any consent obtained is “free” from coercion or manipulation.⁵⁰ This may include requirements to facilitate the community’s access to independent technical support and other resources.⁵¹ Consultation and consent processes must be conducted sufficiently “prior” to the granting of authorizations and the commencement of the project, with relevant information regarding the project provided in an accessible format so that the community is “informed.”⁵² For the FPIC standard to be met, the government must also obtain the community’s “consent.”⁵³ Consent also implies that the government must respect the community’s free and informed decision, regardless of the outcome.⁵⁴

⁴⁹ *International Workshop on Methodologies*, *supra* note 9, at ¶ 47; Anaya & Puig, *supra* note 16, at 457-58.

⁵⁰ *International Workshop on Methodologies*, *supra* note 9, at ¶ 46(i); Anaya & Puig, *supra* note 16, at 457-58.

⁵¹ See, e.g., James Anaya (Special Rapporteur), *Rep. of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, ¶ 51, U.N. Doc. A/HRC/12/34 (July 15, 2009) (noting that consultation procedures for Indigenous peoples are often “not effective” and that imbalances of power need to be addressed by, among other things, ensuring communities have the “financial, technical and other assistance they need” without such assistance being used “to leverage or influence indigenous positions in the consultations.”); Inter-Am. Comm’n H.R., *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources*, ¶ 312, OEA/Ser.L/V/II (Dec. 30, 2009) (“... States may be required to provide [Indigenous] peoples with other means, which can include technical and independent assistance, in order for indigenous peoples to be able to adopt fully informed decisions.”).

⁵² *International Workshop on Methodologies*, *supra* note 9, at ¶ 46(i).

⁵³ *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 134 (Nov. 28, 2007); Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Communication 276/2003, African Commission on Human and Peoples’ Rights, ¶ 291 (Feb. 4, 2010); See also Inter-Am. Comm’n H.R., *Indigenous Peoples, Afro-descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, ¶ 183, OEA/Ser.L/V/II 93 (Dec. 31, 2015); Rodolfo Stavenhagen (Special Rapporteur), *Rep. of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, ¶ 66, U.N. Doc. E/CN.4/2003/90 (Jan. 21, 2003); Emily Greenspan, *The Right to Say “No”: Indigenous Rights Experts Weigh in on Community Consent*, OXFAM: POL. OF POVERTY (Aug. 20, 2015), <https://politicsofpoverty.oxfamamerica.org/the-right-to-say-no-indigenous-rights-experts-weigh-in-on-community-consent/> (quoting Inter-Am. Comm’n H.R. chair Rose-Marie Belle Antoine and United Nations special rapporteur on the rights of indigenous peoples Victoria Tauli-Corpuz); cf Anaya & Puig, *supra* note 16, at 437, 453-54 (focusing on FPIC as a duty for meaningful consultation, which acts as a balancing function to mitigate adverse impacts on the human rights of Indigenous peoples) and Anaya, *supra* note 21, ¶¶ 31–36 (discussing exceptions to the general FPIC requirement).

⁵⁴ Cathal Doyle, *Indigenous Peoples’ Rights: Is HRIA An Enabler For Free, Prior And Informed Consent?*, in HANDBOOK ON HUMAN RIGHTS IMPACT ASSESSMENT (Nora Götzmann ed. 2019), p. 136. See also discussion of the necessity and proportionality exception *supra*

While governments are the primary duty-bearers of obligations under international human rights law, businesses have responsibilities to respect human rights, which includes respect for FPIC rights. More generally, soft law instruments like the UN Guiding Principles on Business and Human Rights (UNGPs) set out the need for strong human rights due diligence and consultation processes.⁵⁵ The Principles for Responsible Contracts, annexed to the UNGPs, also emphasize the need for an “effective community engagement plan through [the project’s] life cycle.”⁵⁶ Outside of explicit human rights frameworks, businesses have increasingly embraced commitments to FPIC, both through certification schemes and specific company policies. These FPIC commitments often apply to all local communities. For example, the standards and criteria of the Forest Stewardship Council,⁵⁷ the Roundtable on Sustainable Palm Oil,⁵⁸ and the EO100 Standard for Responsible Energy Development⁵⁹ set out FPIC requirements for all relevant local communities for different aspects of forestry, palm oil, and renewable energy concessions, respectively. Individual food and beverage companies have also made overarching commitments to FPIC.⁶⁰

3. Consultation and FPIC standards relating to contract negotiations

Although several guidance documents highlight the need for consultation with, or informed participation of, affected communities in the negotiation of investment contracts, existing guidance on how this could be

note 21.

⁵⁵ John Ruggie (Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, ¶ 18(b), U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

⁵⁶ John Ruggie (Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, at 18, U.N. Doc. A/HRC/17/31/Add.3 (May 25, 2011).

⁵⁷ Forest Stewardship Council, *FSC Principles and Criteria for Forest Stewardship*, principle 4.8 (July 22, 2015).

⁵⁸ Roundtable on Sustainable Palm Oil, *Principles and Criteria for Sustainable Palm Oil Production 2018* (revised Feb. 1, 2020), criteria 4.4-4.7. (2020).

⁵⁹ Equitable Origin, *EO100 Standard for Responsible Energy*, objective 2.5 (2017), https://pronto-core-cdn.prontomarketing.com/2/wp-content/uploads/sites/1738/2018/09/EO100-Standard-for-Responsible-Energy-Development_2017.pdf.

⁶⁰ See, e.g., Coca-Cola Company, *The Coca-Cola Company Commitment: Land Rights and Sugar 2* (2013) (stating that “[t]he Coca-Cola Company will adhere to the principle of Free, Prior and Informed Consent across our operations (including bottling partners) and will require our suppliers to adhere to this principle”), <https://web.archive.org/web/20170209181642/http://assets.coca-colacompany.com/6b/65/7f0d386040fcb4872fa136f05c5c/proposal-to-oxfam-on-land-tenure-and-sugar.pdf>.

undertaken in practice generally lacks granular detail. Some guidance documents merely stress the general need for consultation before signing, and during the negotiation of, investment contracts. Other guidance documents go further, exhorting that legitimate tenure right holders be included in project design or negotiations but still not explaining the mechanisms for how this would occur and be linked to investor-state negotiations.

Guidance regarding the general need for community consultation and participation before the execution, and during the negotiation, of investment contracts can be found in the Principles for Responsible Contracts, which sets out that “[c]onsultation with impacted communities and individuals should take place before the finalization of the contract.”⁶¹ These Principles also emphasize the need for community engagement plans, but do not explore in great detail the specific consultation and FPIC processes that could be employed for contract negotiations. Similarly, the African Union’s Guiding Principles on Large Scale Land Based Investments in Africa assert that communities affected by large-scale land-based investment should be “provided sufficient information, consulted on their views prior to finalizing [large-scale land-based investment] agreements and [have] these views taken into consideration.”⁶² The VGGT also note that “[a]ll forms of transactions in tenure rights as a result of investments in land, fisheries and forests should be done transparently” and that “[c]ontracting parties should provide comprehensive information to ensure that all relevant persons are engaged and informed in the negotiations, and should seek that the agreements are documented and understood by all who are affected.”⁶³

Several sources of guidance stress the importance of including affected communities and legitimate tenure right holders in negotiations for land-based investments. For example, the Guide to Due Diligence of Agribusiness Projects that Affect Land and Property Rights, prepared by the French government’s Technical Committee on “Land Tenure and Development,” discusses pertinent considerations, including whether local people were consulted and involved in negotiations, whether the contract was made public, whether local authorities or representatives of local people were co-signatories to the contract, and whether local people were invited to participate in the process of negotiating the contract and

⁶¹ Ruggie, *supra* note 56, at 18.

⁶² African Union, African Development Bank and United Nations Economic Commission for Africa, *Guiding Principles on Large Scale Land Based Investments in Africa* 15 (2014). *See also id.* at 13 (“In order that decisions on LSLBI respond to local and national development priorities, devolution of decision-making authority to appropriate levels, meaningful participation by those affected by the investments in decision-making are required along with transparency throughout the negotiation, approval, contracting and implementation process.”).

