LOCAL COMMUNITIES AND INTERNATIONAL INVESTMENT LAW†

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Abstract

This Article delves into the intricate relationship between local communities (LCs) and international investment law (IIL), highlighting the blurred distinctions between LCs and Indigenous Peoples (IPs). It explores various legal regimes potentially violated in this context and the consequent rights that can be invoked by different stakeholders. The Article further elucidates available remedies under both national courts and the Investor-State Dispute Settlement (ISDS) system, emphasizing the roles of third-party participation, amicus curiae, counterclaims, and investor jurisdictions. The latter parts of the Article focus on the importance of local participation, consultation, benefit-sharing, and multi-actor contracts as mechanisms to protect LC interests. It underscores the crucial roles played by states, investors, arbitral tribunals, and the international community in advancing LC protection. This Article serves as a foundation for the ongoing debate, emphasizing that a collective effort is essential to ensure justice and protection for LCs within the investment law framework.

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I. INTRODUCTION

Today, foreign direct investment regulations, including the rise of bilateral investment treaties (BITs), are in their golden era. Emerging as a relatively marginal issue throughout the 1960s and into the 1980s, they have become one of the most discussed and relevant topics in international law.[1] Concurrent with the rise of BITs is a growing number of cases.[2] Currently, just a few countries are on the periphery of investment law, as they may not be participating fully[3] or have

1. *See generally* U.N. Conference on Trade and Development [UNCTAD], *Investment Laws: A Widespread Tool for the Promotion and Regulation of Foreign Investment* (2016) https://investmentpolicy.unctad.org/publications/155/investment-laws-a-widespread-tool-for-the-promotion-and-regulation-of-foreign-investment.

2. According to the UNCTAD database, there are 2,833 BITs in total (2,222 in force) and 462 treaties with investment provisions (386 in force). *International Investment Agreements Navigator*, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements (last visited Apr. 15, 2024).

3. For instance, Brazil's new bilateral treaties on investment, labeled Cooperation and Investment Facilitation Agreements (CIFAs), offer an innovative model of International Investment Agreement (IIA) which does not contain investor-state dispute settlement (ISDS). *See* Geraldo Vidigal & Beatriz Stevens, *Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?*, 19 J. WORLD INV. & TRADE, 475, 475 (2018). Also, Poland is clearly skeptical regarding

withdrawn their participation altogether.[4] However, the majority of countries do participate and are thus impacted by a prominent aspect of international investment: Investor-State Dispute Settlement (ISDS). Several decisions from investment arbitral tribunals have contributed to extending the scope and interpretation of state obligations under the investment agreements.[5] Critics argue that this expansion is not consonant with the initial will of the states who, when signing a BIT, may not be aware of its broad and extensive interpretation.[6] As a result, these states may potentially treat the BIT as an unimportant or irrelevant treaty.[7]

This disagreement has contributed to the increased fragmentation of the international legal framework governing transnational investment activities.[8] Another repercussion is that investment law, which before had been rather exclusive in its application and marginal in its international law relevance, now influences a greater number of states' policies and public opinion.[9] Today, prominent cases attract national attention and discussion. This should not come as a surprise, as an arbitral award could oblige a state to pay a substantial amount of compensation. These days, awards for more than one billion U.S. dollars are not uncommon.[10] For

investment protection granted by BITs containing an ISDS system in its current form. *See* Marcin Orecki, *Bye-Bye BITs? Poland Reviews Its Investment Policy*, KLUWER ARB. BLOG (Jan. 31, 2017), http://arbitrationblog.kluwerarbitration.com/2017/01/31/bye-bye-bits-poland-reviews-investment-policy/.

4. Ecuador, Bolivia, South Africa, Indonesia, and India have withdrawn their BITs. *See, e.g.*, *Ecuador Denounces its Remaining 16 BITs and Publishes CAITISA Audit Report*, INV. TREATY NEWS (June 12, 2017), https://www.iisd.org/itn/en/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/.

5. *See Public Statement on the International Investment Regime*, BILATERALS.ORG 1–2 (Aug. 31, 2010), https://www.bilaterals.org/IMG/pdf/Public_Statement.pdf.

6. *See* Lauge N. Skovgaard Poulsen, Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries, and Bounded Rationality 181 (2011) (Ph.D. Dissertation, The London School of Economics and Political Science) (LSE Theses Online).

7. *See id.*

8. Michael Waibel, *Fragmentation in International Investment Law, in* STATE OF ARBITRATION: ESSAYS IN HONOUR OF PROFESSOR GEORGE BERMANN, 1–2 (Julie Bedard & Patrick W. Pearsall eds., 2022).

9. *See* Gus Van Harten & Anil Yilmaz Vastardis, *Special Issue: Critiques of Investment Arbitration Reform: An Introduction*, 24 J. WORLD INV. & TRADE 363, 363–64 (2023).

10. *See, e.g.,* Yukos Universal Ltd. (Isle of Man) v. Russia, Case No. AA 227, Final Award (Perm. Ct. Arb. 2014); Occidental Petroleum Corp. and Occidental Expl. and Prod. Co. v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 876 (Oct 5, 2012) (approximately $1.8 billion, reduced to $1 billion on annulment by Decision on Annulment of the Award, ¶ 586 (Nov. 2, 2015)); Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, ¶ 961 (Apr. 4, 2016) ($1,202,000,000); Unión Fenosa Gas, S.A. v. Egypt, ICSID Case No.

that reason, developments in investment law and related cases are often caught in the eye of a public debate cyclone.[11]

The extensive application of investment law has created problems. One of these problems, which is the focus of this Article, is the relationship between local communities (LCs) and international investment law (IIL). Without a doubt, foreign direct investment, especially with regard to extractive industries and sectors, can and does affect LCs.[12] This interaction may be positive, but as this Article describes, there are often many negative interactions between investors and LCs. As research has suggested, a disregard for LCs is not only evinced by international investment regimes (IIRs) but is a systemic problem in international law.[13] In recent years, we have seen several discussions at the national and global levels addressing the abuse of LCs and individual rights as a result of cross-border investment activities.[14]

This Article identifies the linkages between international investment law and the rights of LCs. Possible synergies between the two will be explored, as well as how these synergies could contribute to a more harmonized global legal and governance framework that supports sustainable development.[15] However, the Article also recognizes the breadth of this subject and the relatively scarce literature on this specific topic. For this reason, this Article by no means intends to present a complete and exhaustive picture. Instead, the Article hopes to establish a foundation for further debate.

States are the primary duty holders within their jurisdiction. They have clear obligations to protect their LCs and individuals under

ARB/14/4, Award, ¶ 13.8 (Aug. 31, 2018) ($2,013,071,000); Tethyan Copper Co. Pty Ltd. v. Pakistan, ICSID Case No. ARB/12/1, Award, ¶ 1858 (July 12, 2019) ($4,087,000,000).

11. *See, e.g.*, *Colombia está lista para disputa legal por el tesoro hundido del Galeón Señor San José*, EL TEIMPO (Feb. 23, 2024), https://www.eltiempo.com/colombia/otras-ciudades/search-armada-amenaza-juridica-que-enfrenta-colombia-por-tesoros-del-galeon-san-jose-857805.

12. *See generally* Nicolas M. Perrone, *The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?*, 7 TRANSNAT'L LEGAL THEORY 383 (2016).

13. *See generally* BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE (2003).

14. *See, e.g.*, SERGIO PUIG, AT THE MARGINS OF GLOBALIZATION: INDIGENOUS PEOPLES AND INTERNATIONAL ECONOMIC LAW (2021).

15. The most cited definition of sustainable development is as follows: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of ['] needs[,'] in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs." REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE 41 (1987), http://www.un-documents.net/our-common-future.pdf.

national and international law. Investment obligations, however, produce various incentives or repercussions for different stakeholders that can, in turn, conflict with LCs' rights. Stakeholders lack clarity about how these competing commitments should be addressed, which can lead to investment obligations being interpreted and applied in isolation. This can further fragment the international public legal system and contribute to uncertainty.

Tensions between the rights of LCs and investment obligations create a range of challenges for states. One far-reaching problem is restrictions on a host state's regulatory authority. For instance, restrictions can require the state to comply with environmental obligations to uphold the protection of the environment within their domestic systems.[16] Investors have taken proactive measures to compel states to comply with or advance their human rights and environmental obligations. For example, in China, some investors have advocated for policy reforms, corporate transparency, and accountability mechanisms to address issues such as labor rights violations, environmental degradation, and social injustices.[17]

Today, the whole system of investment law, especially ISDS, is under attack for favoring investors at the expense of state sovereignty.[18] These criticisms have led to various proposals that restructure existing norms to create a more legitimate and just system. The most promising and serious debate was put forth by Working Group III (WG3) within the U.N. Commission on International Trade Law (UNCITRAL).[19] WG3

16. *See* INT'L INST. FOR SUSTAINABLE DEV., INTERNATIONAL INVESTMENT AGREEMENTS, BUSINESS AND HUMAN RIGHTS: KEY ISSUES AND OPPORTUNITIES 8 (2008), https://www.iisd.org/system/files/publications/iia_business_human_rights.pdf.

17. Hinrich Voss, The Foreign Direct Investment Behaviour of Chinese Firms: Does the "New Institutional Theory" Approach Offer Explanatory Power?, 97–100 (June 2007) (Ph.D. dissertation, University of Leeds, Leeds University Business School, Centre for International Business Studies) (on file with author).

18. *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 235 (Cambridge Univ. Press, 2010) (noting that "[the effort to make new types of treaties] may result in the object of investment protection being so emasculated that the purpose of the treaty may become meaningless. The result is that the law will return to the same state of normlessness that prevailed prior to the making of investment treaties.").

19. The mandate of WG3 was described as:

> (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).

has noticed the issue of LCs' participation in ISDS and WG3 believes that allowing third-party participation, more broadly, in ISDS can ensure that important interests related to the environment, human rights, and investor obligations are considered.[20]

While WG3 recognizes that the current treatment of LCs under investment law is problematic, WG3 suggests several other structural reforms to improve ISDS.[21] Nevertheless, the issues experienced by LCs under the current investment regime cannot be ignored. Vulnerable populations experience injustice under the current system.[22] Without addressing this issue, the IIL system will continue to be perceived as unjust and solely investor-oriented. For these reasons, there should be a commitment among all actors (especially investors and states) to address this problem, as leaving it unresolved could jeopardize the system as a whole.

IIL grants special protections to foreign investors.[23] If covered by international treaties, foreign investors will therefore not only be protected by the national law of a host country, but they will also have the chance to invoke protections under international law. The reasoning behind such protections are: (i) that foreign investments may be easily targeted and expropriated for political reasons in the case of growing nationalist sentiments; and (ii) that to attract such investment, a

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U.N. Comm'n Int'l Trade Law [UNCITRAL], Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session, ¶ 6, U.N. Doc. A/CN.9/930/Rev.1 (2017) (modification in original). *See also* UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Note by the Secretariat (Sept. 18, 2017), ¶ 3, U.N. Doc. A/CN.9/WG.III/WP.142.

20. UNCITRAL, Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session, ¶ 31, U.N. Doc. A/CN.9/970 (2017).

21. Currently, the WG3 determines the most relevant issues to be: (a) Tribunals, ad hoc and standing multilateral mechanisms; (b) Multilateral advisory center; (c) Stand-alone review or appellate mechanisms; (d) Standing in the first instance and appeal in investment courts; (e) Arbitrators and adjudicators appointment methods and ethics; (f) ISDS tribunal members' selection, appointment and challenges; (g) Code of conduct; (h) Treaty Parties' involvement and control mechanisms for treaty interpretation; (i) Dispute prevention and mitigation; (j) Strengthening of dispute settlement mechanisms other than arbitration (ombudsman, mediation); (k) Exhaustion of local remedies; (l) Procedure to address frivolous claims, including summary dismissal; (m) Multiple proceedings, reflective loss and counterclaims by respondent States; (n) Cost management and related procedures; (o) Principles/guidelines on allocation of cost and security for cost; (p) Third-party funding and (q) Implementation of the reforms: a multilateral instrument on ISDS reform. *Id.* at ¶ f4.

22. *See generally* LADAN MEHRANVAR ET AL., COLUMBIA CTR. ON SUSTAINABLE INV., HOW THE INTERNATIONAL INVESTMENT LAW REGIME UNDERMINES ACCESS TO JUSTICE FOR INVESTMENT-AFFECTED STAKEHOLDERS (2024).

23. *See* Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, ¶ 57.

foreign investor may require extra guarantees from an inviting state so that its legal environment may not change drastically during the investment.[24]

Often, nationals have argued that foreigners should not be exempt from the national system. In case of national reforms, which may alter the economic system or rentability of conducting business, foreigners may be affected and, thus, foreigners should bear the costs as well.[25] A common rebuttal is that foreigners cannot vote so, since they are not politically represented, they should be shielded from the state's actions.[26] As many scholars have pointed out, "foreign investors invest large amounts of money in places where they have no representation in the local government."[27] For that reason, it is desirable not to leave foreigners entirely subject to the state's discretion, but instead to have an independent investment tribunal that has the power to review a host state's measures.[28] Also, tribunals recognize different legal standing between national and foreigners companies:

> Foreign investors covered by a BIT enjoy an additional level of protection: they can avail themselves of the same instruments open to local investors, and additionally[,] they can draw protection from the international law rights conferred by the treaty. The different treatment between foreign and domestic investors is a natural consequence of a BIT. However, this unequal treatment is not without justification: justice [does not] grant everyone the same, but *suum cuique tribuere*. Foreigners, who lack political rights, are more exposed than domestic investors to arbitrary actions of the host State and may thus, as a matter of legitimate policy, be granted a wider scope of protection.[29]

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24. *See* EL DERECHO INTERNACIONAL DE LAS INVERSIONES: DESAROLLO ACTUAL DENORMAS Y PRINCIPIOS 17–30 (Jose Manuel Alvarez Zarate & Maciej Zenkiewicz eds., 2021).

25. *See* DONALD R. SHEA, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY 3 (1955).

26. Perrone, *supra* note 12, at 384.

27. *Id. See also* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 493 (1923).

28. *See generally* Thomas W. Wälde, *Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Pro-Actively, the Equality of Arms*. 26 ARB. INT'L 3 (2010).

29. Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, ¶ 57.

However, this defense may not be completely credible. Many states depend heavily on foreign investments.[30] Consequently, foreign investors often have the possibility for dialogue, influence, or even coercion via their home states or directly.[31] Thus, a lack of representation—which, in theory, should justify an investor's peculiar and privileged position—may be questioned.[32]

Moreover, the foreign investor is not primarily responsible for LCs. As generally accepted, the primordial responsibility of a foreign investor is to pursue profit maximization on behalf of its shareholders. As Nicolas Perrone pointed out, "[f]oreign investors establish in host countries with expectations about the property that [do] not always have a strong connection with local values. For many local populations, decisions about the allocation and distribution of entitlements should factor in more than the 'maximum effective use of its economic resources.'"[33] This is especially important because an advantage for investors would likely mean a deterioration of rights for LCs. Perrone explains that, due to the *sui generis* nature of negotiations between a state and foreign investor, LCs are typically excluded from this process and consequently, LCs suffer from an information asymmetry.[34] LCs must learn the result of such negotiations, the applicable BIT, and even the rules of interpretation that an arbitrator would use for that particular agreement. Furthermore, LCs must do this on an investment-by-investment basis, further compounding the asymmetrical relationship between LCs vis-à-vis their state and foreign investors.[35]

Currently, there are many initiatives that seek to challenge this regime by putting more obligations on multinational corporations, which are often comprised of foreign investors.[36] These solutions require

30. MAVLUDA SATTOROVA, THE IMPACT OF INVESTMENT TREATY LAW ON HOST STATES: ENABLING GOOD GOVERNANCE? 18 (2018).

31. *See id.* at 111.

32. *See* Perrone, *supra* note 12, at 386 ("But the reality seems to be that host states have a high incentive to treat foreign investors as well as possible.").

33. *Id.* at 390.

34. *See* Cotula L. Perrone N.M., *Investors' International law and its Asymmetries: The Case of Local Communities*, *in* INVESTORS' INT'L LAW 71, 82–87 (Jean Ho & Mavluda Sattorova eds., 2021).

