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Measuring Public Participation in International Investment Treaty  
Law: A Study of the Latin American Extractive Industries.

By

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## Chapter 16. Measuring Public Participation in International Investment Treaty Law: A Study of the Latin American Extractive Industries.

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### [A] Introduction

One of the most severe criticisms received in the legal world has been directed to the existence of the dispute settlement mechanism of investor-state arbitration (ISDS). The Financial Times has referred to the ISDS process to be ‘unsuited to meet global challenges’.<sup>1</sup> Criticisms to the system should not come as a surprise as these are not exclusive of the ISDS process.<sup>2</sup> That said, despite the ordinariness of some of the criticisms, the transformation of the ISDS process is a worthwhile task to pursue in order to achieve a more transparent, consistent and cost-effective arbitration process. To this endeavour, the ongoing work of the ‘ISDS reform’ is currently tackling most of the ISDS pervasive issues.<sup>3</sup>

Nonetheless, a problem that remains unaddressed by the current ISDS reform, is the role of public and indigenous communities in investment projects. This paper uses the momentum gained by the current ISDS transformative era, to draw attention to this also very important issue and set the agenda on the beginning of a paradigm inclusive of communities’ rights in international investment law.

So far, the problem has been that the ISDS process has been narrowly constructed in a way limited to a two-way relationship between investor and state. This paper proposes that the time has come to adopt a bigger dimension where public participation is a also recognised stakeholder in the ISDS process. The benefit is that our attention would be placed at recognising the importance of endemic socio-economic global issues, where the law can foster a better dialogue in achieving domestic, regional and international social justice.<sup>4</sup> This concern has been already recognised in the United Nation’s Sustainable Development Goals (SDGs), where the value of public participation has been identified as an intrinsic element of good governance.

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<sup>1</sup> Kavaljit Singh, *ISDS is unsuited to meet today’s global challenges*, <https://www.ft.com/content/ed08cd0c-2fea-11e7-9555-23ef563ecf9a> (accessed 21 Aug. 2020) and BBC Sounds, *Company vs Country*, <https://www.bbc.co.uk/sounds/play/b05ntj7p> (accessed 21 Aug. 2020).

<sup>2</sup> See for example the criticisms to the WTO in Hunter Nottage, *Evaluating the criticism that WTO retaliation rules undermine the utility of WTO dispute settlement for developing countries*, in Chad Bown and Joost Pauwelyn (eds), *The law, economics and politics of retaliation in WTO dispute settlement*, 320 (Cambridge University Press 2010); Steve Chanovitz, *Transparency and participation in the World Trade Organization*, 56 Rutgers L. Rev. 927 (2004); Gabrielle Marceau and Mikella Hurley, *Transparency and public participation in the WTO: A report card on WTO transparency mechanisms*, 4(1) Trade L. & Dev. 19 (2012) and Robert E. Hudec, *The new WTO dispute settlement procedure: An overview of the first three years*, 8 Minn J. Global Trade 1 (1999).

<sup>3</sup> United Nations Commission on International Trade Law, Working Group III, *Investor-State Dispute Settlement Reform*, [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state) (accessed 23 Jul. 2020).

<sup>4</sup> See for example, United Nations, *Guiding Principles on Business and Human Rights*, [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (accessed 18 Jun. 2020); and *Zero draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> (accessed 3 Jul. 2020).

## [1] Proposition and Main Objective

The Chapter surveys a series of community actions taken to defend and protect collective rights during the performance of an investment project. These community actions are measured employing certain elements of the social tool known as the Arnstein's ladder, in order to understand the effectiveness of power exchange between local communities and foreign investors. In addition, the Chapter evaluates the weight given by arbitration tribunals to the allegations suffered by the communities involved in the investment project. The analysis pins down the effects of a lack of formal normative recognition in investment treaties and the inconsistencies between domestic and international investment laws. Lastly, the Chapter identifies the ISDS capability to enforce community rights and the absence of legal relief to those affected communities.

Therefore, the proposition in this paper is to create a more inclusive decision-making process, in order to have a more socially just ISDS process which can foster its own democratic legitimation.<sup>5</sup> As a matter of fact, it is worth noting that the role of public participation is precisely aligned with SDG 5.5, which integrates vulnerable groups into decision-making processes in order to facilitate informed investment decision-making while strengthening the bridge between the law, business and society.<sup>6</sup>

In navigating the issue of communities' participation, the Chapter questions the extent to which investment treaty law is a socially just adjudication process. To examine this proposition, the Chapter undertakes an empirical scrutiny of publicly available arbitration cases to identify the role of public participation rights exercised when a local community has had interests vested in an investment project.

Therefore, one of the main objectives of this paper is to bring clarity to the intersections between community engagement and international investment law in the particular context of energy and natural resources disputes. The Chapter advocates that community rights should be recognised, protected and become part of a formal normative recognition in international investment treaties. So far, as the analysis in this Chapter reveals, arbitration tribunals tend to overlook participatory rights of local communities, with more prominent violations when indigenous communities are involved. In response, the Chapter zooms into investment arbitration cases in Latin America, home of 42 million indigenous people. According to ICSID Statistics, 51% of disputes registered are in the energy and natural resources sector and Latin America has hosted 33% of all the investment treaty cases under the ICSID Convention.<sup>7</sup>

The discussion presented in this paper is timely and relevant as it identifies with clarity the social problem arising from international investment law in the context of communities' rights. It also provides for a way to classify the current manifestations of community engagement in the aim of contributing to a more formalized discussion advocating for these

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<sup>5</sup> Daria Shapovalova, *Indigenous Rights and Resources Extraction in Guyana: A Learning Opportunity for the New Offshore Sector*, 2 OGEJ Journal, 1, 3 (2020) and Holder J and Lee M, *Environmental Protection, Law and Policy: Text and Materials*, 85 - 185 (2nd ed., Cambridge University Press 2007).

<sup>6</sup> UN Sustainable Development Goals, *Information for Integrated Decision-Making & Participation*, <https://sustainabledevelopment.un.org/topics/information-integrated-decision-making-and-participation> (accessed 17 Jun. 2020).