⁶³ VGGT, ¶¶ 12.3, 12.11.

commenting on draft versions.⁶⁴ In addition, in 2009 the then-UN Special Rapporteur on the right to food highlighted that it is “vital that the negotiations leading to [large-scale land acquisitions and leases] comply with a number of procedural requirements ensuring informed participation of the local communities.”⁶⁵ Other guidance documents emphasize the importance of consultation and participation but are vague regarding whether and how such practices should interact with investor-state negotiations. For example, the USAID Operational Guidelines for Responsible Land-Based Investment urge companies to “include in negotiations those who use or claim the land [...], even if their rights are not formally recognized.”⁶⁶ Similarly, the New Alliance for Food Security and Nutrition’s Analytical Framework for Land-Based Investments in African Agriculture notes that companies should “[i]dentify those who legally own the land, as well as those who have other legitimate rights over the land,” “[i]nclude both groups in negotiation, even if only legal owner signs the contract,” and “[e]nsure that the entity or person signing the contract has legal authority to do so.”⁶⁷ These suggestions raise interesting questions regarding how to incorporate legitimate right holders in negotiations, whether negotiating separate side agreements would suffice, and what type of influence legitimate right holders might have in such processes if they are not allowed to sign the contract.

4. Consultation and FPIC in practice

Many communities have organized to articulate and litigate their demands and to advocate to governments and companies regarding the shape that consultation and FPIC processes can take.⁶⁸ Key to these demands has been a focus on FPIC as a means of community-driven decision-making and a vehicle for self-determination;⁶⁹ this emphasizes

⁶⁴ Technical Committee on “Land Tenure and Development,” *Guide to Due Diligence of Agribusiness Projects that Affect Land and Property Rights* 25–27, 61–63 (2014), <http://www.foncier-developpement.fr/wp-content/uploads/Guide-to-due-diligence.pdf>. The Technical Committee is co-chaired by France’s Ministry of Foreign Affairs and the French Development Agency.

⁶⁵ Oliver de Schutter (Special Rapporteur on the Right to Food), *Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*, ¶ 33, U.N. Doc. A/HRC/13/33/Add.2 (Dec. 22, 2009).

⁶⁶ Karol C. Boudreaux & Yuliya Neyman, U.S. Agency for Int’l Dev., *Operational Guidelines for Responsible Land-Based Investment* 37 (2015).

⁶⁷ NEW ALL. FOR FOOD SEC. & NUTRITION & GROW AFRICA, *ANALYTICAL FRAMEWORK FOR LAND-BASED INVESTMENTS IN AFRICAN AGRICULTURE: DUE DILIGENCE AND RISK MANAGEMENT FOR LAND-BASED INVESTMENTS IN AGRICULTURE* 12 (2015).

⁶⁸ *See, e.g.,* Baleni v. Minister of Mineral Resources 2019 (2) SA 453 (GP) (S. Afr.); YATAMA v. Nicaragua, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 224 (June 23, 2005).

⁶⁹ DOYLE & CARÑO, *supra* note **Error! Bookmark not defined.**, at 15; International Law Association, Resolution No. 5/2012: Rights of Indigenous Peoples, section I, para. 5

self-determination's "internal aspect," which includes the "rights of all peoples to pursue freely their economic, social and cultural development without outside interference."⁷⁰

One approach that Indigenous communities have used to enact the right to self-determination has been the development of community protocols, which set out culturally appropriate ways for external actors to interact with a community, and processes for seeking to obtain its consent.⁷¹ Many community protocols have been developed in anticipation of potential projects or events, allowing communities to proactively set the agenda for how decisions regarding their lands and resources will be made. Community members within the Indigenous reserve of Cañamono Lomapretia in Colombia, for instance, developed a protocol that sets out detailed consultation procedures and requirements that must take place prior to any administrative act, including the granting of concessions and permissions for investment projects within the reserve.⁷² The protocol, while not intended to only apply to extractive projects, goes so far as stating that the communities have made a pre-determined decision to withhold consent for large-scale mining or mining that uses cyanide or mercury.⁷³ Other communities have developed protocols as a response to existing impacts by extractives projects, setting rules and processes for ongoing or future projects.⁷⁴ Such protocols will be most effective when developed in advance of a project, especially given that Indigenous peoples often regard having the ability to design and control an FPIC process as a core part of

(concluding that states are obliged by "customary and applicable conventional international law" to ensure FPIC and the rights to participation and consultation as a prerogative of the obligation to recognize and promote the right of Indigenous peoples to autonomy or self-government).

⁷⁰ Committee on the Elimination of Racial Discrimination, *General Recommendation 21: The Right to Self-Determination*, annex VIII, U.N. Doc. A/51/18 (Aug. 23, 1996) [hereinafter *General Recommendation 21*]. See also Indigenous Representative, Intervention at Columbia Center on Sustainable Investment and Middlesex University Workshop (Apr. 25, 2019) ("They think we want FPIC because we want money. It's not about money, it's a different lifestyle between the mother earth and the people."); Lorenzo Cotula, *Reconsidering Sovereignty, Ownership and Consent in Natural Resource Contracts: From Concepts to Practice*, in 9 EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 143 (Marc Bungenberg et al. eds., 2018) (conceptualizing the self-determination as an exercise of the sovereignty "that ultimately resides in the peoples," and contrasting it with the role of the state, which is to "provide the organisational structures through which sovereignty is held and exercised in international legal relations").

⁷¹ See, e.g., DOYLE & CARIÑO, *supra* note 42, at 29–39; Jael Makagon et al., *Balancing the Scales: Community Protocols and Extractive Industries – Lessons from Argentina, India, Kenya and Zimbabwe* (2016), https://za.boell.org/sites/default/files/balancing_the_scales.pdf; Viviane Weitzner, *Dealing Full Force: Lutsel K'e Dene First Nation's Experience Negotiating with Mining Companies* 33–34 (2006).

⁷² DOYLE & CARIÑO, *supra* note **Error! Bookmark not defined.**, at 28.

⁷³ *Id.*

⁷⁴ MAKAGON ET AL., *supra* note 71, at 5–6.

operationalizing their right to self-determination.⁷⁵ Protocols can also be initiated at other stages of the investment project—to help communities build capacity and organize, and to assist external actors to engage appropriately with the community—although they won't be able to ensure that the FPIC standard is complied with at the earliest stages of decision-making in such circumstances.⁷⁶

In organizing to engage in consultation and FPIC processes, some communities have also sought to democratize their representation. This has included developing processes for community members to elect community liaison committees and any representatives participating in negotiations with the host government and the investor.⁷⁷ In other instances, communities have used national and local legal frameworks to hold referenda regarding whether or not a proposed project should be allowed to proceed.⁷⁸ FPIC protocols also help communities to make decisions collectively, avoiding the potential of one individual overriding the interest of the collective.⁷⁹

These efforts to organize and democratize community decision-making related to resource investments can be complemented by best practice measures to ensure the views of different segments of a community are adequately represented during consultation and FPIC processes. While these different strategies for internal organization, deliberation, and preparation regarding incoming investment projects will most effectively be invoked at the initial stages of decision-making regarding the investment and before authorizations have been granted, they can also help with decision-making regarding the question of community consultation regarding, or participation in, investment contract negotiations.

III. NEGOTIATING INVESTMENT CONTRACTS

1. The negotiation process

Investor companies and host states enter into various types of contracts for natural resource projects, most of which are negotiated before project

⁷⁵ DOYLE & CARIÑO, *supra* note 42, at 4, 17, 18.

⁷⁶ MAKAGON ET AL., *supra* note 71, at 10.

⁷⁷ WEITZNER, *supra* note 71, at 7.

⁷⁸ Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior, and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570, 573 (2009). In Colombia such processes have been met with significant political pushback from national-level government actors and legal challenges from proponent companies. *See, e.g.*, Brief for Columbia Center on Sustainable Investment as Amicus Curiae Concerning the Tutela Hearing of Mansarovar Energy Colombia Ltd. v. Tribunal Administrativo del Meta (The Consulta Popular of Cumaral, Meta), (Dec. 1, 2017) (No. 6.298.958), (Colom.), <http://ccsi.columbia.edu/files/2018/10/Amicus-Cumaral-CCSI-Final-English.pdf>.