35. Perrone, *supra* note 12, at 395.

36. *See, e.g.*, The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG), established under the resolution A/HRC/26/9. OEIGWG works since 2015 and at its 9th session (2023) presented updated draft of legally binding instrument. *Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UNITED NATIONS HUM. RTS. COUNCIL, https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc (last accessed Feb. 20, 2024).

multinational corporations to look beyond pure profitability and consider other aspects, such as human rights, environmental rights, and social rights, among others.[37]

In a perfect world, such discussion would be unnecessary. The state is fully responsible for its citizens, which includes LCs. So, the state is the primary duty holder in the protection of rights, especially human rights. Therefore, if a state is properly protecting the rights of its citizens, there is no need for any subsidiary responsibility to be imposed upon an investor. Unfortunately, the reality is far from that idealized scenario. Many times, state officials, for the sake of the investment, may turn a blind eye to violations of individual rights.[38] States may fail to protect their citizens from the adverse effects of an investment for various reasons. States may not want to, may be unable to, or may not know how to do so.[39] In those scenarios, an LC may not receive protection from the state. In more severe cases, an LC may face opposition from the state because the state has chosen to side with an investor.[40] In such situations, IIL offers no answers nor protections for LCs.

Regarding the latter situation, international law has, however, developed some incipient responses. While limited, there are some developments in holding companies accountable, particularly criminally prosecuting these companies for human rights violations.[41] However, the currently available solutions, described *infra* Part IV, are merely ad hoc responses to the unique circumstances of a specific case. Instead, what would be desirable is a systemic change, where recourse to such abuses would be predefined. Without systemic changes, states may perpetually find themselves with no satisfactory solution. On the one hand, when a state wants to actively protect LCs against the activities of investors, the state may face accusations of interfering with investment protection. On the other hand, by doing nothing, the state avoids a potential violation of investment law. Nevertheless, such a prioritization

37. *See* Maciej Zenkiewicz, *Human Rights Violations by Multinational Corporations and UN Initiatives*, 12 REV. INT'L L. & POL. 121, 123–126 (2016).

38. *See generally* Domitille Baizeau & Tessa Hayes, *The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte*, *in* INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 225 (Andrea Menaker ed., ICCA Congress Series No. 19, 2017).

39. Steven R. Ratner, *Corporations And Human Rights: A Theory Of Legal Responsibility*, 111 YALE L. J. 443, 543 (2001).

40. *See, e.g.*, Valentina Vadi, *Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules*, 25 J. INT'L ECON. L. 522 (2022).

41. *See* PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW: JURISDICTIONAL ISSUES: INTERNATIONAL COLLOQUIUM SECTION 4, BASEL, 21–23 JUNE 2018, 121 (Sabine Glass & Sylwia Broniszewska-Emdin eds., 2018).

of investment law may violate the state's domestic obligations toward LCs, or even their international obligations regarding Indigenous Peoples (IPs) or human rights on the international plane.

Abuses of LCs' rights appear in many sectors and under various circumstances. However, they commonly occur in: extractive sectors, especially in remote, less developed parts of the world (i.e., where minerals are located); as well as less transparent states and those with weaker democratic institutions, because the more autocratic and opaque a system is, the more likely such violations are to occur.[42]

Extractive industries must base their operations where natural resources are located, which is often very close to remote, Indigenous areas.[43] Even if such investments contribute to a state's development,[44] communities that live near the extractive site suffer most of the negative consequences. These consequences can include environmental pollution and destruction of native land, and thus, the activity of investors may irreparably change or even destroy the lives of those vulnerable communities.[45] Other authors bring attention to the plight of LCs in the extractive industry context because it is reminiscent of colonialism.[46] Outside of exploiting natural resources for the investor's gain, the LCs could experience "the cession of large tracts of land under enormously unequal and highly contested concession contracts and intense corruption of government officials, leading to distrust of both government actors and industry."[47] These situations further strain the imbalanced relationships between LCs, investors, and host states. Ultimately, as Ibironke Odumosu-Ayanu notes, "[t]he unrest and poverty in many resource-rich areas of the Third World is also a major impetus for reconsidering the legal mechanisms for engaging with local

42. Robin Luckham, Ann Marie Goetz & Mary Kaldor, *Democratic Institutions and Politics in Contexts of Inequality, Poverty, and Conflict* 10–13 (IDS, Working Paper No. 104, 2000). *See also* Youngsoo Yu, *Do Democratic Institutions Reduce Human Rights Violations or Just Prevent More Violations than Current Levels? An Exogenous Explanation of Human Rights Improvements in Democracies*, 14 KOREAN J. INT'L STUD. 415–446 (2016).

43. *See, e.g.*, Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶ IV.C (2017) [hereinafter Bear Creek v. Peru, Award].

44. OECD, FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT 3 (2002).

45. *See* Kyla Tienhaara, *What You Don't Know Can Hurt You: Investor-State Disputes and The Protection of the Environment in Developing Countries*, 6 GLOB. ENV'T POL. 4, 73–100 (2006).

46. *See generally* Ibironke T. Odumosu-Ayanu, *Governments, Investors and Local Communities Analysis of A Multi-Actor Investment Contract Framework*, 15 MELB. J. INT'L L. 473 (2014); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (Cambridge Univ. Press 2005).

47. Odumosu-Ayanu, *supra* note 46, at 479.

communities."[48] This has led LCs, their representatives, and independent scholars worldwide to advocate for LCs' participation in the economic decisions that impact them.[49]

The need to address the participation of LCs is not just a matter of justice or goodwill. Because of the current backlash, investors will essentially be digging their own graves if they continue to abuse their powers or exacerbate disparities. For the system to prosper and continue, rights and obligations must be rebalanced between *all* the actors, whether they are parties to or indirectly affected by the treaty. This is *sine qua non* for this system to survive. If the system fails to address this concern, states may withdraw from the system entirely. As Perrone explains, "[i]nvestment law scholarship readily accepts that an inability to participate in the political process leaves a group's interests undefended, but ironically hesitates to apply this logic to participation by local populations."[50] The continuation of the status quo, whereby LCs are denied standing and protections under IIL, may be questionable today, but might become unacceptable tomorrow.

As this introduction clarifies, the current IIR functions mainly as an asymmetric relationship between the state and investor,[51] but such a bipolar interpretation of the IIR leaves important actors outside of potential discourse. The IIR facilitates foreign investment decisions, but at the high cost of limiting local participation.[52] LCs have been absent, silent, or invisible actors in the IIR.[53] Moreover, the ramifications of such investments may only be felt once the investment is in progress. This highlights the need to weigh the potential rights of a foreign investor against the prospective negative impacts upon the rights of LCs.[54] The consequence of excluding LCs from the IIR is pronounced.

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48. *See* Odumosu-Ayanu, *supra* note 46, at 478–79.

49. *See* HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT: PUBLIC PARTICIPATION IN THE SUSTAINABLE DEVELOPMENT OF MINING AND ENERGY RESOURCES 123–54 (Donald M. Zillman et al. eds., 2002).

50. Perrone, *supra* note 12, at 391.

51. *See* George K. Foster, *Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties*. 17 LEWIS & CLARK L. REV. 361, 361 (2013).

52. Perrone, *supra* note 12, at 388.

53. Nicolas M. Perrone, *The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime*, 113 AJIL UNBOUND, 16, 16 (2019) ("Essentially, the international investment regime treats local communities as an absent actor. . . . What the international investment regime does in a quiet-but effective-manner is to render invisible these local entitlements and community values. This contrasts with an *inclusive*, relational approach to foreign investment governance.") (emphasis in original).

54. *See* Perrone, *supra* note 12, at 388–89.

With no voice and no advocate, the main actors (states and investors) may shift the costs and risks of the investments on those unheard communities.[55] As silent or invisible actors, LCs look to protect their rights not just under the IIR, but wherever such protection may be available. For that reason, this Article refers not only to remedies under the IIR but to all possible remedies for LCs in case their rights are allegedly violated by a foreign investor.

If the system does not evolve to take these unheard voices into account, more and more states may no longer wait for reform and will instead withdraw from the IIR altogether.[56] Thus, even if it may be advantageous for investors to ignore LCs' interests in the short term, in the long term, this is equivalent to sawing off the proverbial branch that investors are sitting upon. The status quo has received severe criticism, which gives further ammunition to those who question its very existence at all.[57] This Article does not aspire to present the full scope and all possible solutions for this problem. Instead, this Article introduces the complex landscape and will attempt to establish and push forward the debate.

This Article proceeds as follows. Part II examines the legal terms of LCs and IPs, describing attempts to define these terms and presenting the relationship between them. Part III presents a constellation of parties that may invoke a violation of rights and discusses the substance of the rights implicated. Part IV, following the discussion in Part II, explores the diverse array of remedies available to address the challenges faced by LCs in the context of international investment disputes. Beginning with an examination of remedies accessible through national courts and the ISDS, this part delves into mechanisms such as third-party participation, amicus curiae submissions, and counterclaims. Additionally, this part considers the importance of local participation and consultation, the necessity for benefit-sharing arrangements, and the potential efficacy of multi-actor contracts in promoting LC protection. Subsequently, Part V assesses various options for advancing LC protection, including legislative measures at the national level, proactive treaty drafting by states, engagement by investors, treaty interpretation by arbitral tribunals, and collective action by the international community. Part VI offers a brief

55. *See* Perrone, *supra* note 53, at 16–17.

56. Or simply by withdrawing from ICSID, denouncing its BITs web or questioning IIR under its legal system, like Constitutional Court in Colombia in Case No. C-252.

57. See Maria Laura Marceddu & Pietro Ortolani, *What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments* 31 EJIL 405, 407 (2020); Sergio Puig & Gregory C. Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AJIL 361, 408 (2018).

conclusion. Through these discussions, this Article offers a nuanced understanding of the complexities surrounding LCs' rights in the investment context and stimulates further dialogue on potential solutions to enhance LCs' protection.

II. The Ambivalence Between Local Communities and Indigenous Peoples

Before moving forward, the definitions of and relationship between LC and IP should be understood. In the literature on the subject, scholars use varying terminology. The most commonly used terms are "local communities," "Indigenous communities," "Indigenous people," or "aboriginal people."[58] These terms may be divided into two groups. First, more generally, LCs, and second, more specifically, those defined by various international treaties more narrowly than LCs (i.e., IPs and their possible permutations). Putting aside the interesting development on the status of IPs,[59] today, international law has "finally recognized that Indigenous peoples are bearers of rights both as individuals and as communities."[60]

International law increasingly refers to IPs in international instruments, such as the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169)[61] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[62] Also, the problems facing IPs appear on the agenda of many international organizations, leading to the creation of the United Nations Permanent Forum for Indigenous Issues (UNPFII).[63] UNPFII recognizes that IPs are a

58. *See* Katja Göcke, *Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level*, 5 Goetthingen J. Int'l L. 87, 124 (2013). *See also* Sarah Sargent, *Transnational Networks and United Nations Human Rights Structural Change: The Future of Indigenous and Minority Rights*, 16 Int'l J. Hum. Rts. 123, 123–28 (2012).

59. Regarding history and development of IP, see in general: Alexandra Xanthaki, Indigenous Rights and United Nations Standards (2007); Mattias Åhrén, Indigenous Peoples' Status in the International Legal System (2016); Puig, *supra* note 14.

60. Valentina Vadi, *The Protection of Indigenous Cultural Heritage in International Investment Law and Arbitration, in* The Inherent Rights of Indigenous Peoples in International Law 197, 205 (Antonietta Di Blasé & Valentina Vadi eds., 2020).

61. Int'l Labor Org. [ILO], International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 ILM 1382.

62. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, (Sep. 13, 2007) [hereinafter UNDRIP].

63. The Permanent Forum is an advisory body to the Economic and Social Council established by resolution 2000/22 on 28 July 2000. The Forum has the mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and

potentially vulnerable group that needs extra or higher protections under international law.[64]

Article 1(b) of ILO Convention No. 169 defines IPs as follows:

> [P]eoples in independent countries who are regarded as Indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[65]

Taking into account the diversity of IPs within the U.N. system, an official definition of "Indigenous" has not been adopted.[66] Instead, the U.N. system outlines some features of IPs, such as: self-identification of IPs at the individual level and accepted as members by the LC; historical continuity from pre-colonial and/or pre-settler societies; strong links to territories and their surrounding natural resources; distinct social, economic, or political systems; distinct language, culture, and beliefs; forming non-dominant groups of society; and resolving to

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human rights. *See United Nations Permanent Forum on Indigenous Issues (UNPFII)*, U.N. DEPT. ECON. & SOC. AFFS., https://www.un.org/development/desa/indigenouspeoples/about-us/permanent-forum-on-indigenous-issues.html (last visited Mar. 22, 2024).

64. *See* THE WORLD BANK INSPECTION PANEL, INDIGENOUS PEOPLES 1, 17 (2016).

65. ILO, *supra* note 61, art. 1b.

66. The Convention on Biological Diversity observed that

> In the thirty-year history of Indigenous issues at the United Nations, and the longer history in the ILO on this question, considerable thinking and debate have been devoted to the question of definition of "Indigenous peoples," but no such definition has ever been adopted by any UN-system body. One of the most cited descriptions of the concept of the Indigenous was given by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his famous Study on the Problem of Discrimination against Indigenous Populations. Significant discussions on the subject have been held within the context of the preparation of a Draft Declaration on the Rights of Indigenous Peoples and by the Working Group on Indigenous Populations since 1982. An understanding of the concept of "Indigenous and tribal peoples" is contained in article 1 of the 1989 Convention concerning Indigenous and Tribal Peoples in Independent Countries, No. 169, adopted by the International Labour Organization.

See Convention on Biological Diversity, Compilation of Views Received on the Term "Indigenous Peoples and Local Communities," ¶ 1, U.N. Doc.UNEP/CBD/WG8J/8/INF/10/Add.1 (Sep. 17, 2013). *See also*; Jose R. Martinez Cobo (Special Rapporteur of the Sub-Comm'n on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1982/2/Add.6 (June 20, 1982) (descriptive definition of Indigenous people).

maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.[67]

Under international law, it is therefore well established that IPs enjoy additional protections. These special protections refer mainly to human rights, where cultural entitlements are of particular importance.[68] The main reason for the special protection of IPs is to safeguard their unique heritage, which consists of elements, including personal identities, life values, resilience, land, and their way of using it.[69] IPs' cultural traditions are inseparable from their lands, territories, and natural resources as "the safeguarding of Indigenous cultural heritage is indissolubly tied to the ancestral land and human rights of Indigenous peoples."[70]

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[71] although not binding, has stipulations that reflect, or may soon reflect, customary international law and/or general principles of law.[72] The UNDRIP mainly focuses on cultural rights. It finds that these rights are closely related to the lands that IPs have traditionally owned, occupied, or otherwise used and may be perceived as a source of spiritual and cultural identity, which are explicitly protected by UNDRIP.[73] Hence, because those rights should be treated and protected as a whole, "Indigenous culture often cannot be preserved in locations outside traditionally Indigenous territories."[74]

Using the term IP to address the problem of "absent" communities in IIL has some advantages. First, it is immediately clear which group is being referred to, so arbitral tribunals can rely on jurisprudence

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67. *See* U.N. PERMANENT F. ON INDIGENOUS ISSUES, Indigenous Peoples, INDIGENOUS VOICES FACT SHEET, https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf. (last visited Apr. 3, 2023).

68. *See* Vadi, *supra* note 40, at 206.

69. Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT'L L., 121, 121 (2011).

70. *See* Vadi, *supra* note 40, at 206.

71. Regarding UNDRIP and its importance for the protection of IP heritage, *See* Vadi, *supra* note 40, at 207–09.

72. As it was noted by the Commission on the Rights of Indigenous Peoples: "UNDRIP as a whole cannot yet be considered a statement of existing customary international law. However, it includes several key provisions which correspond to existing state obligations under customary international law."; *see* Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, 58 INT'L AND COMPAR. L. Q., 957, 983 (2009).

73. *See* UNDRIP, *supra* note 62, arts. 8, 11–13. *See also* Siefried Wiessner, *Indigenous Self-Determination, Culture and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples, in* INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION 31 (Elvira Pulitano ed., 2012).

74. *See* Vadi, *supra* note 40, at 208.

involving IPs. Second, because of the special treatment and protection of IPs under international and national law, there is a normative basis for extra obligations in protecting that group.