<sup>7</sup> ICSID, *The ICSID Caseload Statistics Issue 2020-2*, <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf> (accessed 21 Aug. 2020).

rights to be explicitly included in investment laws. This is of particular relevance in developing economies including Latin America, a region which already has been the epicentre of distrust to investment treaty arbitration as it has been perceived as a dispute resolution mechanism eliding community values and democratic concerns.<sup>8</sup> In addition, there is already evidence of the political, historical and social tensions between the public and the government due to the imbalances between protecting local communities and the protections granted to foreign investments.<sup>9</sup>

## [2] Methodology, Arnstein's ladder and Social License to Operate

In this paper, the proposal is to collect the available empirical data, mainly from the investment treaty practice in the energy and natural resources sector in Latin America. This data will set out the different scenarios where an investment project appears to have had an effect in the respective local communities. The paper will then proceed to classify the different ways in which the public and communities' concerns have interacted during the performance of the investment project and how this evidence has been taken into account by arbitration tribunals.

The innovative approach this paper offers is the use of Arnstein's ladder as the methodology to define and classify the different examples of community and public participation in investment treaty practice.<sup>10</sup> In social and environmental sciences, Arnstein's ladder has been already used to measure the exchange of power between the community as right holders -but often the less economically advantaged- and foreign investors as power holders.

Using Arnstein's ladder in this paper adds clarity to the discussion, given that previous theoretical constructs that systematize third party rights in investment arbitration do not exist. More concretely, in this paper, Arnstein's ladder will be used to classify the different types of public and communities' actions into different levels of participation and engagement in the planning and execution of investment projects. Arnstein's classification measures the level of *power* exercised by the public and communities and argues that there are seven degrees measuring the power of decision making. These levels are: (1) manipulation, (2) therapy, (3) informing, (4) consultation, (5) placation<sup>11</sup>, (6) partnership, (7) delegated power and (8) citizen control.<sup>12</sup>

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<sup>8</sup> Sherry R. Arnstein, *A Ladder of Citizen Participation*, 36 *Journal of American Planning Association*, 216, 217 (1969), David Schneiderman, *Investing in Democracy? Political Process and International Investment Law*, 60 *University of Toronto Law Journal* (2010); Corporate Europe, *Suing to force through a toxic goldmine: Gabriel Resources v Romania*, <https://corporateeurope.org/sites/default/files/2019-06/Gabriel%20Resources%20vs%20Romania.pdf> (accessed 10 Jun. 202); Tania Voon and Andrew D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law*, 31(2) *ICSID Review - Foreign Investment Law Journal* 413 -433 (2016) and Catharine Titi, *Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas*, 30(2) *Arbitration International*, 357-386 (2014).

<sup>9</sup> World Bank, *Indigenous Latin America in the Twenty-First Century*, <https://www.worldbank.org/en/region/lac/brief/indigenous-latin-america-in-the-twenty-first-century-brief-report-page> (accessed 23 Jun. 2020).

<sup>10</sup> Sherry R. Arnstein, *A Ladder of Citizen Participation*, 36 *Journal of American Planning Association*, 216, 217 (1969).

<sup>11</sup> Which means making someone less angry or annoyed in Cambridge Dictionary, Placate, <https://dictionary.cambridge.org/dictionary/english/placate> (accessed 24 Jun. 2020).

<sup>12</sup> Arnstein, *supra* n. 8, at 216.



Figure 1. Interpretation of Arnstein's ladder, authors' own interpretation

## [i] Arnstein's Ladder in International Investment Law

In interpreting Arnstein's ladder into investment treaty practice, it is important to understand that each step of the ladder increases the community involvement and the power control retained over the investment project.

### Manipulation and Therapy

*Manipulation* and *therapy* are the most basic levels of public and community participation, which enable the community to somehow participate in the planning of the government's program. *Manipulation* and *therapy* occur where the government and the investor can have the opportunity to *educate* the community on the project, but without giving away any level of power in the decision-making.

### Information and Consultation

The second two levels are *informing* and *consultation*, where there is a reciprocal exercise between the investor and the communities to hear and be heard.<sup>13</sup>

### Placation

*Placation* refers to actions, where the economically disadvantaged give advice on the potential impact of the investment project but the investor continues to retain decision-making powers. Moving forward into the ladder, the next level of participation, according to Arnstein, is *partnership*, which permits communities to 'negotiate and engage in trade-offs'.<sup>14</sup>

### Delegated Power and Citizen Control

Lastly, *delegated power* and *citizen control* are based on a horizontal level of power and control between on the one hand the communities, and on the other hand the government and the foreign investor. An example of *delegated power* and *citizen control* is where the community obtains some of the managerial or decision-making control during the life of the project. An additional characteristic to these two last levels of participation (*delegated power*

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

and *citizen control*) is the form in which communities could retain and sustain control, either by banning or prohibiting the project using a veto power.<sup>15</sup>

## [ii] Social License to Operate

In addition, in order to further advance in the social aspect of this debate, the present analysis will be enhanced by looking into the concept of ‘Social License to Operate (SLO)’. SLO is a notion which has emerged in social and environmental sciences and it is often used to encapsulate a set of participatory, social and environmental rights and obligations between the investor and the society involved in an energy or natural resources project.

The SLO idea is that in addition to the legal license given by a government to an investor, the investor also needs to obtain -and maintain- a license to operate from the local community. In other words, SLO crystallises a reiterative process on a project’s ongoing approval by community stakeholders.<sup>16</sup> SLO should be understood differently than an environmental permit; SLO’s scope is broader as it includes key characteristics of procedural justice, access to information, public participation (i.e. Aarhus Convention,<sup>17</sup> Escazu Convention<sup>18</sup> and ILO 169<sup>19</sup>), transparency and early involvement of the public.<sup>20</sup> In addition, local communities can use SLO to scrutinize how companies obtain land access to undertake commercial activities.<sup>21</sup> Given that this is an emergent concept in social sciences; legal literature have acknowledged the difficulty in universally defining the characteristics of SLO.<sup>22</sup>

SLO is not exclusively associated with extractive industries, albeit most of the literature currently emanates from this industry.<sup>23</sup> The power sector already offers examples on how

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<sup>15</sup> Bodil Damgaard and Jenny M. Lewis, *Accountability and Citizen Participation*, in Mark Bovens, Robert E. Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (OUP 2014).

<sup>16</sup> Mihaela-Maria Barnes, *The ‘Social License to Operate’: An emerging concept in the practice of international investment tribunals*, 10 J.I.D.S., 328 - 360 (2019).

<sup>17</sup> UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), <https://www.unece.org/env/pp/introduction.html> (accessed 22 Jun. 2020).

<sup>18</sup> The Regional Agreement on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in Latin America and the Caribbean (2018), [https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428\\_en.pdf](https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf) (accessed 3 Dec. 2020).