⁷⁹ Indigenous Representative, Intervention at Columbia Center on Sustainable Investment and Middlesex University Workshop (Apr. 25, 2019).

operations begin. In addition to concluding contracts, companies will typically conduct feasibility studies, carry out scoping of the project's potential environmental or social impacts, and seek to obtain finance and the necessary permits needed for the project under domestic law. Whether the investment contract is negotiated before or after these steps will depend in large part on the domestic law and the purpose of the contract.⁸⁰

Investment contract negotiations differ in terms of length, and the number of negotiation sessions and persons involved. In some cases, there can be multiple contracts between the same parties for the one project: for example, the investor company and the government might decide to negotiate an investment incentive contract (or memorandum of understanding), in order to obtain financing, followed by a more substantial concession or lease agreement, and various side agreements. (They also will often negotiate additional contracts with other actors—for example, lenders that provide financing to the project, suppliers of goods and services necessary for operations, and purchasers of crops produced/resources exploited.) In addition, parties may subsequently renegotiate or amend relevant contracts based on changes in circumstances. The time that a negotiation for any particular contract or set of contracts takes will depend on the complexity of the project, and the extent to which those negotiating in the room have the authority to sign off on commitments proposed, among other factors. In some cases—including for some investment contracts regulating complex extractive projects⁸¹—negotiations can take years; in other cases, negotiated agreements barely differ from investment contracts previously negotiated in the country with other companies, potentially indicating that they were the result of a much shorter negotiation period.

Negotiations themselves are unpredictable, as a government and company might have widely varying expectations for the contract. The style of negotiations can also vary depending on the priorities of those participating and their ability to control the negotiation process. For instance, negotiations can be “rents-based,” focusing on the “economic equilibrium of the contract,” including the maximization of profits and the minimization of costs; alternatively, parties can work towards an “interests-based” negotiation, where the negotiations seek to incorporate the interests (financial and non-financial) of each party or stakeholder.⁸²

⁸⁰ Sam Szoke-Burke & Kaitlin Y. Cordes, Colum. Ctr. on Sustainable Inv., *Governing Land Investments: Do Governments Have Legal Support Gaps?* 23–24 (2018), <http://ccsi.columbia.edu/files/2017/07/14-Columbia-CCSI-land-report-full-US-letter-mr-hyperlinks.pdf>.

⁸¹ KIENZLER ET AL., *supra* note 5, at 40 (“The agreement for the Simandou iron ore project in Guinea took a number of years, in part due to negotiations over the 650km railway and deep-sea port the project required and their availability for third-party access.”).

⁸² CARIN SMALLER ET AL., INT’L INST. FOR SUSTAINABLE DEV., *THE IISD GUIDE TO NEGOTIATING INVESTMENT CONTRACTS FOR FARMLAND AND WATER* 12 (2014),

2. Status quo: Inadequate consultation and FPIC processes

Governments and companies typically negotiate investment contracts without the knowledge, consent, or participation of communities that stand to be affected by the investment. Oftentimes, communities are unable to access applicable investment contracts even after they have been signed.⁸³ This approach does not satisfy requirements for meaningful consultation and, when relevant, FPIC, given the need for consultation and FPIC processes to be conducted iteratively, as discussed above. Such an approach also ignores the core objective of consultation and FPIC requirements, which is to avoid non-consensual infringements on community lands, territories, resources, self-governance, and cultural rights. Mere advance notification that there will be negotiations, and the provision of general information about the proposed investment, would be inadequate to safeguard community rights to participation and FPIC, unless opportunities also exist for the community to share its perspective and influence negotiations, and, where relevant, give or withhold their FPIC. Such an approach also fails to provide opportunity for communities to react to unforeseen changes in negotiations and increases the risk of violations of community land tenure rights, in addition to rights to participation and, where relevant, FPIC and self-determination. It also excludes the community from decision-making in relation to the lands and resources on which they may depend to maintain their livelihoods and ways of life.

A lack of community involvement in negotiations provokes additional concerns when the contract requires the investor company to subsequently negotiate a community development agreement with the community, or to deliver social benefits. The community's absence during the investment contract negotiations may undermine its ability to shape and influence any subsequent community-investor negotiations, given that the parameters of the investment itself have already been set. In addition, the absence of community input increases the risk that any local development requirements in the investment contract will not be appropriately adjusted to the rights or priorities of the community, and will instead be determined, and will be subject to trade-offs and compromise made, by stakeholders less familiar with the community's needs and with different agendas and priorities than the community.

3. Advantages for communities in participating in negotiations

Even where community-company agreements for revenue sharing, local employment creation, and other rent distribution is legally required⁸⁴

http://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water_1.pdf.

⁸³ Indigenous Representative & Civil Society Representative, Interventions at Columbia Center on Sustainable Investment and Middlesex University Workshop (Apr. 25, 2019).

⁸⁴ See, e.g., COLUM. CTR. ON SUSTAINABLE INV., REQUIREMENTS FOR COMMUNITY

or voluntarily pursued by companies in a separate agreement,⁸⁵ community members may find it advantageous to directly participate in investment contract negotiations. While this will be for the community to decide in each case, there are at least four potential advantages for community members in participating in investment contract negotiations.

First, the substance of the investment contract will affect the operation of the investment, and its impacts on local communities. Investment contracts cover issues pertinent to local communities; these include: social and environmental protections, which can be designed to protect relevant community interests and the resources on which communities rely; the concession's boundaries and size, which may have impacts on community members' use of land and resources; and company-reporting requirements on fiscal, environmental, and other issues, which provide an important accountability mechanism. Fiscal reporting can also help communities monitor the profitability of the project, which can be relevant to determining community entitlements pursuant to revenue sharing arrangements and can help to manage expectations regarding the project's viability more generally. Investment contracts may also contain clauses that can be enforceable *against* communities, such as company rights to exclusive possession and to engage security forces.⁸⁶

Investment contracts also often detail the specific business model that a project will take, which in turn can affect the amount of revenue that will be shared with the community or the number of local jobs created through a community development agreement, as well as more general impacts on local land use, sources of livelihood, and the environment. Take, for instance, a recent study of an oil palm and rubber tree concession in Liberia, which viewed the company's large-scale land concession model as "at a crossroads."⁸⁷ The report detailed two potential alternative scenarios to the company's intention to develop the concession without obtaining FPIC. The first scenario involved proceeding with the investment but respecting buffer zones, obtaining FPIC, and preserving forests; the second involved ceasing to expand the company's own plantations and instead transitioning

DEVELOPMENT IN MINING LAWS (2017), http://ccsi.columbia.edu/files/2014/09/Mining-Community-Development-Requirements-Summary-Table-CCSI-2017_February.pdf.

⁸⁵ See, e.g., BENJAMIN BOAKYE ET AL., CAN. INT'L RES. & DEV. INST., IMPLEMENTING THE AHAFO BENEFIT AGREEMENTS: SEEKING MEANINGFUL COMMUNITY PARTICIPATION AT NEWMONT'S AHAFO GOLD MINE IN GHANA (2018), <https://cirdi.ca/wp-content/uploads/2018/07/Ahafo.community.agreement.2018.pdf>.

⁸⁶ For examples of investor-state contract clauses concerning physical security or protection of property, see Annotation Category: Physical Security or Protection of Property, OPENLANDCONTRACTS.ORG, https://www.openlandcontracts.org/search/group?q=&annotation_category%5B%5D=Physical+security+or+protection+of+property (last visited May 23, 2020).

⁸⁷ BARBARA KUEPPER ET AL., CHAIN REACTION RESEARCH, SIME DARBY: LIBERIAN CROSSROADS (2016), <https://chainreactionresearch.files.wordpress.com/2014/02/sime-darby-161101-final.pdf>.

to an outgrower model and relying on small-scale farmers.⁸⁸ The potential variations in the company's business model for the project would also have very different impacts on local communities. (Even if the company did pursue a concession model, additional outgrower commitments could still be secured, which would potentially be of interest to the communities that stand to be affected.) Given that a project's business model is often outlined in an investment contract, local communities might therefore wish to participate in investment contract negotiations, advocate for specific models that best meet their needs, and warn against models that may be particularly disruptive to the community.