Conversely, using IPs has its disadvantages. First, utilizing the phrase IP will limit protections only to this defined group, and this is problematic given the uncertainty as to whether to classify a particular LC as an IP or not.[75] As a result, some LCs might be excluded from protection if they are not recognized as an IP under international law. Whether a population qualifies as Indigenous is determined by internationally recognized criteria, established by the ILO Convention No. 169 adopted in 1989[76] and other bodies.[77] These criteria typically include self-identification, ancestral connections to land, distinct cultural practices, and recognition by states or communities.[78] Indigenous status involves self-identification by the community and recognition by relevant authorities, including national governments, international organizations, and legal bodies.[79] However, there is a concern that limiting protections only to populations classified as IPs may exclude other LCs who face similar challenges but do not meet the criteria for Indigenous status under international law. For this reason, it is potentially dangerous only to use rules intended for IPs as bearers of rights. It may be easier, as their status under international law is much stronger than that of LCs, but it risks restraining these protections to IPs only.

IP is a legal category that is well—but not fully—defined. Because of this ambiguity, it would be undesirable to ask investment tribunals to decide if an LC classifies as an IP or not. In general, arbitral tribunals are not the best platform to resolve such issues. Under IIL, it would be

75. For example, in Colombia, to advance in the protection and guarantee of the rights of victims belonging to ethnic groups, the category of IPs is an independent category (Decree Law 4633 of 2011). *See* REPÚBLICA DE COLOMBIA MINISTERIO DEL INTERIOR, ENFOQUE DIFERENCIAL PARA PUEBLOS Y COMUNIDADES INDÍGENAS VÍCTIMAS 11 (2017). Also, it provides for a specific category for the Roma or Gypsy peoples (4634 of 2011) and other for the Black, Afro-Colombian and Afro-Colombian peoples and communities (4635 of 2011 Black, Afro-Colombian, Raizal and Palenquero communities). *See id* at 11. These norms constitute the regulatory framework for the prevention, protection, assistance, care, attention, comprehensive reparation and restitution of the territorial rights of ethnic peoples and communities. *See id.*

76. ILO, Indigenous and Tribal Peoples Convention, 1989 (No. 169), 72 I.L.O. (1989).

77. G.A. Res. 61/295, United Nations General Assembly, Declaration on the Rights of Indigenous Peoples, art. 1 (Sept. 13, 2007).

78. ILO, Indigenous and Tribal Peoples Convention, 1989 (No. 169), 72 I.L.O. (1989), art. 1.2.

79. 5 U.N. PERMANENT FORUM ON INDIGENOUS ISSUES, STATE OF THE WORLD'S INDIGENOUS PEOPLES: RIGHTS TO LANDS, TERRITORIES AND RESOURCES 2 (2021).

dangerous to develop protections for LCs that are constrained to IPs only, as it would exclude many vulnerable communities that may be equally affected by the consequences of foreign investment.[80]

Turning now to the term LC, it is worth noticing that such a term is present on the national[81] and the international plane. LC appears in various international law treaties,[82] and the importance of the relation between both terms (IP and LC) has already been addressed in international law.[83] LC appears in environmental law,[84] such as in the Convention

80. *See* Anne Perrault, Kirk Herbertson & Owen J. Lynch, *Partnerships for Success in Protected Areas: The Public Interest and Local Community Rights to Prior Informed Consent (PIC)*, 19 GEO. INT'L ENV'T L. REV. 475, 519 (2007) ("A major challenge is that enforcement of local participation "standards" is usually difficult. Mechanisms to monitor and enforce community rights are rarely provided. Finally, in most instances, guidelines reference only IPs, leaving out protection of many other local communities, including traditional and tribal ones and long-established migrant groups.").

81. *See* Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U.L. REV., 1413, 1414–15 (2017).

82. The system created by the Convention on Biological Diversity and its following protocols (e.g. Nagoya protocol) use both terms inseparately: Indigenous and local communities. *See* The Convention on Biological Diversity, art. 8, June 5, 1992, 1760 U.N.T.S. 69 ("(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices"). *See also The Convention on Biological Diversity and its Working Group on Article 8(j)*, INT'L INST. FOR ENV'T AND DEV., https://biocultural.iied.org/convention-biological-diversity-and-its-working-group-article-8-j (last visited Mar. 19, 2024); *Indigenous Peoples and Local Communities Portal*, WORLD INTELL. PROP. ORG. https://www.wipo.int/tk/en/Indigenous/ (last visited Mar. 19, 2023) (explaining how IP and LC are used by the WIPO system).

83. *See* Nicole Schabus, *Article 8(j): Indigenous and Local Community Participation*, 43 ENV'T POL'Y & L. 288, 289 (2013) (describing this question as it occurred during the meeting of the Working Group on Article 8(j) of the Convention on Biological Diversity, taking place from October 7–11, 2013, the Working Group stated "In terms of the CBD debate about the separation of the terms 'Indigenous Peoples' and 'local communities', an important indicator is that both Indigenous and local community representatives agree that the terms should be separated. Many argue that such separation would increase clarity and align the CBD concepts with the evolution of international law relating to Indigenous Peoples").

84. *See Lee P.* Breckenridge, *Protection of Biological Cultural Diversity: Emerging Recognition of Local Community Rights in Ecosystems under International Environmental Law*, 59 TENN. L. REV. 735, 769 (1992) ("Agenda 21 links the opportunity for broad public participation by both individuals and groups directly to attainment of the international goal of sustainable development: One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making [. . .] This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work.").

on International Trade in Endangered Species of Wild Fauna and Flora.[85] This further suggests that LC voices, as is the case with investment law today, were previously absent from other areas of international law.[86]

However, LC, like IP, is an ambiguous term. There is no one universally agreed definition, but the United Nations Environment Programme (UNEP) Working Group observes some key elements relevant for LC identification:

> [LC] can refer to a group of people which have a legal personality and collective legal rights and this is considered a community in the strict sense. However, many States refuse to accept collective rights, in general and some except is only in relation to the right of self-determination. Alternatively, a "local community" can refer to a group of individuals with shared interests (but not collective rights) represented by an non-governmental organization (NGO). Wherever collective rights exist, the collective should be given legal recognition. For example Indigenous peoples who are often denied their right to collective identity are forced to act through NGOs, which are social rather than community organizations. The issue of cultural identity remains multidimensional and complex issue. Self-identification is the most appropriate way to establish who may be Indigenous and local and/or traditional communities. In international law, it is clear that a "definition" is not a pre-requisite for protection and that groups such as minorities have been guaranteed rights under international law without establishing a definition.[87]

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85. *See* Rosie Cooney & Max Abensperg-Traun, *Raising Local Community Voices: Cites, Livelihoods and Sustainable Use*, 22 REV. EUR. COMPAR. & INT'L ENV'T L. 301, 301 (2013) ("the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)' has begun to directly address the question of how its decision making impacts on the livelihoods of the IPs and LCs who rely on the use and trade of wild resources"). For the use of LC perspective in other fields of international law, see Morris W. Foster, *Analyzing the Use of Race and Ethnicity in Biomedical Research from Local Community Perspective*, 34 J. L., MED. & ETHICS 508, 512 (2006). *See also* Robert E. Agger, *Power Attributions in the Local Community: Theoretical and Research Considerations*, 34 SOC. FORCES 322 (1956).

86. *See* Rosie Cooney & Max Abensperg-Traun, *Raising Local Community Voices: Cites, Livelihoods and Sustainable Use*, 22 REV. OF EUR. COMPAR. & INT'L ENV'T L. 301, 309 (2013) ("It is notable that there is very little participation at CITES meetings of the people – particularly the Indigenous and local rural communities – directly affected by trade controls").

87. Convention on Biological Diversity, Compilation of Views Received on Use of the Term "Indigenous Peoples and Local Communities," at 5, U.N. Doc. UNEP/CBD/WG8J/8/INF/10/Add.1 (Sep. 17, 2013).

The Working Group on Article 8(J) and Related Provisions of the Convention on Biological Diversity sought to define LCs through a set of broad and inclusive essential characteristics, noting that self-identification by the LC is the most important. Specifically, the LC characteristics include: self-identification, reliance on natural resources, occupation of a specific territory, cultural traditions and knowledge, social cohesion, customary laws and institutions, expression of collective rights, reliance on traditional livelihoods, and cultural and biological heritage, among others.[88] These numerous characteristics make it possible to classify several affected communities in investment law as LCs. In the context of investment law, among all twenty-two characteristics mentioned, in the authors' opinion, the most relevant characteristics are the reliance on traditional economic activities, distinctness from other sectors of society, shared property rights over resources, and vulnerability to outsiders with little understanding of law governing intellectual property rights, investment law, and the like. As discussed earlier, the primary reason to protect LCs is because they are especially vulnerable. Such vulnerabilities may be explained by many reasons, including their relationship with the home

88. *Id.* at 6–7 ("(a) Self-identification as a local community; (b) Lifestyles linked to traditions associated with natural cycles (symbiotic relationships or dependence), the use of and dependence on biological resources and linked to the sustainable use of nature and biodiversity; (c) The community occupies a definable territory traditionally occupied and/or used, permanently or periodically. These territories are important for the maintenance of social, cultural, and economic aspects of the community; (d) Traditions (often referring to common history, culture, language, rituals, symbols and customs) and are dynamic and may evolve; (e) Technology/knowledge/innovations/practices associated with the sustainable use and conservation of biological resources; (f) Social cohesion and willingness to be represented as a local community; (g) Traditional knowledge transmitted from generation to generation including in oral form; (h) A set of social rules (e.g., that regulate land conflicts/sharing of benefits) and organizational-specific community/traditional/customary laws and institutions; (i) Expression of customary and/or collective rights; (j) Self-regulation by their customs and traditional forms of organization and institutions; (k) Performance and maintenance of economic activities traditionally, including for subsistence, sustainable development and/or survival; (l) Biological (including genetic) and cultural heritage (bio-cultural heritage); (m) Spiritual and cultural values of biodiversity and territories; (n) Culture, including traditional cultural expressions captured through local languages, highlighting common interest and values; (o) Sometimes marginalized from modern geopolitical systems and structures; (p) Biodiversity often incorporated into traditional place names; (q) Foods and food preparation systems and traditional medicines are closely connected to biodiversity/environment; (r) May have had little or no prior contact with other sectors of society resulting in distinctness or may choose to remain distinct; (s) Practice of traditional occupations and livelihoods; (t) May live in extended family, clan or tribal structures; (u) Belief and value systems, including spirituality, are often linked to biodiversity; (v) Shared common property over land and natural resources; (w) Traditional right holders to natural resources; (x) Vulnerability to outsiders and little concept of intellectual property rights.").

state, the remoteness of their territory, and a lack of representation by lawyers.[89] Such vulnerabilities may be apparent in IPs, but they also may occur within LCs, which are not Indigenous by definition (e.g., LCs do not possess a unique history or distinct language).

From the description of IP rights, it flows that the *ratio legis* was especially focused on the protection of cultural heritage.[90] Even if we may interpret from that set of cultural rights any rights for IPs under IIL, its applicability remains limited only to IPs, not to all LCs. Another problem is that the rationale underlying the *cultural rights* of IPs cannot be applied to LCs in general. Many LCs do not possess the same characteristics as IPs, as they may not be so attached or dependent upon their native land, or their connection with their habitat may not be so spiritual.

For instance, consider a remote tribal community of IPs located in their ancestral lands in the Amazon rainforest. Their cultural practices, livelihoods, and spiritual beliefs are intricately tied to the land, rivers, and forests that surround them.[91] But in the case of LCs, many communities may be considered local and may also be described as traditional communities. Some LCs may include peoples of Indigenous descent. They are culturally diverse and live on all inhabited continents. For example, small farming communities in France, who have occupied and farmed their lands for many generations acquiring useful environmental knowledge, including specialist knowledge about a variety of activities such as sustainable agriculture, cheesemaking and winemaking, or even animal husbandry, represent a local or traditional community. Long-term, established rice and fish farmers in Asia may represent another type of LC.[92]

What can be observed from the relation between IP and LC definitions, or attempts to define them, is that while some LCs may comprise individuals of Indigenous descent, not all LCs are necessarily IPs. However, most, if not all, IPs can be simultaneously defined as LCs. Therefore, the term IP is inherently narrower than LC. This distinction

89. *See, e.g.,:* U.N. GAOR, 77th Sess., 16th mtg., U.N. Doc. GA/SHC/4350 (Oct. 12, 2022); *Low Levels of Social Protection and Statistical Invisibility Increases the Vulnerability of 55 Million Indigenous People*, ILO NEWS (Dec. 15, 2022), https://www.ilo.org/resource/news/low-levels-social-protection-and-statistical-invisibility-increases.

90. *See generally* Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. OF INT'L L. 121 (2011).

91. *Indigenous Peoples' Territorial Sovereign in the Amazon Must be Respected*, LANCET REG'L HEALTH AMERICAS, July 2022, at 1.

92. Convention on Biological Diversity, Compilation of Views Received on Use of the Term "Indigenous Peoples and Local Communities," at 4, U.N. Doc. UNEP/CBD/WG8J/8/INF/10/Add.1 (Sep. 17, 2013).

reflects the broader scope of LCs, which encompass a diverse range of populations residing in specific geographic areas, regardless of their Indigenous status. In contrast, IPs refer specifically to communities with distinct historical and cultural ties to particular territories, often characterized by their Indigenous status and unique cultural identities. This differentiation highlights the complexity and diversity of human populations and underscores the need for nuanced approaches in addressing their rights and interests within the context of investment laws.

The protection and visibility of LCs in the IIR should be guaranteed to all LCs. Obviously, in many states, such visibility and rights guarantees for LCs will be secured under national law. In states with a functioning democratic system and transparency, LCs may act directly or *via* their representatives to secure their rights to be seen and heard. In certain circumstances, IP rights may still be used to protect LCs from the harmful effects of an investment. If IP rights can protect other vulnerable communities, they should be invoked. But this is not a systemic way to resolve the problem at hand. Its application is severely restricted (i.e., only when the definition of IP and LC overlap). For this reason, the application of IP rights could be treated as a temporary or ad hoc solution, but it should not be considered a terminal one. To reiterate, the legal and moral bases for the protection of the rights of LCs should be preexisting under domestic and international law and they should not depend on the special status of a particular community (i.e., IP).

For all these reasons, to resolve the problem of LCs within IIL, we cannot rely only on IPs. Although it might be easier to use this classification because of preexisting treaty obligations, doing so would restrain the scope of the dispute and would exclude a great number of LCs (that are not properly defined as IPs) from protection. To resolve the problems that LCs face in IIL, there must be a broader application of the law to other communities.

III. Legal Regimes Being Violated

Interests of LCs may be described, affected, and defended in various combinations.[93] Part III is closely linked to the following Part IV, which presents remedies available to LCs. This part will first describe the

93. *See* George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights*, 33 Mich. J. Int'l L. 627 (2012). *See also* Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 Colum. Hum. R.L. Rev. 797 (2011); Valentina S. Vadi, *The Double Life of International Law: Indigenous Peoples and Extractive Industries*, 129 Harv. L. Rev. 1755 (2016).

parties that may invoke various rights. Then, this part will discuss the substance of the various rights that may be affected.[94]

A. *Rights to be Invoked by the Host State*

A host state may invoke violations of various rights (i.e., human rights, environmental rights, procedural rights, property rights, contract rights, etc.) on behalf of LCs against an investor and seek redress through its national procedures (i.e., administrative or judicial).[95] During an investment dispute, a state may also argue that an investor has violated international or national obligations towards an LC (e.g., by polluting the environment, etc.), resulting in the illegality of an investment or a finding that impacts potential compensation.[96]

B. *Rights to be Invoked by the Investors*

An investor may argue that the actions of a state, which are intended to protect LCs, are expropriatory and have affected their investment. In such circumstances, an investor would take actions against the state and, indirectly, against the interest of the LC. A common situation involves foreign investors filing claims against the host state, alleging that regulatory measures designed to protect Indigenous heritage or

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94. Without a doubt, for the purpose of the present paper, the rights and obligations of investors are of our primary focus. Perrone proposed a persuasive classification of different obligations to LCs.