<sup>19</sup> The Indigenous and Tribal Peoples Convention, No. 169 (1989), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169) (accessed 3 Dec. 2020).

<sup>20</sup> European Commission, 2013a. Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance’ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0034> (accessed 9 Jul. 2020).

<sup>21</sup> Raphael J. Heffron, Lauren Downes, Oscar M. Ramirez Rodriguez, Darren McCauley, *The emergence of the ‘social licence to operate’ in the extractive industries?*, Resources Policy Resources Policy (2018).

<sup>22</sup> The analysis relies on the works of: David Bursey, *Rethinking Social Licence to Operate – A concept in search of Definition and Boundaries*, 7 Business Council of British Columbia 5 – 6 (2015); Jason Prno and D Scott Slocombe, *Exploring the origins of “Social Licence to Operate” in the mining sector: Perspectives from governance and sustainability theories* 37 Resources Policy 346, 350 – 354 (2012); among others and Heffron, *supra* n. 21.

<sup>23</sup> Airong Zhang and Kieren Moffat, *A balancing act: The role of benefits, impacts and confidence in governance in predicting acceptance of mining in Australia*, 44 Resources Policy, 25 - 34 (2012); Owen, J.R., Kemp, D., *Social licence and mining: a critical perspective*, 38 Resource Policy, 29–35 (2013); Anni Huhtala and Piia Remes, *Quantifying the social costs of nuclear energy: Perceived risk of accident at nuclear power plants*, 105 Energy Policy 320 – 331 (2017) and John Whitton, Kathryn Brasier, Ioan Charnley-Parry and Matthew Cotton, *Shale gas governance in the United Kingdom and the United States: Opportunities for public participation and the implications for social justice*, 26 Energy Research & Social Science 11 – 22 (2017).

SLO has applications across other energy and natural resources industries.<sup>24</sup> For example, in Peru, a major electricity transmission infrastructure project *Electrica Moyombaba-Iquitos* lost the legal permit for the project as it failed to maintain a stable relationship with the local community due the lack of a consultation process with the relevant indigenous communities.<sup>25</sup>

There are, however, some disadvantages of the SLO. Notably, SLO is an informal concept not recognised in domestic or international legislation, which makes SLO difficult to be taken into account as part of the legal requirements of an investment process. Nonetheless, SLO represents an opportunity to formalise and insert binding obligations to investors and governments, which ensures that community rights are not only heard but also respected during the operation of a private project.<sup>26</sup> In addition, differently to FPIC, SLO's scope could function to use some of the principles on Arnsteins's ladder to create systems of control between rights and power holders. For example, it could impose as a requirement to the project the adoption of an impact-benefit agreement not only for indigenous communities but for the entirety of vulnerable communities affected by an investment project.

## [B] Setting the Scene

The National Park *Yiagoje Apaporis* is the home of the Macuna, Tanimuka, Letuama, Cabiyari, Barazano, Yujup Maku and Yauna communities; all of these are a set of diverse indigenous settlements in the Colombian Amazon. The Colombian national government reports that an estimated 1,600 inhabitants are living in the area along with protected fauna, sacred territories and significant gold deposits, the latter with an estimated value of at least USD16.5 billion.<sup>27</sup> In the last twenty years, foreign mining companies have sought to apply for licensing rights, a process which has instigated tensions at various indigenous groups in the region.<sup>28</sup> Alleged inconsistencies in the consultation processes with the indigenous communities have caused delays and cancellations in mining concessions. Foreign investors have claimed loss in their investments blaming the Colombian government failure to conduct prior consent consultations in accordance with domestic laws.<sup>29</sup>

At a different latitude, Las Víboras, an urban municipality located in the North of Mexico, was the epicentre of a series of local community protests against Cytar, a company owned by Tecmed (USA), a waste-management corporation specialized in hazardous industrial waste. During the first years of the investment, evidence of uncontained waste lying exposed caused community opposition, and eventually became a tool of political pressure from the community to the government authorities. Local communities' protests, including rallies and

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<sup>24</sup> Heffron, *supra* n. 21. See for example, Tor Håkon Jackson Inderberg, Helga Rognstad, Inger-Lise Saglie and Lars H. Gulbrandsen, *Who influences wind power licensing decisions in Norway? Formal requirements and informal practices*, 52 *Energy Research & Social Science*, 181 - 191 (2019).

<sup>25</sup> Mala Sentencia: Proyecto Línea de Transmisión Eléctrica Moyombaba-Iquitos, <https://idl.org.pe/mala-sentencia-proyecto-linea-de-transmision-electrica-moyobamba-iquitos/> (accessed 8 Jul. 2020).

<sup>26</sup> Heffron, *supra* n. 21.

<sup>27</sup> Gobierno de Colombia, *Parque Nacional Natural Yaigoje Apaporis*, <http://www.parquesnacionales.gov.co/portal/es/parques-nacionales/parque-nacional-natural-yaigoje-apaporis/> (accessed 16 Jun. 2020).

<sup>28</sup> *Cosigo Resources & Tobie Mining Corp v Colombia*, UNCITRAL, Notice of Intent to Arbitrate, paras 7-8 (5 August 2015); Ioana Florea and Hannibal Rhoades, *Possibilities and pitfalls of environmental justice action*, in Elia Apostolopoulou and Jose Cortes-Vazquez (eds), *The Right to Nature: Social Movements, Environmental Justice and Neoliberal Rules*, Ch. 6 (1st ed., Routledge 2019); Enrique Prieto-Rios and Daniel Rivaz-Ramirez, *Neocolonialism and the Tension between International Investment Law and Indigenous Peoples: The Latin American Experience*, in John Borrows and Risa Schwartz (eds), *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements* (Cambridge University Press 2020).

<sup>29</sup> Cosigo, *supra* n. 28, paras 12-22.

marches, underscored the sentiment towards Cytar's activities as a real or potential threat to health and the environment. Las Víboras citizens' pressure forced the government to refuse Cytar's license renewal. In response, Tecmed initiated investment treaty arbitration against Mexico.<sup>30</sup> In its reasoning, the tribunal concluded that the economic impact caused to Tecmed was more severe than the apparent potential dangers that could have been caused by hazardous waste.<sup>31</sup>

Apaporis and Las Víboras are just two of the many real-life examples elucidating the secondary, yet fundamental, role of the local communities in the life of foreign investments. The *binarity* of the investor-state relationship makes limited room to accommodate the concerns of community rights. Consequently, lack of attention to community rights are ignored throughout the whole life of an investment; including pre-investment and post-investment stages, as well as in the arbitration process.