A second advantage for communities is that there may be opportunities to influence the negotiation of investment contracts to include greater enforceability mechanisms for any related community development agreement. Depending on the mode of consultation or consent, communities could: advocate for the inclusion of a clause in the investment contract that deems relevant company breaches of the community development agreement to constitute breaches of the investment contract; advocate for clauses that make the community a third-party beneficiary with enforceable rights; or, where the community is to be a party to the investment contract, potentially fold the substance of a community development agreement into the investment agreement.⁸⁹

Third, building community consultation or FPIC into investment contract negotiations can help to set the investor's and government's expectations regarding the degree to which the community intends to participate throughout the life of the project, in line with the on-going, iterative aspect of FPIC. This can encourage strict company compliance with the obligations included in the contract as well as providing a stronger basis for future requests from the community for meetings or the disclosure of project-related information. The increased exposure to company and government representatives may also serve to empower community members, enabling them to understand those representatives' motivations and perspectives and increasing their ability to influence decision-making.

Fourth, communities participating in negotiations will be better placed to set robust requirements for the sale or assignment of the investment to a new company. The business drivers for proponent companies change, and such companies may seek to assign or sell their rights and responsibilities for different reasons. Incoming corporate assignees may have radically different understandings and approaches to community engagement and participation, which can drastically undermine any pre-existing

⁸⁸ *Id.* at 1, 10–12.

⁸⁹ Further research would be needed to fully understand the potential benefits and drawbacks of having only one agreement that acts as both a tripartite investment contract and a community development agreement. There also may be limited practical benefits to deeming company breaches of a community agreement to constitute breaches of the investment contract, as host governments will often not take action to enforce such a breach.

arrangements aimed at fostering meaningful community participation.⁹⁰ Close community involvement in contract negotiations can make communities as well placed as possible for future assignments, including by demanding contractual requirements to consult and obtain the community's FPIC regarding any decision to assign.⁹¹ Communities benefiting from option three, discussed below, will also be best placed to set the incoming company's expectations, given their involvement as parties to the investment contract.

IV. MODES OF CONSULTATION AND FPIC FOR INVESTMENT CONTRACT NEGOTIATIONS

This section starts with a discussion of the importance of the community having influence over *how* it will participate in contract negotiations, before detailing factors that will affect how communities can participate and influence decision-making regarding investment contract negotiations in any particular case. It then explores three proposed alternative options for building consultation and FPIC into investment contract negotiations, analyzing the benefits and challenges that each option offers for fostering meaningful participation and creating opportunities for communities to influence the outcomes of the contract.

1. Ensuring that the community has a say

The decision as to which mode of consultation or consent is most appropriate will vary from case to case, and should correspond with the community's expressed preference. The government should thus consult with the community regarding how it should participate in investment contract negotiations, taking into account the community's internal organization and decision-making structures.⁹² Such an approach is especially important for Indigenous communities and ethnic minorities, whose right to self-determination extends to having the right to pursue

⁹⁰ Indigenous Representative, Intervention at Columbia Center on Sustainable Investment and Middlesex University Workshop (Apr. 25, 2019).

⁹¹ SAM SZOKE-BURKE ET AL., COLUM. CTR. ON SUSTAINABLE INV., COMMUNITY-INVESTOR NEGOTIATION GUIDE 2: NEGOTIATING CONTRACTS WITH INVESTORS 50–51 (2018), http://ccsi.columbia.edu/files/2018/09/51-namati_ccsi-guide-2-full-online-lr-compressed.pdf.

⁹² Indigenous Representative, Intervention at Columbia Center on Sustainable Investment and Middlesex University Workshop (Apr. 25, 2019) (“[W]e need to also show the governments how consultation should be. We would like the state to clearly ask us how we’d like to be consulted.”); Ute Dieckmann & Ben Begbie-Clench, *Chapter 19: Consultation, Participation and Representation*, in “SCRAPING THE POT”: SAN IN NAMIBIA TWO DECADES AFTER INDEPENDENCE 595, 597–98 (Ute Dieckmann et al. eds., 2014) (noting the discussion by the ILO’s Senior Specialist on Indigenous and Tribal Peoples’ Issues, Dr. Albert Barume, of the need for “[d]esigning with the participation of indigenous peoples the consultation and participation framework and mechanism . . . (consultation on consultation)”).

freely their economic, social, and cultural development without outside interference.⁹³ Consultation on the question of participation should also include opportunities for representatives of marginalized community segments to contribute their perspective.⁹⁴

Key to any mode of community participation will be the allocation of sufficient resources and time for the community to prepare itself to be able to decide on its preferred mode of participation, to adequately prepare and decide on key priorities within the community, and then to meaningfully participate. This may require support in developing relevant skills and knowledge—potentially on topics including contract negotiations, human rights, the type of project proposed, approaches to communal decision-making, representation and consultation with different segments of the community, and so on—as well as access to legal and other support, and access to sufficient information regarding the proposed project in a form that community members can understand.⁹⁵ Financing for such support and empowerment could come from proponent companies and other investment chain actors, who could be encouraged or required to make financial contributions into an independently administered basket fund for community support.⁹⁶

⁹³ UNDRIP, *supra* note 21, at arts. 3–4; General Recommendation 21, *supra* note 70, at 125, ¶ 4 (referring to the right to self-determination’s “internal aspect”).

⁹⁴ This will be especially important where customary processes and structures risk not being sufficiently inclusive and representative of different community segments. *See* OXFAM & LEGAL RES. CTR., *FREE, PRIOR AND INFORMED CONSENT IN THE EXTRACTIVE INDUSTRIES IN SOUTHERN AFRICA: AN ANALYSIS OF LEGISLATION AND THEIR IMPLEMENTATION IN MALAWI, MOZAMBIQUE, SOUTH AFRICA, ZIMBABWE, AND ZAMBIA* 87 (2018) (“[D]o the benefits of organising in terms of customary law outweigh its dangers? There is no simple answer to that question: while we intuitively believe that the power imbalances within customary communities can be solved through statutory regulation, it has been shown that an imposition of ‘foreign’ norms and standards on communities is not an effective way of changing the way people engage with each other. . . . The better approach, we argue, is to start with the values the communities hold and develop these to be brought in line with, for example, international human rights principles. The fluidness of customary law provides opportunities for such development to happen rapidly and bottom-up.”)

⁹⁵ *See, e.g.,* WEITZNER, *supra* note 71, at 1 (describing an example of peer-to-peer sharing where the document was prepared by the Lutsel K’e Dene First Nation as “a direct response to a request from the Association of Indigenous Village Leaders of Suriname (VIDS) for Canadian Indigenous People to provide capacity-building support to communities in West Suriname who will be affected by proposed open-pit, large-scale bauxite mining by BHP Billiton and Suralco, large-scale hydro-electric development by Suralco, and a nature reserve proposed by the Government of Suriname and the World Wildlife Fund.”).

⁹⁶ *See* Colum. Ctr. on Sustainable Inv., *Guide for Designing and Implementing a Basket Fund for Community Support in the Context of Investment Projects* (2020); Sam Szoke-Burke & Kaitlin Y. Cordes, Colum. Ctr. on Sustainable Inv., *Innovative Financing Solutions for Community Support in the Context of Land Investments* 17 (2019), <http://ccsi.columbia.edu/2019/03/22/innovative-financing-solutions-for-community-support-in-the-context-of-land-investments/>.

2. *Factors affecting increased community involvement in investment contract negotiations*

This subsection considers different factors that may affect how, or the degree to which, a community can be more closely involved in the negotiation of an investment contract.⁹⁷ The government should be strongly influenced by the community's stated preference for the mode of its inclusion in the investment contracting stage. In practice, however, the government may perceive its obligations to comply with human rights law requirements for consultation and FPIC to be in tension with its investment promotion objectives. This perception may persist despite research linking project failure and companies' significant loss of revenue to their failure to implement a sufficiently robust community engagement strategy.⁹⁸ Such perceptions often create pressures to attract investment, including by "streamlining" the processes needed for companies to be granted concessions and authorizations, even though the abandonment of transparency and other good governance practices can degrade the quality of investment.⁹⁹ Of course, the below factors do not provide a legal justification for failing to comply with requirements for consultation and FPIC, including at the investment contract negotiation stage. Nonetheless, it is useful to consider how the perspectives and incentives of both governments and companies can affect the feasibility of different modes of community consultation and FPIC being integrated into contract negotiations in practice.