> Foreign investors have different obligations to [LCs]. They have to comply with international human rights obligations and, importan[tl]y, they also need to respect property and contractual obligations as defined in domestic and-increasingly but still limitedly-in international law. These property and contractual obligations can be divided into four categories. First, foreign investors must respect the property rights of those living near the project, including individual or communal rights in the case of Indigenous land. . . . Second, if foreign investors own property, that may create obligations to the community, such as to let people pass through the property. Third, foreign investors may enter into specific transactions or make representations to local actors, such as in community benefit agreements, creating contractual or reliance obligations. These obligations are typically governed by domestic law and, in some instances, foreign investors are required to enter into these agreements. Finally, foreign investors arguably owe an obligation to the community as a whole to contribute to local values and prosperity.

Perrone, *supra* note 53, at 17–18.

95. *See e.g.* Enrique Prieto-Rios, Juan Francisco Soto Hoyos & Juan P. Pontón-Serra, *Foreign Concerns: the Impact of International Investment Law on the Ethnic-Based and Restitution Programme in Colombia*, 27 INT'L J. OF HUM. RTS. 1 (2023).

96. *See, e.g.*, Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil., ICSID Case No. ARB/11/12, Award, ¶¶ 398–404 (Dec. 10, 2014); Alasdair Ross Anderson and others v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, ¶¶ 51–59 (May 19, 2010).

cultural rights are in breach of the relevant investment treaty provisions.[97] As discussed, *supra* Section III.A, many investor claims will be a reaction to measures taken by the state. Furthermore, an investor may argue that it was the host state that failed to protect the human rights of an LC. Thus, the host state's failure to protect its LCs could create a defense for the investor.

C. *Rights to be Invoked by Local Communities*

LCs, in general, may invoke violations of their rights (i.e., human rights, environmental rights, the right to participate, etc.) at the national and, possibly, at the international levels against both the state and the investor. Usually, LCs start legal action under national law, although there is a question of the effectiveness of such remedies. Under international law, LCs may establish their status in an amicus curiae[98] and independently present their position, no matter if the claim is against an investor or the state.[99]

D. *The Role of Human and Environmental Rights*

This part will discuss norms of human and environmental rights that may be invoked if violated. Human rights and environmental rights are usually invoked by either the state, in defense of their LCs, or by the LCs themselves.[100]

Human and environmental rights may be invoked on various grounds. Modern treaties, which contain rights-related obligations, may allow to directly refer to the violation of the human or environmental right as a violation of treaty provisions.[101] However, more

97. *See, e.g.*, Bear Creek v. Peru, Award, *supra* note 43.

98. *See* Gary Born & Stephanie Forrest, *Amicus Curiae Participation in Investment Arbitration*, 34 ICSID REV. 626, 626–27 (2019) ("The term 'amicus curiae' originated in Roman law and refers to a participant in an adjudicative proceeding who, although not a party to the dispute, is permitted to make submissions or otherwise take part in the proceedings. Amici are often non-governmental 'public interest' organisations, but may also be associations, States or inter-governmental institutions. Amicus participation can take various forms, including written submissions, presentation of evidentiary material or participation in oral hearings.").

99. *See, e.g.*, Border Timbers Ltd. v. Republic of Zim., ICSID Case No. ARB/10/25, Procedural Order No. 2, ¶ 20 (June 26, 2012). *See also* Glamis Gold, Ltd. v. U.S., UNCITRAL, Decision on Application and Submission by Quechan Indian Nation, (Sept. 16, 2005).

100. *See* Elliot Luke, *Environment and Human Rights in an Investment Law Frame*, *in* RESEARCH HANDBOOK ON ENVIRONMENTAL AND INVESTMENT LAW 150 (Kate Miles ed., 2019)

101. *See* Model Agreement on Reciprocal Promotion and Protection of Investments between [N/A] and the Kingdom of the Netherlands, Neth.-[N/A], Oct. 18, 2018; Reciprocal Investment

commonly, there is no reference to human or environmental rights, as in BITs. In such situations, some rights may still emerge:

- as part of the national framework which the investor must observe in order for its investment to be legal;[102]
- as part of the international obligations of a state, which have been ratified and incorporated into the state's law, therefore also forming part of the national order of the state (meaning an investor may be obliged to respect them in order for its investment to be legal);[103]
- from the interpretation of BITs when, for example, such obligations may be derived from the preamble.[104]

Additionally, as documented by Special Representative of the Secretary-General, John Ruggie, discussions have emerged around multinational corporations' human rights obligations.[105] While these obligations are currently only non-binding commitments, they could reappear in binding treaties in the future.[106]

In this regard, some corporate obligations may also follow from national law or even treaty norms. A new trend in international law has been to include corporate social responsibility (CSR) clauses for companies to

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Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Morocco-Nigeria, Dec. 3, 2016.

102. *See* Model Agreement on Reciprocal Promotion and Protection of Investments between [N/A] and the Kingdom of the Netherlands, Neth.-[N/A], art. 7(1), Oct. 18, 2018.

103. *See* Stephanie Barbara Leinhardt, *Some Thoughts on Foreign Investors Responsibilities to Respect Human Rights*, 10 TRANSNAT'L DISP. MGMT. 1, 19 (2013).

104. *See* Agreement Between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments, Switz.-Geor., preamble, June 3, 2014.

105. *See* JOHN RUGGIE, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Human Rights Council, 17th Sess., U.N. Doc. A/HRC/17/31, (Mar. 21, 2011). *See also* JOHN RUGGIE, JUST BUSINESS, MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS (Kwame Anthony Appiah ed., 2013). *See* Żenkiewicz, *supra* 37, at 121–160.

106. A new open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights was established by the Human Rights Council in its Resolution A/HRC/RES/26/9 on 26 June 2014. Its mandate indicates that the Group shall be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights. *See* Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights,* 26th Sess., U.N. Doc. A/HRC/26/L.22/Rev.1, (June 15, 2014).

observe.[107] States have included clauses related to internationally recognized standards on CSR in the area of international arbitration.[108] However, the majority of these provisions are not binding and, with limited exceptions (e.g., the Dutch Model BIT or the Morocco-Nigeria BIT), these provisions do not provide judicial remedies for the enforcement of such obligations.[109]

Brazil has been a pioneer in including CSR norms in treaties. For instance, Article 14 in Brazil's latest BIT with Ecuador in 2019 obligates investors and the investment itself to achieve the highest possible level of contribution to sustainable development and the LCs, specifically through the adoption of a high standard of socially responsible practices which are based on principles and voluntary standards.[110] Also, the Brazil-Ecuador BIT contains a long list of soft legal provisions for the investors to comply with.[111] Similar provisions have also been

107. *See* Crina Baltag et al., *Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?*, 38 ICSID Rev. – Foreign Inv. L.J. 381, 412–414 (2023).

108. *Id.* at 410.

109. For instance, Article 17 of the Argentina–Japan BIT (2018) and Article 14.17 of the United States-Mexico-Canada Agreement (USMCA) states: "[P]arties reaffirm the importance that each of them encourages enterprises operating within its area or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Contracting Party[. . .]." Agreement for the Promotion and Protection of Investment, Arg.-Japan, art. 17, Jan. 12, 2018; United States-Mexico-Canada Agreement, art. 14.17, July. 1, 2020, Off. U.S. Trade Representative, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

110. Cooperation and Investment Facilitation Agreement, Braz.-Ecuador, Sept. 25, 2019. *See also* Cooperation and Investment Facilitation Agreement, Braz.-Surin., May 2, 2018. Both treaties are signed but not yet in force.

111. Art. 14.2 of Brasil-Ecuador BIT (2019) contains following list: (1) contribute to economic, social and environmental progress with a view to achieving sustainable development; (2) respect the internationally recognized human rights of persons involved in the activities of companies; (3) stimulate local capacity building through close collaboration with the LC; (4) encourage the formation of human capital, in particular by creating employment opportunities and by providing training for employees; (5) refrain from seeking or accepting exemptions not contemplated in the legal or regulatory framework relating to human rights, the environment, health, safety, work, the tax system, financial incentives, or other matters; (6) support and uphold the principles of good corporate governance, and develop and implement good corporate governance practices; (7) develop and implement self-disciplinary practices and effective management systems that promote a relationship of mutual trust between the companies and the societies in which they operate; (8) promote employee awareness of and compliance with company policies through appropriate dissemination of policies, including through training programs; (9) refrain from taking discriminatory or disciplinary action against employees who, in

enacted in Brazil's BITs with Guyana, Ethiopia, and Suriname.[112]

Brazil's treaties demonstrate one way for effectuating CSR provisions, namely through investor compliance with CSR provisions as a precondition for an investor's protection under an international investment arbitration (IIA). The investor's failure to comply with their CSR obligations may be considered at different stages of investment proceedings: at the (i) jurisdictional stage, (ii) the merits stage when deciding upon potential violations of substantive IIA provisions, or when (iii) determining the amount of compensation.

E. *Violations of a Host State's Laws*

The next category of norms which an investor's conduct may violate are the host state's domestic laws. These may overlap with the human and environmental rights discussed in the prior section. Still, these domestic laws merit their own brief discussion because a violation of domestic laws may render the investment illegal, and therefore, result in a lack of jurisdiction for an investment tribunal to hear the case.

The requirement to legally establish an investment may be found or interpreted when a BIT clearly indicates that it is applicable only to investments established in accordance with national law.[113] Alternatively, a BIT's definition of an investment can include reference to its legality.[114]

When there is no direct reference to legality in a BIT, tribunals generally take one of two approaches. First, the tribunal deems the

good faith, report to management or, where appropriate, to the competent public authorities on practices contrary to the law or company policies; (10) encourage, to the extent possible, their business partners, including suppliers and contractors, to apply the principles of business conduct; and (11) refrain from any undue interference in local political activities. Cooperation and Investment Faciliation Agreement, *supra* note 110, art. 14.2.

112. Cooperation and Investment Facilitation Agreement, Braz.-Ecuador, art. 23, Sept. 25, 2019. *See also* Cooperation and Investment Facilitation Agreement, Braz.-Guy., art. 15, Dec. 13, 2018.; Cooperation and Investment Facilitation Agreement, Braz.-Eth., art. 14, Apr. 11, 2018 (signed but not yet in force).

113. "Article 1.1 Scope. This Agreement applies to investments existing at the time of its entry into force, as well as to investments made thereafter in the territory of a Contracting Party in accordance with the laws of the latter by responsible investors of the other Contracting Party, in accordance with Article 2." Agreement for the Promotion and Protection of Investments, Colom.-U.A.E., art. 1.1, Nov. 13, 2017.

114. "Article 1. Definitions … 2. The term 'investment' refers to any kind of property, provided that the investment was made in accordance with the laws and regulations of the contracting party in whose territory the investment was made." Agreement for the Promotion and Reciprocal Protection of Investments, Chile-Peru., art. 1, Feb. 2, 2000.

question of legality irrelevant[115] or the tribunal considers that "the admission requirement is met if the investment was accepted by the host [s]tate at the time it was made."[116] Second, as many tribunals have declared, illegal investments cannot be covered by BITs nor the protections of dispute settlement systems.[117] It is generally accepted that the legality requirement must always be met by the investor, whether or not there is a reference to it in a BIT.[118] This is because the purpose of the investment arbitration system is to protect only legitimate and bona fide investments, in accordance with the laws of the host state, as the state cannot be expected to have agreed to extend this mechanism to investments that violate its laws. Similarly, states cannot be expected to want the illegal investments of their nationals to be protected by such international conventions. The main concern in a dispute would be whether this is an issue of jurisdiction or merits.

Such an understanding allows simultaneous consideration of national law and international obligations, which have been accepted by states and incorporated into their national legal systems for the obligation to be treated as a part of national law. In turn, this creates a backdoor for the relevance of domestic law in investment disputes.[119] Such a situation is perfectly illustrated by the case *Álvarez y Marín Corporación S.A.*, where the Tribunal agreed with the claimants that neither treaty contained a legal requirement.[120] However, the Tribunal acknowledged

115. "The tribunal does not find, in the BIT, a requirement that the investments have been made in accordance with the Law of Montenegro." MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8), Award, ¶ 212 (May 4, 2016). *See also id.* ¶ 208–15.

116. Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pak., ICSID Case No. ARB/12/1, Award on Jurisdiction, ¶ 639 (Nov. 10, 2017).

117. *E.g.,* Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 101, (Apr. 15, 2009); Saluka Investments B.V. The Czech Republic, United Nations Commission on International Trade Law [U.N. Comm'n I.T.L.], Partial Award (Mar. 17, 2006); David Minnotte & Robert Lewis v. Republic of Pol., ICSID Case No. ARB(AF)/10/1, Award, ¶ 131 (May 16, 2014); Railroad Development Corp. v. Republic of Guat., ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, ¶ 139 (May 18, 2010); Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Award (Dec. 27, 2016)

118. *See* Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 123 (June 18, 2010).

119. Because of the illegality of the investment, the arbitral tribunal declined their jurisdiction, see Álvarez y Marín Corporación S.A. and others v. Republic of Panama, ICSID Case No. ARB/15/14 (Apr. 20, 2015). Also "[t]he tribunal does not find, in the BIT, a requirement that the investments have been made in accordance with the Law of Montenegro." MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro. ICSID Case No. ARB(AF)/12/8), Award, ¶ 212 (May 4, 2016).

120. Álvarez y Marín Corporación S.A. and others v. Republic of Panama, ICSID Case No. ARB/15/14, ¶ 118 (Apr. 20, 2015).

that "the legality requirement, although not explicitly expressed in the treaties, is an implicit part of the concept of protected investment."[121] The Tribunal declined jurisdiction because the investors had not complied with the host state's domestic law safeguarding IPs' rights.[122]

In sum, the interactions between the investment regime and the LCs can be illustrated through the different rights and obligations under international and domestic laws. There are different rights that can be invoked by the host state, investors, and LCs. A host state may invoke the violations of LCs' human rights, environmental rights, procedural rights in obtaining required permissions for an investment, property rights, or contractual obligations by an investor to seek redress through its national procedures (i.e., administrative or judicial). IIL, with its dispute settlement mechanism, is very effective compared to the dispute settlement mechanisms provided by human rights treaties, as human rights violations can also be brought before arbitral tribunals.[123] During an investment dispute, a state may also raise the argument that an investor has violated their international or national obligations towards LCs (e.g., by polluting the environment), resulting in the illegality of an investment or impacting their potential compensation.

IV. Types of Remedies Available

This part of the Article describes potential remedies available to LCs if their rights are breached. The discussion will not be limited only to investment law and will describe all potential possibilities to seek justice. This exhaustive discussion is intended to explain the entire legal landscape and compare the available options for LCs.

In the national court of a host state, both the state and LCs may directly challenge an investor's actions. LCs may also challenge the actions of their state. In specific situations, it is possible to sue investors as alleged violators of human rights, even outside the jurisdiction of the host state, in either an investor's home state or a third state.[124] LCs can be involved in ISDS proceedings as a third-party participant or through amicus curiae briefs.[125] Host states can also pursue protections in

121. *Id.*

122. The tribunal concluded that not all types of illegality imply that a given investment is not protected by the treaties, considering that such a consequence would be severe. In this regard, it held that protection should only be denied when it constitutes a proportionate response to an investor who seriously breached the host State's law. The seriousness of the breach must be assessed by considering the relevance of the breached standard and the investor's intention. *Id.* ¶ 118.

123. *See* Filip Balcerzak, Investor-State Arbitration and Human Rights 9 (2017).

124. *See infra* Section IV.A.

125. *See infra* Sections IV.B.1–2.

investment-arbitration proceedings in the form of counterclaims or through the dismissal of frivolous claims.[126] Obligations, such as the inclusion of local participation or consulting obligations, under the rule of law of national and international legal regimes may be applicable, with the right to previous consent and consultation being particularly pertinent. There may also exist a possibility to take into account the investors' obligations related directly or indirectly to LCs when assessing compensation, as this has been a helpful tool for states in instances where they can prove that the investor engaged in corrupt acts or violated the host state's laws.[127]

In the current IIL system, rights holders affected by an investment cannot file a dispute before a traditional investor-state arbitral tribunal.[128] However, some mechanisms exist to provide access to international investment procedures. First, domestic laws may provide remedies to protect LCs' rights within the host states' legal regimes or foreign jurisdictions. Second, the host states may defend the interests of communities affected by an investment. They may act as respondents in ISDS and put forth defenses in investment arbitration contests. Also, states may submit counterclaims before investment-state arbitral tribunals or request an early dismissal of frivolous claims.[129] Third, LCs or their representatives, such as NGOs, may pursue their interests by acting as non-disputing third parties or presenting amicus curiae submissions.