## Policy developments and imbalances

At policy and treaty level, there are already novel developments where the notion of participatory rights is being considered.<sup>32</sup> For example, the Canada-EU Free Trade Agreement explicitly refers to promoting transparency in the form of public awareness, availability of information and participation of the civil society (Article 24.9). The Netherlands Model Investment Agreement includes express reference to fundamental instruments on social justice (i.e. ILO Conventions) and refers to the investors to conduct investment panels (before and during the investment), improved forms of impact assessments and transparency initiatives (Article 7.3). In addition, policy discussions such as the one driven at the UNCITRAL Working Group III (ISDS reform), have voiced out the importance of creating sound investment frameworks which harness economic development in a way that protects the environment and is inclusive of the interests of civil society.<sup>33</sup>

There is, however, plenty to do in terms of developing a common conceptual approach to formalise community interventions in international investment treaty law. So far, community interventions can take the form of legal rights, including public consultations and other types of forms where due process consultations are attached to power retention by the local communities in investment projects (i.e. the right to veto). Today, participatory rights in international investment law are understood in a shattered fashion, where the same legal notions are often used to refer to different actions on community engagement. So far, contemporary treatises refer to third parties participation without any systematic understanding, as a matter of fact, some refer to *amicus curiae* participations as the extent to

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<sup>30</sup> *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States (Tecmed v Mexico)*, ICSID Case No.ARB (AF)/00/2, Award (29 May 2003).

<sup>31</sup> *Ibid*, para. 144.

<sup>32</sup> See for example, *the Canada-EU Free Trade Agreement (CETA), art. 24 and the Netherlands Model Investment Agreement (Dutch Model BIT)*, <https://www.tweedekamer.nl/kamerstukken/detail?id=2018D51015&did=2018D51015> (accessed 22 Jun. 2020).

<sup>33</sup> A/CN.9/WG.III/WP.160, UNCITRAL Working Group III, *Summary of the intersessional regional meeting on investor-state dispute settlement (ISDS) reform submitted by the Government of the Dominican Republic*, <https://undocs.org/en/A/CN.9/WG.III/WP.160> (accessed 22 Jun. 2020).

which third party rights are represented in investment treaty law.<sup>34</sup> More advanced literature refers with more detail to landowner,<sup>35</sup> indigenous people<sup>36</sup> and human rights.<sup>37</sup> The problem is, however, that all of these notions are either procedurally or substantively different, and should not be seen as a universal way of formalising all participatory rights in international investment law.

Moreover, none of the current normative formulations fully facilitates ‘responsive, inclusive, participatory and representative decision-making’ processes (SDG 16.7). Landowner, community rights or indigenous rights, for example, are not included into the majority of the normative realm of international investment treaties.<sup>38</sup> Third parties rights can be many, and the argument could be made that international investment law is not the place to define, enlist and protect all the legal rights available to the communities affected by foreign investments.

However, these findings indicate that more research needs to be done regarding the imbalances between international and national laws on the protection of community rights in the light of investment promotion. In this context, current criticisms seem to target international investment law, without addressing the fact that the work needs to start at national level. Therefore, there should be a more systemic understanding and classification on the different types of community engagement interplaying in investment arbitration; this classification can serve as a starting point to advance further the debate on a formal inclusion of participatory and communities rights in investment treaties.

In the context of Latin America, the region is a global economic key player in energy, natural resources and other environmental related investments and it is expected to continue hosting new large-scale projects.<sup>39</sup> Latin America holds some of the world’s largest oil and gas reserves,<sup>40</sup> while Brazil, Chile and Mexico are ranked amongst the top ten global renewable energy markets.<sup>41</sup> In the extractive industries, Peru and Brazil are in the top ten countries for

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<sup>34</sup> Gary Born and Stephanie Forrest, *Amicus Curiae Participation in Investment Arbitration*, 34(3) ICSID Rev. - Foreign Inv. L. J., 625 - 665 (2019); Lance Bartholomeusz, *The Amicus Curiae before international courts and tribunals*, 5(2) N.S.I.A.L., 209 (2005); Alexis Mourre, *Are Amicus Curia the proper response to the public’s concerns on transparency in investment arbitration*, 5(2) Law and Practice of International Courts and Tribunals 257 (2006); Eugenia Levine, *Amicus Curiae in international investment arbitration: The implications of an increase in third-party participation* 29(1) Berk. J. Intl Law, 200 (2011); Filip Balcerzak, *Amicus Curiae submissions in investor-state arbitrations*, 12 Common Law Review 66 (2012); and Denis Parchajev and Rimantas Daujotas, *Can Amici Curiae rescue the fading EU ISDS system*, 1(1) European Investment Law and Arbitration Review 115 (2016).

<sup>35</sup> Lorenzo Cotula and Nicolas M Perrone, *Reforming investor-state dispute settlement: what about third-party rights?*, IIED Briefing Papers, Durham University (February 2019) <https://pubs.iied.org/17638IIED/?a=lorenzo+cotula> (accessed 21 Aug. 2020) and Lorenzo Cotula and Mika Schröder, *Community perspectives in investor-state arbitration*, IIED Land, Investment and Rights Series (2017) <https://pubs.iied.org/pdfs/12603IIED.pdf> (accessed 21 Aug. 2020).

<sup>36</sup> Valentina Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law*, 42 Col. Hum. R. L. Rev., 797 - 889 (2011). See also George K Foster, *Foreign investment and indigenous peoples: Options for promoting equilibrium between economic development and indigenous rights*, 33(4) Mich. J. Intl L., 627 (2012).

<sup>37</sup> Fabio Giuseppe Santa, *The applicability of human rights law in international investment disputes*, 34(1) ICSID Review 136 – 155 (2019).

<sup>38</sup> *UN Sustainable Development Goals, Information for Integrated Decision-Making & Participation*, <https://sustainabledevelopment.un.org/topics/information-integrated-decision-making-and-participation> (accessed 17 Jun. 2020).

<sup>39</sup> Shapovalova, *supra* n. 5.

<sup>40</sup> Statista, <https://www.statista.com/statistics/961596/latin-america-crude-oil-reserves-country/> (accessed 26 Aug. 2020). See also Aljazeera, *Latin America holds one fifth of world’s oil*, <https://www.aljazeera.com/indepth/features/2011/07/201171613719358164.html> (accessed 26 Aug. 2020).