One factor that can add to pressure for community inclusion is the applicable **domestic legal framework**, including laws, regulations, policies, court decisions, and any treaties or other instruments of settlement between the government and communities regarding claims to customary lands and resources. For instance, a tripartite investment contract for a Pooling and Sharing Joint Venture between the South African government, the government-owned Alexkor diamond mining company, and a corporate vehicle established and controlled by members of the Richtersveld community¹⁰⁰ was entered into pursuant to a deed of settlement between the

⁹⁷ These factors are also relevant to FPIC and meaningful consultation more generally, but are treated specifically with regard to the contract negotiation stage of an investment.

⁹⁸ ANNA LOCKE ET AL., ASSESSING THE COSTS OF TENURE RISKS TO AGRIBUSINESSES 10-12 (2019), <https://landportal.org/library/resources/qtr-report-2019/assessing-costs-tenure-risks-agribusinesses>.

⁹⁹ Frederick Lehmann & Ana Teresa Tavares-Lehmann, *Transparency and Inward Investment Incentives*, in THE OXFORD HANDBOOK OF ECONOMIC AND INSTITUTIONAL TRANSPARENCY 308-09 (Jens Forssbaeck & Lars Oxelheim eds., 2014).

¹⁰⁰ See Lorenzo Cotula, Int'l Inst. for Env't & Dev., *Investment Contracts and Sustainable Development: How to Make Contracts for Fairer and More Sustainable Natural Resource Investments* 28 Box 3 (2010); James Gathii & Ibironke T. Odumosu-Ayanu, *The Turn to Contractual Responsibility in the Global Extractive Industry*, 1 Bus. & Hum. Rts. J. 69, 91 (2016); Research Unit of the Parliament of the Republic of South Africa, *Alexkor: Richtersveld Community and the Pooling and Sharing Joint Venture (PSJV)* (2016),

government and the community following the community's successful court claims to ancestral lands and resources.¹⁰¹ In South Sudan, the Tindilo community's reported participation in investment contract negotiations, discussed in the next paragraph, also may have been slightly bolstered by recently enacted land legislation which set out, albeit in undetailed terms, that administration of the country's land shall be based on principles including participation and transparency.¹⁰²

The **political and economic context** may encourage or discourage greater community involvement in negotiations. For instance, state-level authorities from Southern Sudan reportedly faced some political pressure to meaningfully involve the Tindilo community in investment contract negotiations with Tree Farms Sudan Ltd., given that a recent peace agreement included a statement—which also happened to be the Sudan People's Liberation Movement's slogan—that the “land belongs to the community.”¹⁰³ Similarly, where the government *is* willing to increase community involvement but the investor company is reluctant, the government may be able to leverage existing conditions, such as favorable economic conditions for the project, tight timelines, or the fact that certain permits have not yet been granted, to encourage or mandate more participatory processes.¹⁰⁴ In addition, piloting efforts to increase community participation in negotiations may lead to expectations for improved community consultation in future negotiations. For instance, community participation in environmental agreement negotiations for the Ekati Diamond Mine “crystallized expectations about the degree of Aboriginal participation in environmental agreements for major Canadian projects,” making it “virtually impossible to return to a process of closed negotiations between governments and project proponents in this region.”¹⁰⁵

<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/161012alexkorr.pdf>.

¹⁰¹ *Alexkor Ltd. v. Richtersveld Community* 2004 (5) SA 460 (CC) at para. 62 (S. Afr.); *Richtersveld Community v. Alexkor Ltd.* 2003 (2) All SA 27 (Supreme Court of Appeal) at para. 18 (S. Afr.).

¹⁰² David D. Keng et al., Ctr. for Human Rights and Glob. Justice (CHRGJ), *Foreign Land Deals and Human Rights: Case Studies on Agricultural and Biofuel Investment* 51 (2010).

¹⁰³ *Id.* at 48 n.349, 51.

¹⁰⁴ See, e.g., Natasha Affolder, *Rethinking Environmental Contracting*, 21 J. ENVTL. L. & PRAC., 155, 164 (2010) (discussing the Canadian government's strategy for including Aboriginal communities in some contractual negotiations for the Ekati Diamond Mine). O'Faircheallaigh also notes that the national and territorial government parties were “determined that development of Ekati should not be prevented or substantially delayed.” CIARAN O'FAIRCHEALLAIGH, *The Ekati Diamond Mine, Northwest Territories, in NEGOTIATIONS IN THE INDIGENOUS WORLD: ABORIGINAL PEOPLE AND THE EXTRACTIVE INDUSTRY IN AUSTRALIA AND CANADA* 148, 153 (2016).

¹⁰⁵ Affolder, *supra* note 104, at 169. The environmental agreement was called for by Canada's Department of Indian Affairs and Northern Development and was intended to “cover all those issues which are not normally part of license terms and conditions. It will provide a visible record of the commitments of the company to carry out environmental

On the other hand, in contexts where corruption, rent-seeking, or patron-client relationships are prevalent, elite actors may view broad community participation as a threat to their ability to maintain such illicit dealings and relationships, and may seek to ensure that community members are excluded from the negotiation table.¹⁰⁶

Companies desiring to obtain social license to operate in the area may also be receptive to enabling the community to more meaningfully participate in decision-making and contract negotiations.¹⁰⁷ For instance, in the abovementioned Tree Farms Sudan example, a company representative stressed that the long-term nature of the project meant that the company needed “a local community who looks upon the project as their property, so they can guard and protect the plantation themselves.”¹⁰⁸ Additionally, or alternatively, the investor company may face pressures from its headquarters, parent company, financiers, or investors to engage in international best practices. One example is found in the participation by Aboriginal representatives in negotiations between the Government of the Northwest Territories of Canada and a diamond mining company regarding both an Environmental Agreement and a Socio-Economic Agreement for the Ekati Diamond Mine. A representative from the company noted that by including Aboriginal communities in the negotiations, the company sought to demonstrate innovations in community engagement to maintain its parent company’s interest in the project, which was at risk of waning because of a slow and costly permitting phase.¹⁰⁹

Having considered various factors that may affect the likelihood or feasibility of building improved modes of consultation or FPIC into investment contract negotiations, this article now explores three proposed options for doing so.

3. Option one: Periodic consultations during negotiations

An obvious option for increasing meaningful participation and providing for iterative consent processes is to make the negotiations subject to regular community consultations. Specifically, any relevant investor-

monitoring, monitoring programs, and to prevent and mitigate environmental impacts.” *Id.*, at 163.

¹⁰⁶ See, e.g., Sam Szoke-Burke & Eric Werker, Benefit Sharing through Project-Level Multi-Stakeholder Institutions: Community Benefit Agreements, Rent Sharing, and the Performance of New Institutions in the Ahafo Mine in Ghana (forthcoming) (describing how chiefs may be personally incentivized to form “spoiler coalitions” with local company representatives rather than allowing for meaningful participation by other community segments in investment-related decision-making).

¹⁰⁷ This is not to equate social license to operate, which is fundamentally based in obtaining community acquiescence to a project with FPIC, which is a formal legal standard that has more rigorous normative requirements.

¹⁰⁸ KENG ET AL., CTR. FOR HUMAN RIGHTS AND GLOB. JUSTICE, *supra* note 102, at 52.

¹⁰⁹ Affolder, *supra* note 104, at 164.

state negotiation process would need to include sufficient opportunity for consultations and to obtain consent as necessary, with such processes being based on an informed understanding of negotiations to date and being able to influence continued negotiations. Under this option, a government and company that plan to conduct negotiations in the absence of community representatives and civil society organizations would conduct negotiations in “rounds,” with corresponding consultations and consent processes taking place between each round, based on the latest draft version of the contract.¹¹⁰ The dates of negotiation rounds could be set at the outset; in addition, rules could be determined to enable (or require) either party to halt contract negotiations to report back to, and gather input from, the community, if negotiations touch on key issues identified by the community beforehand.