However, it is important to note that these mechanisms do not offer a useful or practical means of accessing justice for a company's abuses or harms through international investment.[130] The following section will discuss available remedies under national courts in any state, rather than only within a host state.

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126. *See infra* Section IV.B.3.

127. *See* Perrone, *supra* note 53, at 18 ("Investment tribunals have treated corruption strictly, dismissing a claim if there is evidence of bribery. In *World Duty Free v. Kenya*, the tribunal rejected the claim, noting that the prohibition of corruption is a matter of transnational public policy. Other tribunals have dismissed claims based on serious violations of domestic law during the establishment of the project.").

128. *See* Martin Jarrett, Sergio Puig & Steven Ratner, *Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals*, 14(2) J. OF INT'L DISP. SETTLEMENT 259, 277 (2023).

129. See discussion *infra* Section IV.B.3.

130. U.N. Comm'n on Int'l Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018), A/CN.9/935, (May 14, 2018).

A. *Remedies Under National Courts*

Domestic laws provide for the protection of LCs' rights, although effectiveness varies across jurisdictions. Tort actions and human rights relief[131] are meant to protect LC and individual rights affected by foreign investments. Also, legal institutions, such as the *action popularis*[132] or the class action,[133] are means to seek protection for LCs.

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131. Among these rights is the right to an action of protection, tutelage, or enforcement of fundamental rights, which is guaranteed by Article 25 of the American Convention on Human Rights (ACHR), in harmony with Articles I and II of the same Convention and the constitutional provisions. The action of protection also constitutes a guarantee that can be deduced in situations where in order to restore the affected right there is no procedural way or means that is suitable for it, as recognized by the doctrine and comparative jurisprudence. The right to protection is part of the constitutional block of rights in Latin American States (Argentina, Brazil, Chile, Costa Rica, Colombia, Venezuela, Honduras, Guatemala, among others). In this way, the right to protect all rights is guaranteed by the Constitution. *See* Hildegard Rondón De Sansó, Amparo Constitucional 71 (1988); Osvaldo Gozaíni, El Derecho de Amparo 26 (1995).

132. Latin popular actions means: "[a]n action that a male member of the general public could bring in the interest of the public welfare." *Actio popularis*, BLACK'S LAW DICTIONARY (8th ed. 2004). Also, as Berger explains, actiones populares are

> Actions which can be brought by "any one among the people" (*quivis* [*quilibet*] *er populo*). They are of praetorian origin and serve to protect public interest (*ius populi*). They are penal, and in case of condemnation of the offender the plaintiff receives the penalty paid. Such actions are: *actiones de cibo corrupto, sepulchri violati, de termino moto, de positis ac suspensis,* etc. There are instances, however, established in statutes or local ordinances, in which the penalty was paid to the state or municipal treasury, or divided between the *aera-rium* and the accuser, as, e.g., provided in a decree of the Senate in the case of damage to aqueducts.

ADOLF BERGER, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW 347 (1953).

133. The class action, or collective action, is a procedural instrument that is presented, a priori to protect effective rights that affect a plurality of people. In U.S. law, a lawsuit in which the court authorizes a Single person or a small group of people to represent the interests of a larger group; specif., a lawsuit in which the convenience either of the public or of the interested parties requires that the case be settled through litigation by or against only a part of the group of similarly situated persons and in which a person whose interests are or may be affected does not have an opportunity to protect his or her interests by appearing personally or through a personally selected representative, or through a person specially appointed to act as a trustee or guardian. Federal procedure has several prerequisites for maintaining a class action: (1) the class must be so large that individual suits would be impracticable, (2) there must be legal or factual questions common to the class, (3) the claims or defenses of the representative parties must be typical of those of the class, and (4) the representative parties must adequately protect the interests of the class. *See* Rule 23 of the Federal Rules of Civil Procedure (FRCP) in the United States. "The class action was an invention of equity [. . .] mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, United in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs [. . .]. By rule 23 the Supreme Court has extended the use of the class

Environmental Impact Assessment processes further protect LCs' environmental rights.[134]

Under national law, the rights of LCs may be protected by direct actions in domestic courts against an investor, but LCs may also sue for alleged negligence or omissions of their own state.[135] Moreover, states can also sue the investor to protect LCs.[136]

Therefore, remedies under national law may provide adequate protection for LCs subject to various conditions, such as the independence and transparency of a judicial system or the goodwill of the state to protect its LCs. However, in cases where the state itself is not interested in protecting LCs' rights, relief through state action may be merely illusory.

Relatedly, several domestic laws allow for the protection of the rights of aliens in foreign countries. For example, in the United States, the Alien Tort Claims Act (ATCA)[137] grants jurisdiction to the federal courts to hear civil liability claims filed by foreigners in the event of violations of international law.[138] The ATCA provides for a form of class

action device to the entire field of federal civil litigation by making it applicable to all civil actions." Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).

134. *See* RHUKS AKO, ENVIRONMENTAL JUSTICE IN DEVELOPING COUNTRIES: PERSPECTIVES FROM AFRICA AND ASIA-PACIFIC 32 (2013).

135. *E.g.*, Article 140 of the Colombian Code of Administrative Procedure and Administrative Litigation provides: "Direct Compensation. In accordance with Article 90 of the Political Constitution, interested parties may directly demand compensation for the unlawful damage caused by the action or omission of State agents. [. . .] the State shall be held liable when the cause of the damage is an act, an omission, an administrative operation, or the temporary or permanent occupation of property due to public works or any other cause attributable to a public entity or a private individual acting under explicit instructions from the public entity. Public entities shall also seek the same claim when they are harmed by the actions of a private individual or another public entity. In all cases where both private individuals and public entities are involved in the causation of the damage, the judgment shall determine the proportion for which each of them must be held liable, taking into account the causal influence of the act or omission in the occurrence of the damage." C.P.C. & C.C.A. 1437 (2011).

136. *E.g.*, According to Article 9 of the Organic Law of the Ombudsman (Defensoría del Pueblo) of Peru, the State, represented by the Ombudsman or People's Representative, is authorized to initiate and continue investigations, either on their own or upon request, to clarify actions and resolutions of the Public Administration and its agents that affect the constitutional and fundamental rights of individuals and the community. They are also empowered to initiate or participate in any administrative procedure on behalf of individuals or groups of people for the same purpose. *See* Ley Orgánica de la Defensoría del Pueblo del Perú, Ley 26520, art. 9 (Organic Law of the Ombudsman of Peru, Law 26520, art. 9); Ley Orgánica de la Defensoría del Pueblo del Perú, art. 9. Ley 26520 (Organic Law of the Ombudsman of Peru, Law 26520, art. 9).

137. 28 U.S.C. § 1350 (1789).

138. In Filartiga v. Peña Irala, 630 F.2d 876 (2d Cir. 1980), a citizen from Paraguay sued a policeman from Asunción based on that law, for the torture and death of his son during the dictatorship of General Stroessner. This case inaugurated a series of lawsuits, during which the

action for severe violations of international law. Similarly, in the United Kingdom, group tort claims are allowed for violations of human rights and environmental harms.[139]

The ATCA has been used to provide justice for LCs and individuals when their human rights have been harmed by investors.[140] Judges have also recognized that the ATCA could serve to protect labor and environmental rights.[141] The ATCA may be very useful, but it applies only in unique circumstances, namely, where a violation has occurred within the state and there are no alternatives to seek justice. Importantly, the *Kiobel* criteria prevent extraterritoriality.[142] The Supreme Court of the United States concluded that a presumption against extraterritoriality precluded the exercise of jurisdiction over ATCA claims unless the claims "touch and concern the territory of the United States . . . with sufficient force to displace the presumption."[143]

For this reason, the ATCA is an incomplete tool, and it would be preferable to create systemic changes,[144] so that such idiosyncratic laws will no longer be needed.

United States courts have expanded the scope of the law, including claims for atrocities committed outside of that country both by representatives of States and other foreign citizens, as well as by large multinationals; but also recent development in Kiobel case has to be noted. Kiobel v Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (refusing to apply the Alien Tort Claims Act as a tool for holding liable companies for human rights violations). In this judgment the Supreme Court refused to apply Alien Tort Claims Act as a tool for holding responsible companies which violated human rights; *see* Ralph G. Steinhardt, *Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink*, 107 AM. J. INT'L L. 841, 843 (2014). *See also* Robert Bird, Daniel Cahoy & Lucien Dhooge, *Corporate Voluntarism and Liability for Human Rights in a Post-Kiobel World*, 102 KY. L. J. 601, 606–08 (2013).

139. See Tara Van Ho, *Vedanta Resources PLC v. Lungowe*, 114 AM. J. INT'L L. 110–116 (2020) (discussing the case's reasoning on the duty of care owed by the parent company to the local populations in the host country).

140. In Doe I v. Unocal Corp., 395 F.3d 932, 943 (9th Cir. 2002), the inhabitants of a region of Burma sued the Unocal company for forced labour, rape, torture and murder committed by the Military Junta of that nation, as a result of the construction of an oil pipeline. Those affected claimed that the company had collaborated and consented to such acts. The parties reached an agreement.

141. In Aguinda v. Texaco, Inc., 303 F.3d 470, 474 (2d Cir. 2002), IPs from Ecuador, sued that oil company in 1993, for the destruction of their habitat. Without going into the merits of the matter, the North American judge understood that the Ecuadorian courts were better placed to understand the matter, applying the doctrine of forum non-conveniens. However, what is relevant is that the plaintiffs maintained that the different international norms on environmental protection, usually considered soft law, they had crystallized in rules whose violation fell within the scope of application of ATCA.

142. In Kiobel, 569 U.S. at 110, the US Supreme Court refused to apply the Alien Tort Claims Act as a tool for holding responsible companies which violated human rights.

143. *See id*. at 126.

144. For further discussion regarding systemic change, *see infra* Section V.A.

B. *Remedies Under the Investor-State Development Settlement System*

Apart from available options under national jurisdictions, LCs may have protected rights on the international plane (e.g., under rights enshrined in investment law treaties). This section explores the remedies available under the ISDS system and delves into various aspects of ISDS, including third parties' participation, the role of amicus curiae submissions, and the use of counterclaims.

1. Third Parties' Participation in Investor-State Dispute Settlement

In ISDS, investment-affected rights holders, such as LCs, are not formally parties to the dispute. The factual configurations are very diverse, and investment-affected rights holders' relationships with the state could affect various substantive rights. Current investor-state arbitration may allow, besides the parties other persons, their agents, counsel and advocates, witnesses and experts, and officers of the tribunal to attend or observe all or part of the proceedings. Notably, this depends on the parties' mutual approval. For instance, ICSID Arbitration Rules provide for the possibility of third-party hearings and submissions.[145] Also, UNCITRAL rules[146] and NAFTA provide for third-party participation.[147]

Third-party participation mechanisms are ultimately insufficient tools to provide access to justice to the state, the investment-affected individuals, or the community, because third-party participation can be subject to both the state and the investor's veto.

2. Amicus Curiae in Investor-State Development Settlement

Another mechanism for the marginal protection of individuals in investment law is the possibility to participate as amicus curiae.[148] The amicus curiae (i.e., friend of the court or friend of the tribunal) is a Latin expression used to refer to presentations made by third parties not involved in litigation, who "voluntarily offer their opinion on some point of law or other related aspects, to collaborate with the court in the resolution of the subject matter of the process."[149] Rule 37(2) of the ICSID arbitration proceedings allows for the use of amicus curiae

145. *Rules of Arbitration Proceedings*, 2006 ICSID REGUL. AND RULES 1, 115, 117.

146. Response to the Notice of Arbitration, 2013 UNCITRAL Arbitration Rules art. 4, at 7.

147. North American Free Trade Agreement, Statement of the Free Trade Commission on Non-Disputing Party Participation ¶ 1, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

148. *See generally* Gary Born & Stephanie Forrest, *Amicus Curiae Participation in Investment Arbitration*, 34 ICSID REV. 626 (2019).

149. JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 248, 251 (2005).

briefs.[150] Regarding NAFTA litigation, amicus curiae briefs were accepted in *Methanex*,[151] *UPS*,[152] *Glamis*,[153] and *Foresti*.[154] However, the majority of the cases involving transnational litigation have denied amicus curiae (e.g., *Chevron*).[155]

The amicus curiae may serve as a means to involve non-state actors, such as companies, industry associations, and NGOs, in dispute settlement proceedings. They allow these actors to provide their perspective, contribute additional information, and offer different analysis to the adjudicating bodies. This participation is seen as a way to enhance the legitimacy and transparency of the decision-making process.[156] However, in practice, amicus curiae briefs have been infrequently submitted and only receive consideration related to arguments already made in the parties' submissions.[157] This limits the practical effectiveness of amicus curiae briefs in incorporating non-state actors' views in disputes.

Amicus curiae briefs are an insufficient tool to provide access to justice to investment-affected individuals and communities for three reasons. First, amicus curiae do not provide a mechanism to claim remedies for substantive rights and obligations. Second, they only provide a possibility for viewpoints to be offered on some legal or substantive aspect of the ongoing dispute. Third, the admission of an amicus curiae brief is conditioned to the tribunal's will or the will of the parties to the dispute.

3. Counterclaims

Another way to protect the rights of LCs in investor-state arbitration is through counterclaims[158] for violations of investment and domestic

150. Rules of Procedure for Arbitration Proceedings, 2006 ICSID Regul. and Rules r. 37, at 117.

151. *See* Methanex Corp. v. United States, 44 I.L.M. 1345 (2005).

152. *See* United Parcel Service of America, Inc. v. Canada, ICSID Case No. UNCT/02/1, Denial of Justice (May 24, 2007).

153. *See* Glamis Gold Ltd. v. United States, 48 I.L.M. 1035 (2009).

154. *See* Foresti v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1, Quarrying and Trading Enterprise, ¶ 9 (Aug. 4, 2010).

155. *See* Chevron Corp. v. The Republic of Ecuador, PCA Case Repository 2007-02/AA277 (Perm. Ct. Arb. 2007).

156. Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. 200, 217 (2011).

157. *See Can Amicus Curiae Lead Investor-State Arbitration out of its Legitimacy Crisis and Towards More Efficient Dispute Resolution?*, WOLTERS KLUWER ARBITRATION (July 15, 2022), http://arbitrationblog.kluwerarbitration.com/2022/07/15/can-amicus-curiae-lead-investor-state-arbitration-out-of-its-legitimacy-crisis-and-towards-more-efficient-dispute-resolution/.

158. *See* Andrea K. Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 LEWIS & CLARK L. REV. 461, 464 (2013).

laws. Counterclaims are procedural rights specified in investment treaties and allow states to file an opposing claim to an investor's initial claim.[159] Some IIAs expressly allow the possibility of granting the right of reaction, or the right to counterclaim, to the host state.[160] In this Article, we leave aside the debate about the basis for counterclaims or whether they are permitted, as this question is not essential for our Article and has been addressed elsewhere.[161]

The majority of current investment treaties do not provide for counterclaims, but there is an acknowledgement that "drafting treaties to permit closely related counterclaims would help to rebalance investment law."[162] For example, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[163] the Common Market for Eastern and Southern Africa (COMESA),[164] the Argentina-United Arab Emirates BIT,[165] and the Colombia-United Arab Emirates BIT[166] have created a mechanism for counterclaims if consented to by the investor. Also, the Draft 2016 Pan-African Investment Code and the 2012 Southern African Development Community Model BIT[167] provide that when an investor violates rules and principles of domestic and international law, the competent body hearing such a dispute shall consider whether the breach "is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or any damages awarded in the event of such award."[168]

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159. *E.g.*, India-Netherlands Agreement for the Promotion and Protection of Investments, India-Neth. June 11, 1995, 2242 U.N.T.S. 101.

160. *See, e.g.*, Agreement for the Promotion and Protection of Investments, *supra* note 113, Annex 2. See more examples in the next paragraph.

161. *See* Bjorklund, supra note 158, 461–64. *See also* Jean E. Kalicki, *Counterclaims by States in Investment Arbitration, International Institute for Sustainable Development*, INV. TREATY NEWS (Jan. 14, 2013). https://www.iisd.org/itn/en/2013/01/14/counterclaims-by-states-in-investment-arbitration-2/; Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775 (2007); Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. FOREIGN INV. L. J. 232 (1995).

162. *See* Bjorklund, *supra* note 158, at 461–64.

163. Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 9, Aug. 3, 2018, 3346 U.N.T.S. No. 56101.

164. COMESA Investment Agreement art. 18, ¶ 9.

165. Argentina-United Arab Emirates Bilateral Investment Treaty art. 28, Arg.-U.A.E., Apr. 16, 2018

166. *See* Agreement for the Promotion and Protection of Investments, *supra* note 113, Annex 2.

167. SADC Model Bilateral Investment Treaty, July 2012.

168. Draft Pan-African Investment Code, art. 43, Dec. 2016; SADC Model Bilateral Investment Treaty, art. 5, July 2012.

Arbitration rules also permit counterclaims. For example, counterclaims are permitted in the ICSID Arbitration Rules;[169] ICC Rules,[170] UNCITRAL Rules;[171] the London Court of International Arbitration (LCIA) Rules;[172] and the Singapore International Arbitration Centre (SIAC) Rules.[173]

Investors are obliged to comply with the host state's laws and regulations, including those designed to protect social and environmental values. The obligation of legality is embedded within BITs, as it is usually part of the definition of investment in the majority of treaty provisions.[174] Also, investors are usually compelled to comply with domestic laws by contractual clauses. An investment agreement may explicitly provide that an investor must comply with applicable host-state laws. Thus, a host state is allowed to make a counterclaim when an investor has begun international arbitration.

States could bring counterclaims against investors that violate domestic laws and cause damage. Domestic laws could also enshrine international law and further impose obligations on the investor with respect to other social and environmental values. Thus, a state might seek damages for an investor's failure to comply with environmental obligations, where such failure has caused damage to a protected community. However, counterclaims do not provide an adequate or practical remedy, as they work only as a reaction to investor claims and only serve to mitigate or offset the merits of a claim or any reparation potentially awarded.

Arbitral tribunals usually do not recognize counterclaims if the parties to the treaty have not given their express consent.[175] Tribunals tend to also refuse counterclaims based on jurisdiction.[176] Recent arbitral tribunals accepted counterclaims when consent to jurisdiction was explicitly granted and when the investor's obligations primarily stemmed from domestic law.[177] The Tribunals decided to grant Ecuador's

169. Rules of Procedure for Arbitration Proceedings, 2006 ICSID REGUL. AND RULES 1, 118.

170. Rules of Arbitration of the International Chamber of Commerce, 2017 RULES AND PROC. 12.

171. Rules of Procedure for Arbitration Proceedings, 2006 ICSID REGUL. AND RULES 1, 118.

172. LCIA Arbitration Rules, 2014 LCIA 2.

173. SIAC Rules, 2016 SIAC 5, 24.

174. *See infra* Section III.E.

175. *See* Kalicki, *supra* note 161, at 5.

176. *See* Bjorklund, *supra* note 158, at 473.

177. *See* Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims, ¶ 60 (Feb. 7, 2017) (holding Burlington liable for violating Ecuador's domestic law implementing international standards); Urbaser v. Argentina, ICSID Case No. ARB/07/26,

counterclaims in *Burlington v. Ecuador*[178] and *Perenco v. Ecuador*.[179] In both cases, under the France-Ecuador BIT and the United States Free Trade Agreement (U.S. FTA), the source of obligation was found in domestic law and regulations related to the environment and infrastructural damages.

Counterclaims are a relatively weak tool to strengthen the participation of LCs, as their application is relatively narrow, and their use is dependent on a state's support of LCs' rights and claims.

4. The Investor Accepting the Jurisdiction of the Arbitral Tribunal to Decide Local Communities-Related Issues

The greatest impediment to LC-related issues being heard is the scope of jurisdiction of the arbitral tribunal. Although, surprisingly, foreign investors do at times agree that an arbitral clause's scope includes LC-related rights and that these disputes fall within the tribunal's jurisdiction. Investors' motivations behind agreement vary. An investor may hold real concern and have a desire to settle the issues once and for all. Alternatively, an investor may use this as procedural tactics, having the issue decided by an international tribunal rather than the national court.

In *Burlington v. Ecuador*, the company Burlington Resources Inc., the claimant in the dispute, initially alleged that the Tribunal lacked jurisdiction over Ecuador's counterclaim for environmental harm.[180] However, Burlington later accepted that there was jurisdiction and the Tribunal proceeded to examine the rights and obligations of the investors.[181] Despite the environmental harm alleged by Ecuador, the resolution of such disputes occurs in an international arbitral forum focused on foreign investment protection, often far removed from the communities directly impacted.[182] This highlights a broader concern about the accessibility and inclusivity of these proceedings, particularly regarding the involvement and perspectives of LCs in decision-making processes related to environmental issues and community.[183]

¶ 1192 (Dec. 8, 2016) (holding that a bilateral investment treaty "[is] not a set of rules defined in isolation without consideration given to rules of international law").

178. *See* Burlington Resources Inc., ICSID Case No. ARB/08/5, ¶ 60 (2017).

179. *See* Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, ¶ 1004 (Sept. 27, 2019).

180. *See* Burlington Resources Inc., ICSID Case No. ARB/08/5, ¶ 6 (2017).

181. *See id.*

182. *See* Perrone, *supra* note 53, at 18.

183. *Id.* ("The problem is that these decisions are made in an international arbitral forum specialized in foreign investment protection, conducted far away from the local community.").

C. *Local Participation and Consultation*

International law has strengthened protections for IPs and other communities by recognizing their rights to "free, prior, informed consent" (FPIC) and "prior consultation." These rights serve as democratic mechanisms to ensure the participation of communities in decisions that may affect their interests. These protections emerged as a result of the historical impact of state actions on Indigenous and ethnic groups.[184] The obligations to engage in prior consultation and obtain FPIC have been formalized through different international legal provisions dedicated to safeguarding the rights of IPs.[185]

First, the right to prior consultation constitutes a fundamental right over cultural, social, and economic protections. Its primary legal basis is outlined in Articles 6 and 15 of ILO Convention No. 169,[186] which requires states to consult with affected communities in advance through appropriate procedures or by enacting legislative or administrative measures when they are likely to affect IPs and other ethnic groups.[187] Although the right to consultation does not imply a right to veto (i.e., approving or denying the implementation of an economic project or administrative/legislative provision), national regulations specify that decisions must not irreversibly affect the interests and rights of ethnic communities.[188] This fundamental right must be exercised in

184. *See* UNITED NATIONS ECLAC, GUARANTEEING INDIGENOUS PEOPLE'S RIGHTS IN LATIN AMERICA 22 (2014), https://repositorio.cepal.org/server/api/core/bitstreams/d7a89fa6-5c4e-4f57-8582-06f8cb0a94d4/content.

185. *See id.* at 22.

186. ILO, *supra* note 78, art. 15. ("1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.").

187. *Id.* Article 6.1(a): "1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly."

188. FREE PRIOR INFORMED CONSENT PROTOCOLS AS INSTRUMENTS OF AUTONOMY 37 (Cathal Doyle et al. eds., 2019).

good faith and in a manner appropriate to the circumstances to reach an agreement or obtain consent on the proposed measures.[189]

Second, a stricter limitation upon the right of action by the state is the FPIC, as provided for in Articles 15, 16, 19, and 22 of the UNDRIP.[190] This is a mechanism of participation for the protection of ethnic communities and IPs.[191] Many countries expressed reservations concerning the language, as it would give IPs a right to veto national legislation and the state's management of resources.[192] Nonetheless, consent is understood to be freely given, provided there is an absence

189. *See* ILO, *supra* note 61, Article 6.2: Article 6.2: "2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."

190. Per UNDRIP, *supra* note 62, arts. 10–11, 19, 22, 32:

> Article 10. Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the Indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
>
> Article 11. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, de-signs, ceremonies, technologies and visual and performing arts and literature.
>
> [. . .]
>
> Article 19. States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent be-fore adopting and implementing legislative or administrative measures that may affect them.
>
> [. . .]
>
> Article 22. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with Indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken with-out their free, prior and informed consent or in violation of their laws, traditions and customs.
>
> Article 32.2 States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

191. It is worth it to mention that, the Declaration was adopted by the Human Rights Council on 29 June 2006 by a vote of 30 in favour, 2 against and 12 abstentions. *See* G.A. Res. 61/295 Declaration on the Rights of Indigenous Peoples, at 1 (Sept. 13, 2007).

192. *See* Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007) (noting that the United States, Canada and New Zealand did not sign the Resolution on this ground).

of coercion or manipulation in the process.[193] Communities should feel unencumbered in saying "yes" or "no" to developing a project or administrative decision in their territories, with sufficient time to learn the potential impact.[194] Crucially, consent must be provided before the start of the economic activity or modification of it.[195]

The ILO and U.N. provisions about the rights to prior consultation and FPIC invariably produce some subjectivity in their applications. Still, implementations of prior consultation and FPIC, which is the state's responsibility, has been carried out, more or less, rigorously.[196] Domestic systems have strengthened the prior consultation obligation on different levels, starting with a pre-consultation requirement with gradually more legal requirements until IPs and ethnic groups consent to the state's action.[197] Some mechanisms have been developed as a reinforced constitutional standard of protection for communities.[198] FPIC strengthens the willpower of IPs and ethnic groups, requiring their consent to implement industrial projects or administrative decisions that would significantly affect their cultural traditions and territories.[199]

In Latin America, six of the twenty-two countries have adopted the ILO Convention No. 169,[200] and of these states, all twenty-two are part of the

193. *See* UNODC, THE ROLE OF 'CONSENT' IN THE TRAFFICKING IN PERSONS PROTOCOL 22 (2014), https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf.

194. *See* FAO, RESPECTING FREE, PRIOR AND INFORMED CONSENT: PRACTICAL GUIDANCE FOR GOVERNMENTS, COMPANIES, NGOS, INDIGENOUS PEOPLES AND LOCAL COMMUNITIES IN RELATION TO LAND ACQUISITION 33 (2014), https://www.fao.org/3/i3496e/i3496e.pdf.

195. *See id.* at 4.

196. *See id.* at 7.

197. *See* ILO, *supra* note 61.

198. For instance, the majority of Latin-American Constitutions. Bolivia, Ecuador, Guatemala, Mexico, Colombia, Brazil have given the right of consultation a constitutional right. Also, New Zealand, Canada and Australia. *See* DUE PROCESS OF LAW FOUNDATION, RIGHT TO FREE, PRIOR, AND INFORMED CONSENT IN LATIN AMERICA 5 (2015).

199. See FAO, *supra* note 194, at 5.

200. S. James Anaya, (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), *Application of Convention No. 169 By Domestic and International Courts in Latin America*, U.N. Doc. A/HRC/9/9, ¶ 3, n. 2. (Aug. 11, 2008). El Salvador and Panama have not ratified the Convention. *See Ratifications by Country*, ILO, https://www.ilo.org/dyn/normlex/en/f?p=1000:11001 (last visited Mar. 29, 2024).

UNDRIP.[201] Bolivia,[202] Chile,[203] Colombia,[204] Costa Rica,[205] Ecuador,[206]

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201. UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples (last visited June 9, 2024).

202. ILO Convention 169 was incorporated into the Bolivian legal system with Law No. 1.257 of 1991. Bolivia also adopted Law No. 3760 of 2007, "elevating to the rank of domestic law the 46 articles of the United Nations Declaration on the Rights of Indigenous Peoples[.]" *See* Rep. of Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, ¶ 14, U.N. Doc. A/HRC/11/11 (Feb. 18, 2009). There are also other specific norms in the Bolivian domestic legislation related to the right to consultation, mainly in the hydrocarbon sector. *Id.* ¶¶ 34–45.

203. The Chilean State ratified ILO Convention 169 in 2008, after a delay of fifteen years following its submission to the National Congress for ratification. *See* ILO, CONSULTATIONS WITH INDIGENOUS PEOPLES ON CONSTITUTIONAL RECOGNITION: THE CHILEAN EXPERIENCE (2016–17) 8 (2018). On September 25, 2009, Chile adopted Decree 124, which intended to give transitory compliance to the obligations of indigenous participation and consultation. *See id.* at 11.

204. Colombia adopted one decree-law (70 of 1993) and eleven decrees that regulate the right to consultation with different scopes. *See Law 70, Protecting Afro-Colombian Rights (English Translation)*, WASH. OFFICE ON LATIN AM. (Apr. 24, 2007) https://www.wola.org/analysis/law-70-protecting-afro-colombian-rights-english-translation. *See also* Anaya, *supra* note 200, at 63.

205. Between 2015 and early 2018, the Ministry of the Presidency promoted the creation of a General Mechanism for the of a General Mechanism for Consultation with Indigenous Peoples (MGCPI), created jointly and with the consent of twenty-two of the twenty-four Indigenous territories in the country. *Indigenous World 2019: Costa Rica*, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS [IWGIA] (Apr. 24, 2019), https://www.iwgia.org/en/costa-rica/3377-iw2019-costa-rica.html; ICCA Consortium, *Costa Rica firma Mecanismo General de Consulta a Pueblos Indígenas Costa Rica firma Mecanismo General de Consulta a Pueblos Indígenas*, AMERICA LATINA BLOG (Mar. 20, 2018), https://www.iccaconsortium.org/es/2018/03/20/costa-rica-firma-mecanismo-general-de-consulta-a-pueblos-indigenas-costa-rica-firma-mecanismo-general-de-consulta-a-pueblos-indigenas-2/. The MGCPI was officially published on March 6, 2018. *Id.* The CMGDPI is comprised of two norms: Executive Directive 042-MP, which is the norm that initiates the process, and Executive Decree No. 40932-MP-MJP, which is the normative result of the process of the consultation process on the consultation. *Id.* Both norms are issued by the Ministry of the Presidency and mark respectively the beginning and the end of the process. *Id.*

206. Although the country does not have a general law on consultation, there are a number of sectoral laws and regulations that expressly mention this right. expressly mention this right, including: the Organic Law on Water Resources, Uses and Development of Water; the Organic Law on Citizen Participation; the Mining Law and the Law on Mining and the Organic Code of Territorial Organization. *See* Derecho Ecuador, Decreto núm. 1247 que dicta el reglamento para la ejecución de la consulta previa libre e informada en los procesos de licitación y asignación de áreas y bloques hidrocarburíferos, Registro Oficial (Separata) núm. 759, Aug. 2, 2012, https://natlex.ilo.org/dyn/natlex2/r/natlex/fe/details?p3_isn=98181. With respect to hydrocarbon activities, Decree 1247 of 2012 establishes the "Regulations for Prior, Free and Informed Consultation, Free and Informed Consultation in the Bidding and Assignment Processes of Hydrocarbon Areas and Blocks." *Id.* Constitutional Court of Ecuador has established some criteria that must be observed in consultation processes. *See id.* These include: the public and

Peru,[207] Guatemala,[208] and Honduras[209] have enacted a regulatory framework that addresses prior consultation and FPIC processes with some degree of complexity.[210] These countries have adopted laws, regulations, and decrees that regulate the rights of prior consultations and FPIC in specific economic sectors and state decision-making.[211] For instance, in Colombia, a judgment of the Constitutional Court indicates at least three essential cases where FPIC is mandatory: (i) when it involves the transfer or displacement of the communities on account of the work or project; (ii) when they are related to the storage or dumping of toxic waste on ethnic lands; and (iii) when they represent a high social, cultural, and environmental impact on an ethnic community, which puts its existence at risk, among others.[212]

National laws play a significant role in regulating consultation and FPIC requirements, specifically in the context of environmental, labor, and sectoral legislation. For instance, in Canada, the duty to obtain FPIC from Indigenous communities is enshrined in federal laws.[213] In *Haida Nation v. British Columbia (Minister of Forests)*, the Supreme Court of Canada emphasized the importance of meaningful consultation with

informed nature of the informed nature of the consultation; its definition as a systematic process of dialogue between the legitimate representatives of the parties; the obligation to define in advance who are the subjects of the subjects of the consultation; and respect for the systems of authority and representation of the consulted people. *See id.*

207. Law No. 297 of September 2011, the Prior Consultation Law and Its Regulation (approved through Supreme Decree No. 001-2012-MC of April 2012) currently constitute the two most relevant normative bodies of this right in Peru. Peru is the only country in the region with a comprehensive law. *See* DUE PROCESS OF LAW FOUNDATION, RIGHT TO FREE, PRIOR, AND INFORMED CONSENT IN LATIN AMERICA 5 (2015).