<sup>41</sup> International Renewable Energy Agency, *Renewable Energy Market Analysis: Latin America*, <https://www.irena.org/publications/2016/Nov/Renewable-Energy-Market-Analysis-Latin-America> (accessed 24 Jun. 2020) and Lisa Viscidi and Rebecca O’Connor, *The Dialogue, US-Latin America Energy Investment: Proposals for Policy Engagement*, <http://www.thedialogue.org/wp-content/uploads/2017/05/US-Latin-America-Energy-Investment-FINAL-for-web.pdf> (accessed 24 Jun. 2020).

gold mine reserves. In addition, the transformation of energy systems in line with the energy transition requirements will pave the way to more innovation, technology and investments, including in the hydrogen sector.<sup>42</sup>

The data obtained in this paper is of the highest importance for the socio-economic success of energy investments in Latin America; it addresses the potential tensions arising from energy investments with the local communities. These tensions can put at risk the well-being of local communities and cause irreversible social, economic or environmental damage. This is the example of many of the current investment arbitration cases, which come from the extractive industries,<sup>43</sup> where exploitation and disposition of resources have been affected by the *resource curse* paradox.<sup>44</sup> The resource curse paradox describes the phenomenon where natural resources and sovereignty belong to the people, while the actual control is legally vested in the governments.<sup>45</sup> The real problem is that, despite abundance of natural or mineral resources, the resource curse theory propounds that the resource-rich countries tend to lack economic growth, partially due to the lack of clear laws regarding the management and control of foreign investments, which can aggravate the tension between foreign investors and the local communities.<sup>46</sup>

### [C] The Notion and Limitations of Public Participation in International Law

Environmental studies have explained that rather than one single persuasive argument to advocate for the inclusion of public participation in the law, different elements should be considered in a cumulative manner.<sup>47</sup> This is reflected in international environmental law, where the notion of public participation must have three essential elements: access to information, public participation in environmental decision making and access to judicial remedies.<sup>48</sup>

Today, the best normative example of environmental democracy in international law is the *Aarhus Convention*,<sup>49</sup> which aims to guarantee the right to access to information, public participation and access to justice in environmental matters (Article 1). The baseline of the *Aarhus Convention* is that public participation contributes to ‘*more environmentally benign decisions*’.<sup>50</sup> In addition, the Convention links public participation with individual and human rights in order to collectively protect the environment by actively exercising *environmental citizenship* at participating in the public debate on private decisions.<sup>51</sup> The three pillars of access to information, public participation and access to justice have now also been adopted in the Escazu Convention, with specific focus of application on Latin America and the

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<sup>42</sup> Energy Advisor: *A publication of the dialogue: Does hydrogen fuel have a bright future in Latin America*, <https://www.thedialogue.org/analysis/does-hydrogen-fuel-have-a-bright-future-in-latin-america/> (accessed 7 Jul. 2020)

<sup>43</sup> See for example, the cases of *Beer Creek v Peru*, ICSID Case No. ARB/14/21; *South American Silver Limited v Bolivia*, PCA Case No. 2013-15; *Copper Mesa Mining Corporation v Ecuador* (PCA Case No. 2012-2) and *Gabriel Resources Ltd v Romania*, ICSID Case No. ARB/15/31.

<sup>44</sup> On resource curse, see Jorge E Vinuales, *The resource curse: A legal perspective* 17 *Global Governance*, 197-212 (2011).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Holder J and Lee M, *Environmental Protection, Law and Policy: Text and Materials*, 97 (2nd ed., Cambridge University Press 2007).

<sup>48</sup> *Ibid.*, at 86. Report of the United Nations Conference on Environment and Development (1992) (Rio Declaration) prin 10, [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf) (accessed 3 Dec. 2020).

<sup>49</sup> UNECE, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (1998), <https://www.unece.org/env/pp/introduction.html> (accessed 22 Jun. 2020).

<sup>50</sup> Holder and Lee, *supra* n. 47, at 99.

<sup>51</sup> *Ibid.*

Carribbean.<sup>52</sup> However, the Escazu Convention is yet to enter into force, as it requires ratification by at least 11 states (Article 22), out of which 9 states have ratified thus far.<sup>53</sup> It has been observed that both of the Aarhus and Escazu Conventions show regional approach to the application of the global standards on public participation, as stipulated in the principle 10 of the Rio Declaration.<sup>54</sup> Meanwhile, the Escazu Convention better enhances the standards of public participation, compared to the Aarhus Convention, with respect to its innovative provisions on the protection of vulnerable groups (Articles 4.5, 5.3 and 5.4), the protection of the defenders of human rights on environmental matters (Article 9) and capacity building (Article 10).<sup>55</sup> The Escazu Convention therefore seeks to address the unique challenges facing the region of Latin America and the Caribbean on the aforesaid issues.<sup>56</sup>

There are additional international instruments which consider participatory rights either in the context of hazardous waste (1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal<sup>57</sup>) or environmental impact assessments and transboundary issues (i.e. the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context<sup>58</sup> and 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes).<sup>59</sup>

In the context of minority rights (i.e. indigenous groups), there are a number of relevant international frameworks such as the International Labour Organization 169 (**ILO 169**),<sup>60</sup> the UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**)<sup>61</sup> and, regionally, in Latin America, the American Declaration on the Rights of Indigenous Peoples (**ADRIP**). Unlike the *Aarhus Convention*, one of the relevant characteristics of the ILO 169 is that it has been ratified by Latin American countries home of many indigenous groups; including Argentina, Bolivia, Colombia, Mexico and Peru.<sup>62</sup>

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<sup>52</sup> The Regional Agreement on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in Latin America and the Caribbean (2018), [https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428\\_en.pdf](https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf) (accessed 3 Dec. 2020).

<sup>53</sup> United Nations Treaty Collection, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-18&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-18&chapter=27&clang=_en) (accessed 1 Dec. 2020).

<sup>54</sup> Stephen Stec and Jerzy Jendroska, *The Escazu Agreement and the regional approach to Rio Principle 10: process, innovation, and shortcomings*, 31 *Journal of Environmental Law* 533 - 545 (2019). See also Emily Barritt, *Global Values, Transnational Expression: From Aarhus to Escazu*, Dickson Poon Transnational Law Institute, King's College Research Paper Series 2 - 10 (2019).

<sup>55</sup> Sidney Guerra, *Implementing Principle 10 of the 1992 RIO Declaration: a comparative study of the Aarhus Convention 1998 and the Escazu Agreement 2018*, 2(55) *Curitiba* 1 - 33 (2019).