To maximize the degree to which communities are able to participate, such processes could involve local meetings that are culturally appropriate (i.e. implemented in accordance with local customs and practices) and that would allow for consultation with members of the community, their representatives, and local civil society groups. As for any consultation process, specific strategies may be needed to facilitate the meaningful participation of marginalized segments of the community, such as ensuring meetings are convened at accessible times, convening separate meetings for different segments, and providing for appropriate translation into local languages. Some investment projects will affect multiple communities who may not necessarily share the same culture, and the customs and perspectives of each should be appropriately factored into design of participatory processes.¹¹¹ Depending on the local context, a range of media and communications technologies could be used to share information and publicize meetings. Where appropriate, online contract repositories could also be used to publish draft versions of contracts,¹¹² along with resources that make it easier for affected persons and technical support providers of their own choosing to understand the implications of the draft contract and to formulate their subsequent submissions to the negotiating parties.

¹¹⁰ See also Cotula, *supra* note 70, at 169 (“Addressing these questions may require step-by-step contracting—whereby an initial investor-state contract outlines key specifics but keeps options open to enable FPIC and impact assessments; and a fuller investor-state contract is informed by the outcomes of those local processes including any community-investor agreements.”).

¹¹¹ Indigenous Representative, Intervention at Columbia Center on Sustainable Investment and Middlesex University workshop (Apr. 25, 2019).

¹¹² For example, OpenLandContracts.org hosts investment contracts between investors and host governments relating to agriculture and forestry investments; each contract is accompanied by plain language summaries of the contract’s key social, environmental, fiscal, and operational provisions. OPEN LAND CONTRACTS, <http://OpenLandContracts.org> (last visited May 23, 2020). ResourceContracts.org provides a similar platform for oil, gas and mining contracts. RESOURCECONTRACTS.ORG, <http://ResourceContracts.org> (last visited May 23, 2020).

Where there are credible concerns regarding the commercial sensitivity of information contained within the contract, consultations could be conducted with a lightly redacted version of the draft agreement. Alternatively, consultations could take place solely with community representatives and local civil society groups on a confidential basis, on the understanding that information of a general nature would then be the subject of more widespread consultations with community members. Another alternative in such circumstances would be to adopt consultative committees, which would include representatives from any traditional community decision-making structures as well as members of all segments of the community, including women, religious minorities, youth, workers, the elderly, people with disabilities, and so on, as well as representatives from civil society organizations that support them. Regardless of which modality is employed, all potential impacts on community rights would need to be accessibly disclosed before decision-making in order to constitute meaningful consultation; to meet the FPIC standard, community FPIC would need to be sought in relation to those impacts and any measures instituted to mitigate them.

Opportunities and challenges

The likelihood of governments and companies agreeing to community demands for this option may be bolstered by the fact that this option shares some features with existing consultation processes and provides avenues to protect commercially sensitive information. Negotiators may, however, be reluctant to halt negotiations when they have gained momentum; mechanisms would be needed to ensure that the breaks between negotiation rounds are sufficiently long, and could be periodically triggered, to ensure the community has ample opportunity to follow developments and offer its perspective. This option deepens consultations with communities beyond mere one-off *ex ante* consultations,¹¹³ by providing the community with regular updates on negotiations and, if carried out meaningfully, providing opportunities for community members to influence and shape negotiations. The lack of community or civil society presence at negotiations, however, renders community members reliant on other actors to keep them updated on the progress of negotiations. Absence from the negotiating table also limits the community's ability to shape the agenda of contract negotiations and to ensure that their concerns are adequately reflected in the structure and substance of the investment contract. Any restrictions on a

¹¹³ For an example of the shortcomings of solely conducting *ex ante* consultations in the extractive industries context, see KIENZLER ET AL., *supra* note 5, at 45 (“A civil society representative noted that the government engaged with them in advance of negotiations for a mining agreement. However, despite the CSO’s efforts to have local communities included in the actual negotiations, they were not consulted in any way during talks, nor did the government or the company come back after the deal was completed to inform the people what was agreed to.”).

community's access to the draft agreement would also significantly undermine its ability to participate meaningfully, given the importance of the wording of contract clauses.

Another challenge with this approach would be ensuring that breaks between negotiation rounds allowed a sufficient amount of time to enable the consultation to take place meaningfully. This may be hard to achieve when negotiations move quickly unless clear criteria for triggering a break in negotiations are set out. Yet negotiating timetables may not allow for adequate consultation with communities. Even when a community has a representative in the room, the involvement of different segments of the community may be limited because of time pressures faced by the company, as community elders found in the Ekati Diamond Mine negotiations.¹¹⁴ This highlights the even greater difficulties that non-represented communities may face. Requiring the negotiators to comply with any community requests to halt negotiations to enable them to consult and deliberate internally would be crucial.

Overall, this option holds some potential for improving consultation processes at the negotiation stage, by ensuring that communities are aware of developments and, potentially, that they can voice concerns and shape negotiations while they take place (though this will depend on the degree to which either party to the negotiations accurately reports back to the community and allows for community perspectives to influence negotiations). The option is less attractive as a means of ensuring FPIC: while communities may be more "informed," and while such processes would take place "prior" to the contract being finalized, the degree to which any consent is "free" may be undermined by the lack of opportunity to consider alternative options. Such an approach also risks the state proceeding to authorize projects in the absence of community consent, regardless of whether it has demonstrated that authorizing the project in the absence of such consent meets the necessity and proportionality tests mentioned under "*A proviso...*" above.

4. Option two: Community participation in negotiations, as a non-party

A second option for improved consultation and FPIC at the contract negotiation stage involves community representatives being present at, and directly participating in, investment contract negotiations, but not actually signing the agreement as a contractual party. The degree to which the community's representatives were able to participate would be influenced by their ability and willingness to follow and participate in discussions, and

¹¹⁴ WEITZNER, *supra* note 71, at 13 ("When the negotiation was happening, the Elders weren't informed until it was too late," one Elder said. "But even though when the negotiators came back to the Elders to give them information, it was already processed. They were informed, but then it was too late. And the government was already ahead with the mines.").

may also be affected by the attitudes of the government and company negotiators. Under such an arrangement, community representatives may need time and resources for skill building and preparation, as well as ongoing support, for example, from an adequately trained interpreter and, potentially, from legal advisors or civil society allies. Community representatives would also benefit from reserving the right to put negotiations on hold if more time is needed to consult with the broader community to obtain input on unexpected proposals or developments.

Representatives of communities and civil society organizations have already participated in negotiations with host governments and companies in ways similar to the approach outlined in this option. Examples include: the aforementioned reported inclusion of the Tindilo community in negotiations for an investment contract for the Tree Farms Sudan tree plantation and forestry conservation project in Southern Sudan (which had an annexed Community Support Program agreement between the community and the government);¹¹⁵ the participation by Aboriginal representatives in contractual negotiations for the Ekati Diamond Mine, also discussed above;¹¹⁶ and Afghanistan EITI's presence as an observer of investment contract negotiations for an extractive project.¹¹⁷

The exact mechanism for determining who will represent the community at negotiations will vary, but should result in the selection of community members who are truly representative of the broader community. While traditional councils or other customary decision-making structures may be appropriate, these will often need to be accompanied by representatives from relevant segments of the community to ensure all perspectives are represented.¹¹⁸ Also, as noted under option one, it will still be vital for community representatives to regularly report back to, and consult with, community members regarding the negotiations to ensure community members remain informed and can offer their opinions on new developments.

Despite not being a formal party to any investment contract negotiated under this option, communities can use their participation in negotiations to bolster the enforceability of related community-investor or community-government agreements, which can be referenced in, or annexed to, the investment contract between the investor company and the state. For instance, the Community Support Program agreement for the Tindilo

¹¹⁵ CHRJ, *supra* note 102, at 16.

¹¹⁶ WEITZNER, *supra* note 71, at 6; Affolder, *supra* note 104, at 156; O'FAIRCHEALLAIGH, *supra* note 104 at 153.

¹¹⁷ KIENZLER ET AL., *supra* note 5, at 45.