208. The Municipal Code, adopted by Congressional Decree 12-2002, regulates the right of consultation. *See id.* Under the legal and jurisprudential parameters in force in Guatemala, the result of this type of consultation is binding for the respective municipality. *See id.*

209. ILO Convention 169 was ratified by Honduras in 1995. *See* ILO, *Perspectiva empresarial sobre la consulta previa del C169 en América Latina: Honduras 8* (Sept. 2021). For some years now, there have been objections from some Indigenous and Afro-Honduran organizations to the organizations to attempt to regulate the right to prior consultation in the country.

210. Argentina, Brazil, El Salvador, Mexico, Nicaragua, and Venezuela have not adopted rules to regulate the implementation of prior consultation processes. *See* DUE PROCESS L. FOUND., IMPLEMENTATION OF PRIOR, FREE, AND INFORMED CONSENT AND CONSULTATION: COMPARATIVE EXPERIENCES IN LATIN AMERICA AND DISCUSSION ON A CONSULTATION LAW IN MEXICO (Oct. 10, 2018).

211. *See* UNITED NATIONS ECLAC, GUARANTEEING INDIGENOUS PEOPLE'S RIGHTS IN LATIN AMERICA 23 (Nov. 2014), https://repositorio.cepal.org/server/api/core/bitstreams/d7a89fa6-5c4e-4f57-8582-06f8cb0a94d4/content.

212. Corte Constitucional [C.C.] [Constitutional Court], marzo 3, 2011, Sentencia T-129/11 (8.1(vii)), http://www.corteconstitucional.gov.co/relatoria/2011/t-129-11.htm (Colom.).

213. Constitution Act, 1982, Schedule B to the Canada Act, 1982 c 11 (U.K.).

Indigenous communities.[214] The Court clarified that the level of engagement required depends on the potential impact on Indigenous rights, and in some cases, it goes beyond mere consultation to involve comprehensive discussions and decision-making processes.[215] The Court recognized that, in more significant matters, obtaining the full consent of the Indigenous nation is necessary.[216] These duties reflect a commitment to uphold and respect Indigenous rights.[217]

Western Australia introduced the 2021 Aboriginal Cultural Heritage Bill to protect Indigenous heritage, primarily focusing on consultation to reach agreements with Indigenous communities.[218] Mozambique's 1997 Land Act mandates consultation with LCs to confirm that areas are free of occupants before issuing permits and leases to extractive industry investors.[219] Mozambique's Act also states that national law may require state or investor-led risk assessments, including consultations with LCs, during the early stages of investment projects.[220] The Philippine Indigenous Peoples Rights Act recognizes the right of IPs to give prior and informed consent to projects that may affect their territories.[221] The law also mandates that no community be displaced or relocated without the written consent of the specific persons authorized to give consent.[222]

These pieces of legislation are crucial for the enforcement of Indigenous and ethnic peoples' rights to prior consultation and FPIC. They emphasize that investors must abide by the laws and regulations of the host state where they operate. Host states should not provide protections to investors who violate domestic laws. Although many international

214. Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 531 (Can.).

215. *See id.* at 531–36.

216. *Id.* at 531.

217. *Id.*

218. *Aboriginal Cultural Heritage Act 2021* (WA) pt 1 div 2 sib-div 4 (Austl.).

219. Land Law, No. 19/97 (Oct. 7, 1997), Boletim da República No. 40 3d Supplement, 200 (15) (Mozam.).

220. *Id.* art 13.3 ("O processo de titulação do direito de uso e aproveitamento da terra inclui o parecer das autoridades administrativas locais, precedido de consulta às respectivas comunidades, para efeitos de confirmação de que a área está livre e não tem ocupantes [The process of titling the right to use and benefit from the land includes the opinion of the local administrative authorities, preceded by consultation with the respective communities, for the purpose of confirming that the area is free and has no occupants.]").

221. *See* An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes, Rep. Act No. 8371, § 58 (Oct. 29, 1997) (Phil).

222. *Id.*

investment treaties include illegality clauses, there have been cases where arbitral tribunals have recognized the requirement of legality, even where such clauses are absent, as discussed *infra* Section III.E.[223]

Further, IIL may allow for some deviations in fulfilling a particular BIT's obligations to protect some values related to the LCs or individuals. Examples include the protection of public morals, human life or health, exhaustible natural resources, and national security.[224] Exceptions are present as explicit exclusions in many treaties, although the content of the exceptions vary.[225] For instance, Article 17 of the Argentina-Japan BIT (2018) and Article 14.17 of the United States-Mexico-Canada Agreement (USMCA) states:

> [P]arties reaffirm the importance that each of them encourages enterprises operating within its area or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Contracting Party . . . .[226]

The issue of local participation and consulting was discussed in two important cases: *Bear Creek Mining*[227] and *South American Silver Limited (Bermuda) (SAS) v. Bolivia*.[228] In *Bear Creek*, the rights of IPs[229] were impacted by Canadian Bear Creek Mining Corporation's silver exploitation project in Peru. According to the Peruvian Constitution, due to the location of the deposits, the silver could not be acquired or owned by foreigners.[230] In response, Bear Creek provided evidence of its

223. Bear Creek v. Peru, Award, *supra* note 43, ¶ 306.

224. *See, e.g.*, General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) art. XX-XXI.

225. *See* Maciej Żenkiewicz, *Compensable vs. Non-compensable States' Measures: Blurred Picture and Changing Borderlines under Investment Law,* 17(3) MANCHESTER J. INT'L ECON. L. 362, 369–71 (2020).

226. Agreement for the Promotion and Protection of Investment, Arg.-Japan, *supra* note 109, art. 17.

227. Bear Creek v. Peru, Award, *supra* note 43.

228. S. Am. Silver Ltd. (Bermuda v. Bolivia), Case No. 2013-15 (Perm. Ct. Arb. 2013-15).

229. Communities of Huacullani, Ingenio, Challocolo, Cóndor de Aconcagua, Ancomarca, Arconuma. *See* Bear Creek v. Peru, Award, *supra* note 43 ¶ 159.

230. The only exception to this rule is "in case of public necessity expressly declared by supreme decree approved by the Council of Ministers in accordance with the law" which in the case authorized Bear Creek to Bear Creek to acquire, own and operate the rights derived from the concession. The Project has faced strong social opposition, leading to violence and protests by

consultation and agreements made with various affected Indigenous communities. The Tribunal appreciated that the claimant's many efforts included a variety of actions of outreach to the LCs both on its own and in cooperation with Peru's authorities.[231] The Tribunal also considered that actions beyond those that Bear Creek took would have been possible and feasible.[232] Bear Creek implemented a jobs/rotational program, direct payments for land use, and other benefits designed to help only those communities in close proximity to the Project.[233] More distant communities, including those likely to be affected by water use and contamination, were not parties to the agreements and were instead offered work or other forms of recompense.[234] Thus, support for the Project came from communities that were receiving some form of benefits.[235] Other communities that remained silent or objected were not receiving benefits or were uninformed.[236]

The Tribunal had to determine if Bear Creek fulfilled its obligations to obtain a social license. Peru argued that these actions were insufficient to

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the Indigenous communities directly affected by the mining operation, especially because of its impact on water and land. Bear Creek held information workshops with local Indigenous communities and reached some agreements that eventually expired. The opposition to mining increased, and protesters requested the cancellation of the Santa Ana Project as well as the protection of Cerro Khapia (sacred land for the Aymara), and strikes and acts of violence occurred, from road blockades including access roads to Bolivia, and confrontation with police forces, becoming known to social resistance actions with the name of the "aymarazo". In this confrontation, the government decided to issue a set of regulations regarding mining in Peru. Bear Creek lost the fundamental requirement to be able to operate in two measures: 1) a Decree (082/2007) that suspended mining concessions in the department of Punto for 36 months and with respect to those already granted, a new round of consultations with LCs would be carried out in compliance with Convention 169 of the International Labor Organization (ILO) on Indigenous and tribal peoples; and 2) A Decree (032/2011) which establishes that new concessions would not be authorized without prior consultation with LCs. Understanding that these measures constituted an indirect expropriation of the company under the Peru-Canada Free Trade Agreement (the "FTA"), Bear Creek requested the initiation of arbitration before the ICSID. The claim for damages was US$522 million. The Tribunals had to assess the relationship between the action of foreign investors and LCs. The Claimant argued that it fulfills its obligations to obtain Social Licence, and Respondent argues that these actions were not sufficient to fulfill the legal requirements, in particular, consulting Indigenous communities in accordance with article 32 of UNDRIP was not properly conducted. Bear Creek v Peru, Award, *supra* note 43, ¶ 403.

231. *Id.*

232. *Id.* ¶ 404.

233. *Id.*

234. *Id.* ¶ 403.

235. *Id.* ¶ 407.

236. *Id.*

fulfill the legal requirements,[237] namely whether the consultations with Indigenous communities were properly conducted in accordance with Article 32 of UNDRIP.

The Tribunal concluded that Bear Creek reasonably believed it had complied with all legal requirements for community outreach.[238] Therefore, Peru could not retroactively claim that Bear Creek's actions caused social unrest or violated ILO Convention No. 169.[239]

In his dissent, Professor Philippe Sands pointed out that "the circumstances which the Peruvian government faced—massive and growing social unrest caused in part by the Santa Ana Project—left it with no option but to act in some way to protect the well-being of its citizens."[240] However, other less draconian options were available to the government, which the Respondent did not consider. Professor Sands argued that the assessed damages should be reduced, disagreeing with other members of the Tribunal.[241]

For the arbitrator, "the Project collapsed because of the Investor's inability to obtain a 'social license,'" and "the necessary understanding between the Project's proponents and those living in the communities most likely to be affected by [this lack of social license]."[242] Professor Sands highlighted that "the viability and success of a project such as this, located in the community of the Aymara peoples, a group of interconnected communities, was necessarily dependent on local support."[243] For the arbitrator, the investor "did not ... take real or sufficient steps ... to engage the trust of all potentially affected communities and this contributed, at least in part, to some of the population's general discontent with the Santa Ana Project."[244] The arbitrator concluded that "[t]he Canada-Peru FTA is not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain such a license."[245]

In a UNCITRAL arbitration *South American Silver Limited (Bermuda) (SAS) v. Bolivi*a, the Tribunal ruled that Bolivia unlawfully expropriated SAS's investment, but only awarded the mining investor its sunk costs.[246]

237. *Id.* ¶ 403.
238. *Id.* ¶ 412.
239. *Id.*
240. *Id.* at Partial Dissenting Opinion, ¶ 2.
241. *Id.* ¶ 663.
242. *Id.* at Partial Dissenting Opinion, ¶ 3.
243. *Id.* at Partial Dissenting Opinion, ¶ 4.
244. *Id.* at Partial Dissenting Opinion, ¶ 5.
245. *Id.* at Partial Dissenting Opinion, ¶ 4.
246. S. Am. Silver Ltd., *supra* note 228, ¶ 938.

On November 7, 2003, Compañía Minera Malku Khota (CMMK) was incorporated in Bolivia to explore and develop the Malku Khota mining project.[247] The plaintiff, SAS, indirectly owned all the shares of CMMK.[248] Between 2003 and 2007, CMMK acquired ten mining concessions.[249] Native communities mainly inhabited the area of concessions.[250] In 2010, these communities accused CMMK of contaminating sacred spaces, disrespecting native authorities, deceiving and threatening community members, and raping women in the community.[251] The tension between LCs and CMMK officials ended in violent confrontations.[252] The Bolivian government intervened and reached an agreement with the native communities.[253] On August 1, 2012, Bolivia issued Supreme Decree No. 1308, declaring the reversion of ownership of all mining concessions to Bolivia.[254] SAS claimed that the reversion constituted an expropriation under Article 5 of the Bolivia-United Kingdom BIT.[255]

According to the Tribunal, there was no doubt that the conflict escalated into serious acts of violence.[256] Furthermore, it determined that native communities' opposition to the project stemmed from various grievances, including environmental concerns, social misconduct allegations against CMMK, and failures in the management of socialization programs, which were perceived as serious failures on the part of SAS in managing the socialization programs with the community. [257] The Tribunal also stated that the mere absence of an express reference to human rights or the protection of the communities did not necessarily mean that the reversion was not carried out for a social benefit related to the internal needs of Bolivia.[258] Instead, the rationale for the reversion included "the protection of human rights[, namely] the right to life and the right to peace," and "the protection of the communities . . . against the difficulties [caused by] the [P]roject."[259]

247. *Id.* ¶ 80.

248. *Id.* ¶¶ 85–88.

249. *Id.*

250. *Id.* ¶ 104.

251. *Id.* ¶¶ 112–18.

252. *Id.* ¶¶ 150, 172.

253. *Id.* ¶¶ 150–63.

254. *Id.* ¶¶ 169.

255. Agreement for the Promotion and Protection of Investments, Bol.-U.K, art. 5, May 24, 1988, T.S. No. 34.

256. S.Am. Silver Ltd., *supra* note 228, ¶ 559.

257. *Id.* ¶ 559–60.

258. *Id.* ¶ 561.

259. *Id.*

D. *The Need for Benefit-Sharing*

The overarching aim of benefit-sharing is to enable the fair distribution of benefits between the users of an investment, the LCs, and the investors to open the doors for a reasonable income.[260] Benefit-sharing involving natural resource use is absent in IIL. However, under certain conditions, the requirement of benefit-sharing may serve as a precondition for the granting of FPIC, or it may represent the end result of an FPIC process.[261]

E. *Multi-Actor Contracts*

One way to account for the voice of unheard LCs is to allow tripartite contracts, or more generally, any tripartite agreement, between LCs, investors, and host states. While such a solution would not be appropriate in every circumstance, the opportunity to create rights and obligations for LCs under private law (e.g., contract) is worth examining.

As previously explained, the main obstacles for LCs in their fight for their rights against investors is their absence on the international plane. During negotiations or execution of the bilateral treaty, LCs must depend on their host state to properly address and protect their interests. Also, under international law the obligations between an LC and investor may be dubious, as principally such obligations and rights are between the investor and host state only. The option to enter into a tripartite contract with relevant stakeholders addresses this ambiguity by distinctly outlining the obligations towards the LC for both the investor and the host state, thus enhancing enforceability. Additionally, it allows for a precise articulation of the acquired rights and obligations of the LC.

Nowadays, "[i]nvestment contracts are not a relic of past practice[:] they remain commonplace in the modern era, and indeed, investors often continue to insist on obtaining them."[262] Contract-based obligations

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260. *See generally* Elisa Morgera, *The Need for an International Legal Concept of Fair and Equitable Benefit Sharing*, 27(2) EUR. J. INT'L L. 353 (2016).

261. "[A] growing number of international legal materials refer to 'benefit sharing' with regard to natural resource use[.]" *Id.* at 353–54. "[B]enefit sharing applies to relations between communities and private companies that may be protected by international investment law[.]" *Id.* at 355. On the linkage between FPIC and benefit sharing, "much remains to be clarified about the interactions between benefit sharing and FPIC." *Id.* at 376. "On the one hand, benefit sharing may serve as a condition for the granting of FPIC . . . On the other hand, benefit sharing may represent the end result of an FPIC process[.]" *Id.*

262. Jason Webb Yackee, *Do We Really Need BITs? Toward a Return to Contract in International Investment Law*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 121, 133 (2008).

under IILs are nothing new nor uncommon.[263] Particularly in extractive industries, contracts are a major mechanism for regulating obligations and rights between states and private investors.[264] As these contracts may substantially impact the rights of LCs,[265] LCs should be a party to the contract. These "multi-actor contracts could attempt to remedy the deficit in sustained interaction."[266]

LCs or IPs indeed do appear in some tripartite agreements. One example is Economic and Community Development Agreements with a state's Indigenous communities. Since 2010, Canada has entered into many such agreements with IPs.[267] Other agreements that include LCs are Global Memoranda of Understanding (GMoU),[268] Impact and Benefit Agreements (IBAs),[269] and Community Development Agreements (CDAs).[270]

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263. "Many investors, and probably the vast majority of all large investors in high-risk sectors, rely primarily on investment contracts to legally secure their investments, despite the advent of BITs." *Id.* at 137 (emphasis omitted). "BITs are hardly necessary to encourage investment, there is no evidence that investors demand the treaties as a condition to investing, and it is worth seriously considering whether host states might be better served by forgoing the treaties in favor of a regime in which the default terms of bargain provided to investors are relatively mild by today's standards." *Id.*

264. Odumosu-Ayanu, *supra* note 46, at 485.

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

266. *See* Odumosu-Ayanu, *supra* note 46, at 485.