<sup>56</sup> Lalanath De Silva, *Escazu Agreement 2018: a landmark for the LAC region*, 2 *Chinese Journal of Environmental Law* 93 - 98 at 97 (2018).

<sup>57</sup> *UN Environment Programme, Basel Convention*, <http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx> (accessed 25 Jun. 2020).

<sup>58</sup> *UN Economic Commission for Europe, EIA Convention*, <http://www.unece.org/fileadmin/DAM/env/eia/welcome.html> (accessed 25 Jun. 2020).

<sup>59</sup> *UN Economic Commission for Europe, Water Convention*, <https://www.unece.org/env/water.html> (accessed 25 Jun. 2020).

<sup>60</sup> International Labour Organization, *C169 - Indigenous and Tribal Peoples Convention, 1989* (No. 169), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169#A43](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169#A43) (accessed 25 Jun. 2020).

<sup>61</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples* (2 Oct. 2007) A/RES/61/295, [https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.18\\_declaration%20rights%20indigenous%20peoples.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.18_declaration%20rights%20indigenous%20peoples.pdf) (accessed 25 Jun. 2020).

<sup>62</sup> ILO 169, Ratifications, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312314](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314) (accessed on 25 Jun. 2020).

ILO and UNDRIP recognise prior and informed consent as a specific right that pertains to indigenous people.<sup>63</sup> However, this right does not produce a straight forward opportunity to give or withhold consent to a project which might affect their land. *Free* means that this consent needs to be given without any type of coercion or manipulation. *Prior* means that consent should be timely sought to allow making a decision before the authorization or commencement of the investment project. *Informed* is that the participation engagement includes access to the information necessary to the decision-making process. Lastly, *consent* means that there is a collective decision made by the right holders.<sup>64</sup>

The problem is, however, that forms of prior or informed consent are also limited in scope as it exclusively aims to guarantee participatory rights to indigenous communities as land owners.<sup>65</sup> FPIC does not contemplate mechanisms to ensure that right owners can exercise or retain power as a guarantee that their rights will continue to be protected during the life of the investment. Therefore, delegation of power or citizens control is not part of FPIC. Secondly, in some Latin American regions, indigenous communities often cohabitate with the rest of a vulnerable community. The community is vulnerable either because there is limited access to public health, labour opportunities or infrastructure (roads, schools, etc). There are many local communities in Latin America in this situation where there are no clear divisions between one population or the other, and collectively they become the local vulnerable community hosting an investment project. Therefore, even if FPIC would be incorporated in its current form into international investment laws, FPIC's outreach and exchange would be limited in terms of content and subjects (i.e. without no power exchange as guarantee to protect all types of right holders).

## **[D] Community Participation in International Investment Treaty Law and Practice**

### **[1] Limitations on Power Exchange due Absence of Normative Safeguards**

The analysis of the investment treaty law and its practice has identified some of the crucial failures when integrating communities' rights into the ISDS system. The first set of cases analysed seem to indicate that the absence of normative safeguards provokes limitations on power exchange between the right holders and the power holders; meaning the community and investor respectively. For example, a one-way communication system indicates that while the community was able to express their concerns, there is evidence that either the state or the investor failed at following through to mitigate their concerns. The analysis reveals that this is attributed to the lack of normative instruments which does not acknowledge and protect the community's priorities.

The first example chosen to analyse citizen's power and public participation is *Tecmed v Mexico*,<sup>66</sup> a case which shows how the government's conduct relegated community participation to a one-way flow information exercise. The investment project involved a controlled landfill of hazardous waste located close to an urban centre, a project which was

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<sup>63</sup> Food and Agriculture Organization of the United Nations, *Free, Prior and Informed Consent*, <http://www.fao.org/indigenous-peoples/our-pillars/fpic/en/> (accessed 8 Jul. 2020).

<sup>64</sup> Mauro Barelli, *Free, Prior, and Informed Consent in the UNDRIP Articles 10, 19, 29 (2), and 32(2)* in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the rights of indigenous peoples: A commentary*, 250 - 253 (OUP 2018).

<sup>65</sup> Food and Agriculture Organization of the United Nations, *FPIC: An Indigenous Peoples Rights and a Good Practice for Local Communities*, <http://www.fao.org/3/a-i6190e.pdf> (accessed 8 Jul. 2020).

<sup>66</sup> *Técnicas Medioambientales Tecmed S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/002, Award (29 May 2003).

opposed by public protests. The decision of the government to embark on the project had been opposed at the community level at the earliest stage of the investment but opposition was ignored. The community members particularly opposed the Government's approach of transferring hazardous wastes of another region into the landfill. The government subsequently granted to *Tecmed* the necessary permits. However, public opposition became more serious and the Government decided to close down the project, without due regard to an agreement to relocate and continue with the project. The tribunal found that the operations did not cause public opposition, instead the Tribunal concluded that the real cause of the public protests was government's failure to address concerns which occurred before the concession was awarded.<sup>67</sup> *Tecmed v Mexico* falls into the Arnstein's ladder informing rung, where it seems that there was only a one-way flow of information at the particular moment when local communities raised concerns and protested. The community did not have any opportunity to exchange feedback or to influence the waste-management programme and without any follow through action.

In *Gold Reserve v Venezuela*, from the beginning of the project, the Ministry of Environment had grave concerns, due to the fact that the project was located in an ecologically and culturally sensitive area. The concerns were related to water resources management, biodiversity protection and the socio-economic impact on the indigenous communities.<sup>68</sup> Venezuela eventually decided to revoke an environmental permit to the construction project and then declined to renew the investor's concessions.<sup>69</sup> Venezuela argued that the revocation order was lawful because it was *founded* upon the Ministry's authority to revoke annual permits, which are contrary to Venezuela's constitutional obligation to protect the environment, promote a sustainable development and protect the rights of indigenous people.<sup>70</sup>

The Revocation Order declared that 'the mining activities in Bolivar State had altered the environment...affected the nearby populations, indigenous communities...serious environmental deterioration of the rivers, soil, flora, fauna and biodiversity in general, caused by the uncontrolled mining activities performed by the large number of miners present in the area'.<sup>71</sup> In the award, the Tribunal acknowledged that a State has responsibility to preserve the environment and protect local populations living in the area where mining activities are conducted. However, this responsibility does not exempt a State from complying with its commitments to international investors by searching ways and means to satisfy both conditions in a balanced way.<sup>72</sup>

According to *Arnstein's* approach, it can be seen that citizens had some level of influence on the environmental and social impact assessments of the investments. However, power exchange took place only between the State and the investor, where community's participatory rights (i.e. consultation process) seems to have taken a secondary role when planning the investment. The classification of *Gold Reserve v Venezuela* could be placed between consultation and placation, simply because at the moment of taking the decision to start the investments, the conditions did not ensure that the views of the local communities would be heard. As mentioned, power retention was only between the State and the investor,

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<sup>67</sup> *Ibid* at paras 131 and 136.