¹¹⁸ For instance, during the negotiations for the Ekati Diamond Mine, the Lutsel K'e Dene's council represented that community in negotiations, resulting in youth groups and Elders feeling that their views were not sufficiently represented. WEITZNER, *supra* note 71, at 12–13.

community is referenced in the investment contract for that project.¹¹⁹ Communities can also seek to include third-party beneficiary clauses in the investment contract,¹²⁰ though it is not yet common for such clauses to be created for the benefit of affected communities in investment contracts. Such clauses could identify the community as having enforceable rights under the investment contract—for instance, regarding company obligations to protect the environment or to avoid negative human rights impacts.¹²¹

Opportunities and challenges

This option would immediately increase the community's access to information regarding the negotiations and would provide another forum for community representatives to communicate and share their perspectives with the government and the investor. Being in the negotiation room also creates more opportunities for community representatives to influence negotiations—both substantively and, if negotiations are proceeding too quickly or if a break is needed to allow for further consultation with community members, procedurally.

The principal challenge of this option is that the community's ability to influence negotiations might be undermined by the fact that it is not a formal party to the agreement. There will be no guarantee that the community will be able to shape what is agreed upon, especially if the contracting parties begin to “backchannel” negotiations away from the community's scrutiny.

Nevertheless, this approach does create the potential for improved consultation, given that community representatives will be more informed

¹¹⁹ Land Title Agreement between the Ministry of Agriculture & Forestry, Central Equatoria State, and Tree Farms Sudan Ltd., art. 4.6 (2008), OPEN LAND CONTRACTS, <http://www.openlandcontracts.org/contract/ocds-591adf-2526678534/view#/pdf/page/2/annotation/24035>.

¹²⁰ In the agricultural context, *see, e.g.*, Memorandum of Understanding between the Sierra Leone Ministry of Agriculture, Forestry and Food Security, Ministry of Finance and Economic Development, Ministry of Trade and Industry, and Sierra Land Development Ltd., art. 6, appendix, arts. 10–11 (2013), OPEN LAND CONTRACTS, <http://www.openlandcontracts.org/contract/ocds-591adf-2317427356/view#> (granting third party beneficiary rights to the investor's shareholders, contractors and subcontractors with regard to a stabilization clause and a clause prohibiting nationalization and expropriation). In the extractive industries context, *see, e.g.*, Mineral Development Agreement between the Government of the Republic of Liberia, Western Cluster Limited, Sesa Goa Limited, Bloom Fountain Limited, and Elenilto Minerals & Mining LLC, art. 27.9 (August, 22, 2011), AUTHORITY MINISTRY OF FOREIGN AFFAIRS, <http://resourcecontracts.org/contract/ocds-591adf-6207349867/view#/pdf> (granting third party beneficiary rights to the investors' shareholders to invoke mediation and arbitration rights).

¹²¹ International Senior Lawyers Project & Columbia Center on Sustainable Investment, *Guide to Land Contracts: Forestry Projects* 8 (2017), <http://ccsi.columbia.edu/files/2017/01/GuidetoLandContracts-ForestryProjects.pdf>; UNIDROIT Working Group on Agricultural Land Investment Contracts, UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts: ALIC Zero Draft 32–33 (2019).

regarding the direction negotiations take, and will be well-placed to seek to influence negotiations as they take place. It also can contribute to ensuring communities are informed, as required by FPIC requirements. However, to the extent that communities risk having their views ignored during negotiations this option will fall short of being an adequate instantiation of meaningful consultation or FPIC.

5. Option three: Including the community as a party / Tripartite investment contracts

A third option for improved consultation and FPIC at the contract negotiation stage would involve the community being a party to the investment contract. This would make the contract a tripartite¹²² or “multi-actor”¹²³ investment contract, with the host government, the investor, and the local community (or communities or peoples) as parties. The contract would set out the government’s and investor company’s obligations with regard to the investment as it normally would in an investor-state contract. Depending on how the contract is structured, the community could obtain enforceable rights to hold either actor accountable if they were in breach of the contract.

Examples of other types of tripartite contracts between governments, companies, and affected communities exist, but only provide a limited insight into what tripartite investment contracts for resource investments would include and how they would operate in practice. Tripartite contracts also should not automatically be regarded as FPIC-compliant: their compliance will depend on the circumstances in which they are negotiated and whether the option to withhold consent is on the table, among other factors. One example of a tripartite agreement requirement comes from Mozambique, which requires mining companies to enter into tripartite memoranda of understanding with the government and families or communities who may face resettlement, with such memoranda detailing the amount of compensation the company will pay to those families or communities.¹²⁴ Tripartite agreements in the context of extractive industries have also been negotiated in Canada. For instance, a socio-economic agreement for the Diavik Diamonds Project was entered into between the investor company (Diavik Diamond Mines Inc., owned by Rio Tinto), the government of the Northwest Territories of Canada, and five aboriginal

¹²² BOUDREAUX & NEYMAN, *supra* note 66, at 37–38.

¹²³ Ibrinke T. Odumosu-Ayanu, Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework, 15 MELB. J. INT’L L. 473 (2014) [hereinafter Odumosu-Ayanu, MJIL]; Ibrinke T. Odumosu-Ayanu, Multi-Actor Contracts, Competing Goals and Regulation of Foreign Investment, 65 U.N.B.L.J. 269 (2014) [hereinafter Odumosu-Ayanu, UNBLJ]; UNIDROIT Working Group on Agricultural Land Investment Contracts, *supra* note 121, at 31–32.

¹²⁴ Mining Law No. 20/2014, art. 30 (Mozambique).

signatories,¹²⁵ some of whom were involved in the Ekati Diamond Mine negotiations. The agreement focuses on benefit sharing, including employment creation and environmental monitoring, and was used as the basis for five subsequent individual participation agreements with each aboriginal signatory.¹²⁶ A second example comes from the same Canadian territory; the Snap Lake environmental agreement has as its parties the Government of Canada, the Government of the Northwest Territories, the investor company (De Beers Canada Mining Inc.), and four aboriginal signatories.¹²⁷ The agreement focused on environmental management. While both agreements detail important processes and mechanisms ancillary to the project—the Diavik agreement sets up an advisory board and details the company’s benefit sharing commitments, while the Snap Lake agreement creates an environmental monitoring agency to be established by the aboriginal signatories—neither cover the full range of issues usually included in investment contracts. Finally, the Pooling and Sharing Joint Venture between the South African government, Alexkor (a government-owned company), and a corporate vehicle for the Richtersveld community is an example of a tripartite investment contract, albeit of a very unique character. The agreement reportedly sees the two corporate parties pooling their marine and land mining rights and having equal representation on the Joint Board, with Alexkor entitled to a 51% share in the joint venture, and the community’s company entitled to the remaining 49%.¹²⁸ This agreement has been noted to arise from unique factors, including a landmark court ruling in favor of the community that legally recognized the community’s customary ownership of land and mineral resources, and significant government assistance and cooperation.¹²⁹

Communities with prior experience with formal negotiations—such as Indigenous communities that have previously negotiated treaties with governments or community development agreements with companies—will be especially well placed to embark upon this mode of participation.¹³⁰ It

¹²⁵ Socio-Economic Monitoring Agreement between Diavik Diamond Mines Inc., The Government of the Northwest Territories, and Aboriginal Signatories and Parties (Oct. 2, 1999), OPEN COMMUNITY CONTRACTS, <https://opencommunitycontracts.org/contract/northwest-territories-and-aboriginal-peoples-diavik-diamond-mines-1999-socio-economic-monitoring-agreement/>.

¹²⁶ Richard Missens et al., *Aboriginal Partnerships in Canada: Focus on the Diavik Diamond Mine*, 1 J. ENTERPRISING COMMUNITIES: PEOPLE & PLACES GLOBAL ECON. 54, 56–57 (2007).

¹²⁷ Environmental Agreement between the Government of Canada, Government of the Northwest Territories, De Beers Canada Mining Inc., Dogrib Treaty 11 Council, Lutsel K’e Dene Band, Yellowknives Dene First Nation, and North Slave Métis Alliance (2004), <http://www.slema.ca/wp-content/uploads/2011/02/De-Beers-Final-Environmental-Agreement-PDF1.pdf>; See DOYLE & CARIÑO, *supra* note 42.

¹²⁸ COTULA, *supra* note 100, at 28 (Box 3).