267. For an exhaustive list of those agreements, see *Economic and Community Development Agreements*, B.C., https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/economic-and-community-development-agreements (last updated Dec. 20, 2023).

268. *See, e.g.*, *Chevron Signs MoU with Host Community [Nigeria]*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE (Aug. 8, 2005), https://www.business-humanrights.org/en/latest-news/chevron-signs-mou-with-host-community-nigeria/(detailing Chevron and Shell's signing of GMoU with communities in Nigeria).

269. Once again, Canada serves as a good example of such agreements. *See generally* Drew Meerveld, Assessing Value: A Comprehensive Study of Impact Benefit Agreements on Indigenous Communities of Canada (Mar. 2016) (Major Research paper, Graduate School of Public and International Affairs, uOttawa) (on file with uOttawa). Also see the activity of the Centre of Expertise on Impacts and Benefits Agreements (CEIBA), https://fnqlsdi.ca/centre-of-expertise-on-impact-and-benefits-agreements/ (last visited Nov. 2023).

270. Community Development Agreements (CDAs) are formal contracts increasingly adopted by mining companies to establish clear guidelines and obligations regarding their interactions with affected communities. *See* THE WORLD BANK, MINING COMMUNITY DEVELOPMENT AGREEMENTS SOURCE BOOK 5 (2012). These agreements serve as mechanisms to manage expectations and foster positive relationships among stakeholders, including the mining company, LCs, government entities, and non-governmental organizations. *See id.* As legal instruments, CDAs are

International actors are not blind to the negative effects on LCs. Industry-specific LC agreements, like the IBAs and GMoUs, have helped remedy some of these effects.[271] That framework may be useful in the search for proper tools to protect the rights of LCs in the ISDS.

V. Options to Push Forward Local Communities Protection

The protection of LCs' rights in investment law can be achieved through national legislation, treaty drafting, investor actions, arbitral tribunal interpretation, and international community involvement. States can introduce laws to safeguard communities, while treaties can explicitly include provisions protecting LCs' rights. Investors can accept broader tribunal jurisdiction, include community safeguards in agreements, and engage in tripartite negotiations. Tribunals can interpret treaties to incorporate human and environmental rights provisions. The international community can facilitate complex solutions through U.N. bodies and multilateral treaties. Overall, a multi-faceted approach is needed to ensure that the rights of LCs are respected in investment contexts.

A. *By States: National Law*

The state alone may introduce, through its own legislation, obligations on various levels (e.g., constitutional) to protect LCs. Such legislative reforms could guarantee various substantial rights, including free, prior consultations or the obligation to share benefits. Moreover, the state may create institutions or agencies that can monitor the fulfillment of LCs' rights, or they may be incorporated into a preexisting system (e.g., an ombudsman).

To address the systemic changes needed, it is crucial to enhance domestic laws to provide more effective protection of LC rights, ensuring consistency and robustness across jurisdictions. Additionally, reforms should focus on strengthening legal mechanisms, such as tort actions and human rights relief, to safeguard both LCs and individual rights affected by foreign investments. Legal institutions like *actio popularis*, otherwise known as class action suits, should be reinforced to empower LCs to seek protection and redress for grievances. Moreover, environmental impact assessments (EIA) processes should be further refined to bolster LCs' environmental rights and ensure their meaningful participation in decision-making processes. Under national law, LCs

designed to outline the specific requirements and parameters for community engagement and development initiatives associated with mining operations. *See id.*

271. *See* Odumosu-Ayanu, *supra* note 46, at 478.

should have recourse to take direct actions in domestic courts against investors, while also retaining the ability to sue their own state for negligence or omissions in protecting their rights. States should be empowered to intervene on behalf of LCs, ensuring that their interests are safeguarded, even in cases where the state itself is not inclined to protect their rights. Furthermore, efforts should be made to enhance international legal frameworks to provide avenues for justice for LCs affected by transnational investments. For example, while laws like the ATCA in the United States have been instrumental in providing redress for human rights violations, they remain limited in scope and applicability. Therefore, systemic changes are needed to create a more comprehensive and equitable framework that eliminates the need for ad hoc legal measures like the ATCA and ensures consistent protection for LCs' rights across borders.

B. *By States: Treaty Drafting*

One possible method for balancing investment law with affected communities' rights would be through the drafting and redesigning of investment treaties. The drafters should expressly include provisions to protect the rights of those affected in the treaties.[272] For example, in new treaties, the affected communities may be explicitly mentioned in the preamble, exceptions, annexes and, generally, the treaty's rules. Also, an investment treaty may include substantive obligations on the investor to comply with environmental standards and fundamental human rights as a precondition for filing a claim under the treaty.

Protection of LCs could also be achieved by requiring investors to comply with domestic regulations. Additionally, a treaty could include security measures, such as CSR regulations. A treaty could also extend conventional international investment treaty rights to the communities and individuals affected by the investment. These would include rights rooted in public international law, such as: fair and equitable treatment, full protection and security, and non-discrimination.

A new trend in international law is the development of placing CSR obligations on companies and multinationals. States have included clauses related to internationally recognized standards on CSR in the area of international arbitration. However, the majority of those provisions are non-binding and, with few exceptions (e.g., the Dutch Model

272. *See* Stephan W. Schill & Vladislav Djanic, *International Investment Law and Community Interests* 4 (Soc. of Int'l Econ. L., Working Paper No. 2016/01, June 23, 2016).

BIT and the Morocco-Nigeria BIT), LCs are not entitled to judicial relief.

A complementary approach would be the inclusion of community representatives in the drafting and renegotiating of IIAs on LCs' rights. The Human Rights Council on the Rights of Indigenous Peoples provided that the standard of protection in IIAs may have "significant potential to undermine the protection of indigenous peoples' land rights and the strongly associated cultural rights."[273] States should involve LCs in treaty negotiations to allow for their comments and input in the negotiation of IIAs.[274]

Treaty drafting could, but does not necessarily, solve the conflict between IIL and other community interests on its own.[275] At the same time, treaty drafting can stabilize relations between investors, states, and LCs affected by the investment. It seems crucial to consider domestic mechanisms to promote consideration of LCs in IIL and arbitration, with special consideration to those in developing countries.

C. *By Investors*

Investors can protect the rights of LCs by taking several measures. First, they can accept the jurisdiction of a tribunal beyond traditional arbitration clauses, allowing the tribunal to address issues vital to LCs, such as human rights and environmental protection. Second, investors can include provisions in their agreements that explicitly safeguard LC rights, such as commitments to sustainable development and consultation with affected communities. In addition to these steps, investors can engage in tripartite negotiations involving the state and LCs to ensure all parties' concerns are considered. They can also voluntarily adopt codes of conduct outlining their commitments to social and environmental responsibility, monitor the well-being of vulnerable communities, and invite NGOs to conduct independent assessments or provide mediation services. By implementing these measures, investors can promote a more inclusive and responsible approach to investment that prioritizes the rights and well-being of LCs.

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273. Rep. of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples on the Impact of International Investment and Free Trade on the Human Rights of Indigenous Peoples, U.N. Doc. A/70/301, ¶ 23 (Aug. 7, 2015).

274. Pushkar Anand & Amit Kumar Sinha, *Protecting the Rights of Tribals*, THE HINDU (Feb. 27, 2017), https://www.thehindu.com/opinion/op-ed/protecting-the-rights-of-tribals/article17372134.ece#:~:.

275. Sondra Faccio, *Investment Contracts and the Reform of Investment Arbitration: Towards Sustainability*, 38 ICSID REV. 625, 630 (2023), https://doi.org/10.1093/icsidreview/siad026.

D. *By Arbitral Tribunals: Treaty Interpretation*

By using the toolbox of treaty interpretation, in particular Articles 31–33 of the Vienna Convention,[276] investment tribunals may incorporate notions of human rights and environmental rights provisions that protect LCs and individuals affected by the investment.[277] Thus, as part of public international law,[278] international investment tribunals already provide tools to assess the interaction between investor and LC rights.[279] Arbitral tribunals can interpret IIL in conformity with international law.

Thus, by means of interpretation, tribunals may seek balanced applications of the provisions in investment treaties and LC rights. Tribunals have examined the legality of human and environmental rights by giving reach and limits to investment provisions. For instance, concerning legality, investment tribunals have an extensive interpretation of the definition of investment and have rejected claims that are tainted by the investor's illegal behavior, even without a specific requirement of legality in the international investment treaty.[280]

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276. Vienna Convention on the Law of Treaties art. 31–33, May 23, 1969, 1155 U.N.T.S. 331 (1969).

277. *See* Vivian Kube & Ernst-Ulrich Petersmann, *Human Rights Law in International Investment Arbitration*, 11(1) ASIAN J. WTO & INT'L HEALTH L. & POL'Y. 65, 73 (2016) (noting that even though "investment tribunals may seem to be a rather odd place for independent human rights claims . . . if the jurisdictional and applicable law clauses of the respective IIA are sufficiently broad to include human rights violations, adjudicating a pure human rights claim could be possible.").

278. Stephan W. Schill & Vladislav Djanic, *International Investment Law and Community Interests*, *in* COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 2 (Edith Benvenisti & George Nolte eds., 2018) ("[W]hile [international investment law] is a highly specialized system, it is not a self-contained one, but forms part of the general system of international law").

279. Several international law instruments recognize and protect the human rights of IPs, including the United Nations Declaration on the Rights of Indigenous Peoples, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights (ICESCR), and ILO Convention 169. *See* G.A. Res. 61/295 United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP] (Sept. 13, 2007); G.A. Res. 217A Universal Declaration of Human Rights [UDHR] art. 18, 27, 29 (Dec. 10, 1948); G.A. Res. 2200A (XXI) International Covenant on Civil and Political Rights [ICCPR] art. 8, 18.1 (Dec. 16, 1996); G.A. Res. 2200A (XXI) International Covenant on Economic, Social and Cultural Rights [ICESCR] art. 1.1, 1.2, 25 (Dec. 16, 1996); ILO Indigenous and Tribal Peoples Convention 169 (June 27, 1989).

280. *See* Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 123 (June 18, 2010); *see also* Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Decision on Provisional Measures, ¶ 101, (Apr. 6, 2007). *See also* ZARATE ET AL., *supra* note 24, at 224–26.

Arbitral tribunals are of limited jurisdiction and cannot adjudicate violations of human rights obligations by states or by investors. Instead, they are only able to assess whether the rights conferred to investors in the relevant investment treaty have been breached. However, under international law, states should protect against human rights violations, even if they are caused by third parties.[281] International law protects LC rights through both hard and soft legal provisions that arbitrators should take into account.[282] However, while some tribunals have entertained the notion of allowing counterclaims based on human rights provisions, they have simultaneously neglected to safeguard the property and contractual rights of LCs.[283]

In *Urbaser*, the tribunal concluded that investment laws must be construed in harmony with other rules of international law, including those relating to human rights.[284] Public international law adjudication can also have persuasive authority in investment arbitration. In *Álvarez y Marín Corporación S.A. v. the Republic of Panama,* the arbitral tribunal concluded that human rights adjudication could influence investment arbitration.[285]

E. *By International Community*

This set of options to protect LC rights is more dispersed and diverse. There are many actions which are available for international communities

281. For one, it is unlikely that foreign investors will violate human rights openly and deliberately. The Copper Mesa P. Ecuador is a serious case of misconduct-which included criminal activity-and the arbitrators only granted a 30 percent discount. Copper Mesa Mining Corp. v. Ecuador, PCA Case No. 2012-2, award, ¶ 7.30 (Perm. Ct. Arb. 2016). For another, most foreign investors only invest after securing sufficient state support, support that can be later used to show state inconsistency, awareness of misconduct, and the need to protect the Investor despite its obligations (as occurred in Copper Mesa and Bear Creek).

282. For instance, Article 1 of both the ICCPR and the ICESCR recognize the right of self-determination in referring to the peoples' right to "freely determine their political status and freely pursue their economic, social and cultural development." ICCPR, *supra* note 279, art. 1.2; ICESCR, *supra* note 279, art. 1. The same provision also clarifies that international economic cooperation is "based upon the principle of mutual benefit[] and international law" and that "[i]n no case may a people be deprived of its own means of subsistence." ICESCR, *supra* note 279, art. 1. Significantly, the principle of self-determination is commonly regarded as a jus cogens rule. *See generally* Alexander Orakhelashvili, *Peremptory Norms in International Law*, 2007 BRIT. Y.B. INT'L L. 480; Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, 11(4) HUM. RTS. L. REV. 609 (2011).

283. See Urbaser v. Argentina, ICSID Case No. ARB/07/26, ¶ 199–210 (Dec. 8, 2016).

284. *See id.* ¶ 1200.

285. Álvarez y Marín Corporación S.A. and others v. Republic of Panama, ICSID Case No. ARB/15/14, ¶ 118 (Apr. 20, 2015).

in various fora. For example, we mention actions taken to find complex solutions by U.N. bodies (e.g., system-wide action plan (SWAP) on the rights of IPs, also known as United Nations Indigenous Peoples Council (UNIPC)) and other international organizations (e.g., UNCITRAL Working Group III). International community concern may also be reflected in the growing interest of academics (and therefore the growing number of projects related to the issue) or in the growing concern of the public, which may increase pressure on states and investors to take LC interest into account.

VI. Conclusion

This Article serves as an introductory exploration of the complex landscape surrounding the participation of LCs and their interests in IIL. The Article's purpose is to initiate and advance the ongoing debate on this topic rather than providing definitive solutions. The subject matter is vast, there are numerous areas requiring further investigation, and there are significant loopholes within existing mechanisms.

While certain tools, such as amicus curiae, counterclaims, and the acceptance of jurisdiction by investors, exist to facilitate LC participation, they are constrained by limitations that hinder their effectiveness in safeguarding the interests of LCs. Amicus curiae, despite enhancing transparency and legitimacy, are infrequently utilized and receive limited consideration by adjudicating bodies. Their submission does not guarantee remedies for substantive rights and their admission is at the discretion of the parties involved. Similarly, counterclaims, which allow host states to file opposing claims against investors, have a narrow application, as most investment treaties do not explicitly provide for them. The consideration of counterclaims is further contingent upon the consent of the parties and jurisdictional grounds, thereby limiting their efficacy in addressing the concerns of LCs. Furthermore, the acceptance of jurisdiction by investors to decide LC-related issues depends on their willingness to include such matters in the arbitral clause, which is not a widespread practice and is influenced by various factors.

The rights of FPIC and prior consultation hold significant relevance within the framework of IIL. However, the effective implementation of these rights varies depending on the specific countries involved, and their practical application may be limited to mere bureaucratic procedures, lacking substantive impact. It is worth noting that the proper application of FPIC and prior consultation can have implications for the legality of an investment under domestic laws, as compliance with these rights becomes a crucial criterion to assess the legitimacy and legality of an investment project.

Benefit-sharing, which aims to achieve a fair distribution of benefits, is notably absent in IIL. Further exploration is required to determine the relationship between FPIC and benefit-sharing, as benefit-sharing requirements may serve as a precondition for granting FPIC or as an outcome of the FPIC process, ensuring a reasonable income for LCs. Tripartite contracts, or agreements between LCs, investors, and host states, offer potential solutions to address the concerns of LCs. By establishing clear obligations and recognizing LC rights under private law, these agreements can improve enforceability and promote inclusivity.

To enhance the protection of LCs, states can introduce national legislation that explicitly recognizes and safeguards LC rights and revise treaty drafting to include specific provisions addressing LC concerns, and investors can voluntarily undertake measures to protect and promote these rights. Arbitral tribunals can also play a role by interpreting investment treaties in a manner that incorporates human rights and environmental protections. Additionally, the international community can contribute to addressing these issues through U.N. bodies and the development of multilateral treaties.

In conclusion, a comprehensive approach involving the active participation of states, investors, arbitral tribunals, and the international community is necessary to address the problem of limitations faced by LCs in IIL. By collectively overcoming these challenges, greater access to justice and the protection of LC interests can be achieved within the framework of IIL. However, this Article's conclusions are not exhaustive, as the topic encompasses a wide range of considerations that require further analysis and discussion.