<sup>68</sup> *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09, Award, para. 333 (22 Sept. 2014).

<sup>69</sup> *Ibid* at para. 341.

<sup>70</sup> *Ibid* at para. 318.

<sup>71</sup> *Ibid* at para. 594.

<sup>72</sup> *Ibid* at para. 595.

where there was no opportunity to articulate communities' priorities and the extent to which the community had the opportunity to push for those.

In *Quiborax v Bolivia*, the investment project was located in Salar de Uyuni (the world largest Salt Lake). As part of the Quirobax mining concession project, the Ministry of Sustainable Development granted an environmental license, which triggered civil unrest, including strikes and road blockades.<sup>73</sup> The argument was, according to the media, that foreign investors were looting the resources and the State did nothing to prevent this.<sup>74</sup> In response to the social unrest, the Bolivian Government suspended all activities and decided to revoke the environmental license and the region was declared in state of emergency.<sup>75</sup> A subsequent ministerial memo confirmed that the revocation was a consequence of the social and political pressure from the town of Uyuni.<sup>76</sup> The Tribunal concluded that while there was no doubt that Bolivia was motivated by national interest, expropriation failed to meet the lawful condition, and quoted that 'discrimination does not cease to be because it is undertaken to achieve a laudable goal'.<sup>77</sup> According to the Arnsteins' ladder, placation is on the higher side of the spectrum given that the citizens were not completely powerless as they were able to press for their vested interest, which triggered Bolivian government's response in revoking the environmental license.

While *Glamis Gold v USA* is a case that took place at a different latitude, it is pertinent to also take into account the lessons from this case to elucidate some of the tensions arising from public participation rights, in the context of indigenous groups in the Americas. In this case, the investor planned to mine gold and silver in South-eastern California, the site of the project was near an area protected by the California Desert Protection Act of 1994. Federal laws identified that the Desert in South-eastern California is a sensitive area home of archaeological resources, which required the Bureau of Land Management (**BLM**) to conduct an impact assessment.<sup>78</sup>

In addition, due to the proximity of the project to the ancestral lands, the BLM also required consultation with the Quechan Indian Nation as the Californian Desert local tribe. Among other issues, the impact assessment evidenced that the land surrounding the project was near cultural and ancient trails.<sup>79</sup> The trail was part of a larger network named the Trail of Dreams, which was part of the Quechan Cosmology.<sup>80</sup> BLM also determined that the project would affect fifty-five Native American historic properties. In response to the outcome of the impact assessment, the Quechuan community expressed their opposition to the mining project as it would put their practices in peril.<sup>81</sup>

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<sup>73</sup> *Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2. Award, paras 7, 10–12, 17 and 19 (16 Sept. 2015); Arif Ali, Erica Franzetti, Jose Manuel Garcia Represa and Eduardo Silva Romero, *Mining Arbitration in Latin America: Social and Environmental Issues in Investment Arbitration Cases*, in Jason Fry and Louis-Alexis Bret, *Global Arbitration Review: The Guide to Mining Arbitration*, 200 (Law Business Research 2019).

<sup>74</sup> *Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia*, *supra* n. 65, at para. 250.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid* at para. 252.

<sup>77</sup> *Ibid* at para. 253.

<sup>78</sup> Georg K. Foster, *Investor - Community Conflicts in Investor-State Dispute Settlement: Rethinking "Reasonable Expectations" and Expecting More from Investors*, 69 *American University Law Review* 105 (2019).

<sup>79</sup> *Ibid* at 108.

<sup>80</sup> *Ibid* at 105-108.

<sup>81</sup> *Glamis Gold, Ltd, v United States of America* (Award) UNCITRAL (8 June 2009) and *Glamis v. US*, Counter-Memorial of Respondent United States of America.

In studying the arbitration process of this case, there is neither evidence that Glamis approached the Quechan Tribe seeking to establish any type of consultation process regarding the adverse effects of the investments, nor evidence on establishing possible economic compensation.<sup>82</sup> The Quechan Tribe put additional pressure on the State of California, which led to the enactment of legislation prohibiting mining operations in the sacred site, unless the land contours of the project would be amended.<sup>83</sup> In response, Glamis started arbitration proceedings against the US arguing that the new requirements would make the project financially infeasible and have caused illegal expropriation, both claims were rejected by the Tribunal.<sup>84</sup> In its reasoning, the Tribunal was required to be mindful of how it construes the provisions at issue in this claim, so that the Tribunal is not endorsing conduct of the kind that would conflict with international norms protecting indigenous people. However, in dismissing Glamis' claims, the Tribunal did not refer to any of the arguments submitted by the Quechan Tribe.<sup>85</sup>

In *Glamis Gold v USA*, there are many dimensions of citizen control and participation; the first rung to appear according to the Arnstein's ladder is at the end of the placation spectrum due to the fact that the Quechan Tribe was ignored by the investors without exploring any type of negotiation regarding economic compensation due to the effects of the investment. Nonetheless, the case displays a very good indication of trade-offs between the US Government and the Quechan community, where community priorities were respected and led to the enactment of legislation prohibiting mining operations in the area. Therefore, Arnstein's delegated power rug appears in the actions led by the communities, which resulted in achieving a dominant control over the planning of the investment. Nonetheless, this example of delegated power could have had a more successful outcome if the investors would have responded positively to recommendations made by the BLM assessments and proceeded to make adjustments. Moreover, the investor should have engaged into a negotiation process with the Quechan community in order to find ways to protect the community's values and priorities during the life of the mining project. In the alternative, the investor could have engaged with the community in negotiations to agree a financial compensation scheme in exchange for an opportunity to perform the desired investment activities.