¹²⁹ *Id.*

¹³⁰ See Affolder, *supra* note 104, at 164 (“Why did this agreement happen at Ekati?”)

has also been suggested that tripartite contracts may be more likely to work where there is a “special need for cooperation,” a manageable number of contractual parties, and an expectation of cooperation—and not strategic stalling or opposition—towards reaching an agreement.¹³¹ This final criterion should not, however, be regarded as fixed or binary. Community opposition, however vociferous, may often be a result of failures by governments and companies to respect and operationalize community rights to FPIC and meaningful participation in the first place. In such circumstances, opposition may be one of a very limited set of options available to the community.¹³²

Opportunities and challenges

Provided the project-affected community would have adequate time and access to sufficient resources, skill building, and technical support from lawyers, paralegals, and other support providers, this option would strengthen the community’s opportunity to be meaningfully consulted on, and to influence and potentially consent to, the exact parameters of the investment contract eventually agreed upon. Opportunities for communities to set the agenda of negotiations and exercise leverage over decision-making regarding the project’s design are generally rare.¹³³ This option provides a genuine opportunity to do so, and may lead to investment contracts that minimize the adverse impacts of, and potentially leverage the benefits of, the investment projects.¹³⁴ Close participation in negotiations can also help set expectations regarding the degree to which the community may wish to have a regular line of communication with the company and be involved in future decision-making regarding the project when community members’ rights may be affected—potentially including participation in the

Local Aboriginal groups were effective negotiators, with the legal and technical capacity to negotiate the agreements. One company official described the Aboriginal negotiators involved as “the best negotiators in the world” given their decades-long experience with land claims negotiations.”).

¹³¹ Odumosu-Ayanu, UNBLJ, *supra* note 123, at 304 (referring to Meinhard Doelle, *Regulating the Environment by Mediation and Contract Negotiation: A Case Study of the Dona Lake Agreement*, 2 J. ENVTL. L. & PRAC. 189, 212 (1992)).

¹³² Indigenous Representative, Intervention at Columbia Center on Sustainable Investment and Middlesex University Workshop (Apr. 25, 2019) (“[T]he executive is the one to oversee [the consultation process]. And they do this knowing that it will be done in bad faith. ... The State, acting in bad faith in 2002, said there was consultation [but] they had done it in a way that was totally illegal and unconstitutional. This is a vicious cycle. The state says these communities have been consulted, but the communities think they have been fooled. ... [In this case], communities opposed the mining activities and asked that the consultation be made via vote.”).

¹³³ Affolder, *supra* note 104, at 173–74.

¹³⁴ The presence of organized community members could also assist governments with low capacity who may not have the expertise or the political motivation to ensure that each aspect of the contract is sufficiently considered and adapted to the needs of the country and the local community.

design of resettlement and water management plans.

Tripartite contracts could also give the community rights to enforce the contract in the event of breaches of obligations by the government or company. It would mean the community would have enforceable contractual rights against both the government and the company once negotiations have been finalized, and that any “benefits” or local development projects that a company is required to undertake are established in the context of full awareness of the community’s stated priorities and its ability to enforce them. Linking clauses important for the community to the validity of permissions for carrying out the investment—which is of supreme importance to the investor—could give the community more leverage to enforce its entitlements and hold the company to its responsibilities (though inclusion of such clauses may be very difficult to achieve during negotiations). In addition, the prospect of an enforceable contract may also increase the likelihood that the company and government partners will properly engage with community proposals during negotiations, thereby bolstering the degree to which the community can participate and drive decision-making.

In both common law and civil law jurisdictions, the community, by being a party to the contract, may also be able to invoke a rich body of contract law protections that are aimed at addressing power imbalances between contracting parties. Common law protections include protections against unconscionable conduct, misrepresentation, undue influence, and duress;¹³⁵ civil law protections include the doctrine of cause, protections against unfair contract terms and defects of consent (including lesion), and requirements to provide information.¹³⁶ These protections echo FPIC requirements that consent and consultation be “free,” and may thus provide an additional means of enforcing FPIC and consultation rights. The availability of these protections could also create additional incentives for the government and company to comply with the FPIC standard during the contract negotiation stage.

This option will also face challenges, most of which might arise with options one and two as well. In many instances, the community will face power imbalances, which may only be partially mitigated, rather than alleviated, by skill building, empowerment, advice, sufficient time and resources to prepare, and the promise of contractual law protections. Companies may seek to “buy off” any community resistance to proposals¹³⁷ and procure authorization from individuals falsely purporting to represent

¹³⁵ Odumosu-Ayanu, MJIL, *supra* note 123, at 27; Gathii & Odumosu-Ayanu, *supra* note 100, at 71.

¹³⁶ Ejan Mackaay, The Civil Law of Contract, in ENCYCLOPEDIA OF LAW AND ECONOMICS 424 (Gerrit De Geest ed., 2nd ed. 2011); Hannes Rosler, Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-Level Private Law, 18 EUR. REV. PRIVATE L. 729, 736, 741 (2010).

¹³⁷ Affolder, *supra* note 104, at 173–74; WEITZNER, *supra* note 71, at 11.

the community.¹³⁸ This option would also require a degree of cooperation and inclusiveness afforded by the government that has so far proven to be rare.¹³⁹ Further, questions remain as to how the many host governments that already struggle to negotiate advantageous investment contracts¹⁴⁰ would manage with a third party in the room. In addition, community members participating in negotiations have reported many adverse impacts in doing so, including stress and consultation fatigue, as well as disputes within the community and with other communities regarding the amount and allocation of financial benefits.¹⁴¹ There also is no guarantee that communities empowered to participate in negotiations will be able to successfully negotiate agreements that meet community concerns.¹⁴² Despite these challenges, the prospect of tripartite investment contracts creates real possibilities for effectively building FPIC and consultation into investment contract negotiations.

V. CONCLUSION

Government obligations with regard to consultation and FPIC are designed to enable communities to exercise a greater degree of influence over decision-making regarding the use of their lands and resources, and can also ensure greater protection of other human rights of affected communities in the context of natural resource investments. Yet in practice, these standards are rarely carried out adequately, despite important innovations by communities and civil society allies. Investment contract negotiations are one stage of the investment process that is relatively unexplored, and where current consultation or FPIC processes conducted by governments and companies are almost always inadequate. Yet the importance of getting meaningful consultation and FPIC right at this stage should not be underestimated: the signing of an investment contract without meaningful consultation and consent will fundamentally limit the opportunities for communities to operationalize their rights to give or withhold FPIC and to meaningfully participate in decision making. It will also increase the risk of community grievances and conflict that can have disastrous consequences for investor companies, investment chain actors, and host governments wishing to attract responsible investment. This article has sought to highlight this deficiency and propose different options for how these standards could be met at the investment contract negotiation

¹³⁸ Indigenous Representative, Intervention at Columbia Center on Sustainable Investment and Middlesex University Workshop (Apr. 25, 2019).

¹³⁹ *Id.*

¹⁴⁰ SZOKE-BURKE & CORDES, *supra* note 80, at 26–31.

¹⁴¹ WEITZNER, *supra* note 71, at 16–18.

¹⁴² Researchers studying the Tindilo community’s involvement in negotiations noted that the resulting agreements were lopsided and written in “remarkably vague terms.” CHRGI, *supra* note 102, at 54, 56. Similarly, community members from Lutsel K’e Dene noted that the agreement negotiated “had some serious flaws.” WEITZNER, *supra* note 71, at 29.

stage. In doing so it has considered the dynamic nature of contract negotiations and the various challenges that may be encountered by communities seeking to be more closely involved in such a technical process. The options in this article remain relatively untested, and many questions deserve further attention. The options may not be relevant or of interest to communities who fundamentally and resolutely oppose a proposed investment, or who insist on negotiating solely with the government and not any private sector actor. The options may also be met with resistance from public and private sector actors, who may perceive a threat to their control over the existing status quo with regard to investment contract negotiations. In many other cases, however, the options discussed can provide stakeholders involved in natural resource investments with concrete ideas for strategies to improve practices with regard to investment contract negotiations; such options are intended to lead to improved communication and information sharing between stakeholders, greater influence and empowerment for communities, and ultimately to decision-making around investments that is compliant with human rights law and responsive to community needs and concerns.