Another case, which is outside Latin America but relevant to the agenda-setting of indigenous communities in international investment law is *Clayton v Canada*. In this case, Bilcon (Canadian subsidiary of Clayton) was seeking to build a quarry and marine terminal in Nova Scotia, Canada. The Nova Scotia Government sought to attract attention from investors with promotional documents on the region's potential on mining and develop a project at the Digby Neck area.<sup>86</sup> Bilcon applied for approval subject to an environmental impact assessment according to provincial and federal laws. As part of the social and environmental impact assessment, a Joint Review Panel (**JRP**) was set up and it concluded that the investment project had significant and adverse effects on *community core values*.<sup>87</sup> For example, in the human assessment, the JRP explained that there are some aboriginal communities which have used Digby Neck as a hunting and harvest place, where the proponent (i.e. the investor) has failed at its efforts consulting the community and left

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<sup>82</sup> Foster, *supra* n. 78, at 120.

<sup>83</sup> *Ibid* at 175.

<sup>84</sup> *Ibid* at 105.

<sup>85</sup> Valentina Viadi, *Heritage, Power, and Destiny: The Protection of Indigenous Heritage in International Investment Law and Arbitration*, 4 Geo. Wash. Intl L. Rev. 50 (2018).

<sup>86</sup> William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware v The Government of Canada (*Clayton v Canada*), PCA Case No.2009-4, Award on Damages (AD), paras 5 - 9 (10 Jan.2019).

<sup>87</sup> Joint Review Panel, *Environmental Assessment of the Whites Point Quarry and Marine Terminal Project* 109–12, 114–15 [https://iaac-aeic.gc.ca/B4777C6B-docs/WP-1837\\_e.pdf](https://iaac-aeic.gc.ca/B4777C6B-docs/WP-1837_e.pdf) (accessed 15 Jul. 2020).

traditional knowledge outside the environmental impact assessment.<sup>88</sup> The JRP also highlighted some reluctance from community members to participate in the assessment process due to tensions between the investor and community members regarding archaeological burials on the site. The JRP mentioned that the investor's response at the consultation process was at times dismissive, if not openly hostile. Moreover, the report mentioned that there should have been a further attempt to mitigate the rift in the society through the use of a more effective participation programme.<sup>89</sup>

In the arbitration claim, the Arbitration Tribunal concluded that the JRP's emphasis on community core values was beyond the scope of the assessment as 'a fundamental departure from the methodology required by Canadian and Nova Scotia law ... reliance on community core values was a distinct, unprecedented and unexpected approach taken by the JRP'.<sup>90</sup> Moreover, in the arbitration award, the Arbitral Tribunal noted that community values are not part of Canadian domestic laws and that these standards are unclear and open to different interpretations.<sup>91</sup> A dissenting opinion was issued by one of the members of the Tribunal, commenting that the majority's decision could be considered as a remarkable step backwards in environmental protection. The dissenting arbitrator commented that the JRP is usually made up of scientists and environmental experts and not necessarily lawyers and mentioned that: '... the idea of an environmental review panel putting more weight on the human environment to conclude that community values are of utmost importance for the socio-economic success of the project should not come as a surprise...'.<sup>92</sup>

In this case, there is good evidence on the participation of local communities to express and ensure that their priorities and concerns were respected. Similar to *Glamis Gold v USA*, there is an initial engagement of power control between the local community and the State. Power control is particularly reflected in the outcome of the JRP assessment, where it is mentioned that the investment project would endanger a set of Aboriginal community values. Arnstein's delegated power rung appears to be successfully followed to the extent in which the JRP made the investor accountable and responsible for having failed at its efforts in conducting the public consultation. Nonetheless, the level of community power is limited at two different moments, first when the investor failed at having a more effective participation programme and behaved dismissively at responding to the fundamental social problems raised at the consultation process. Secondly, the lack of community and indigenous safeguards in NAFTA is reflected in the decision-making process of the arbitrators by mentioning that community core values are outside the methodology of the JRP assessment. This indicates, that as long as investment laws do not contain explicit indication on the duty to protect and respect local communities; tribunals will show reluctance at accommodating indigenous and communities' rights. Consequently, the community's well-being will often fail to be duly considered as one of the essential requirements investments should follow in order to successfully obtain and maintain all the legal approvals to undertake an investment project.

There is another set of arbitration cases leaning towards a more structured and balanced exercise between public participation rights, investors and state obligations. The first case illustrating a cohesive understanding on the vital role of community's rights is the case of

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<sup>88</sup> *Ibid*, at 67.

<sup>89</sup> *Ibid*, at 68-70.

<sup>90</sup> *Clayton v Canada*, *supra* n. 86, at para. 125.

<sup>91</sup> *Ibid*, at paras 502-547.

<sup>92</sup> *William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware v The Government of Canada (Clayton v Canada)*, PCA Case No.2009-4, Dissenting Opinion Professor Donald McRae, paras 13,46 and 51.

*South American Silver Limited v Bolivia*.<sup>93</sup> In this case, the Claimant alleged breach of the Bilateral Investment Treaty (BIT) between UK and Bolivia. Claimant's mining concessions were located in an area which is occupied by the locally organised Aymara and Quechua indigenous groups, communities which make all types of decisions in consensus. In preparation for the investment, South American Silver carried out 8 environmental and socioeconomic studies. South American Silver hired a Bolivian consultant and met with the communities and organised 35 workshops with the assistance of Bolivian consultants.

However, in December 2010, the community decision-making group passed a resolution to cease mining activities on the allegation that the Claimant had contaminated the environment of the communities' sacred places, abused authority, deceived and threatened community members.<sup>94</sup> Events subsequently led to abduction of personnel, clashes between community members and local police, as well as damage to the drilling rig and blockage of the mining area.<sup>95</sup> The Government consequently revoked the mining concessions on August 1, 2012. In the arbitration case, the Claimant sought damages for expropriation, costs and interests. The Claimant argued that the scope of the rights of the indigenous group is not clear under the international law and it cannot override the specific protections granted an investor under treaty provisions.<sup>96</sup>

The Tribunal found that the Claimant's failure to obtain the project's social acceptance was due to the fact of attempting to convince a partial section of the community, which led to problems regarding the communities' consensus system.<sup>97</sup> Reports also showed that the Claimant held meetings with some of the local groups, disregarded suggestions of collective meetings and offered donations to individual members of the community.<sup>98</sup> The Tribunal concluded that the Claimant had shortcomings in its community relations which were not corrected.<sup>99</sup> The Tribunal also found that the Respondent complied with the treaty provisions on expropriation including the requirement of due process, except that it failed to pay compensation and the Tribunal awarded 18.7 million dollars.<sup>100</sup>

The dissenting opinion issued by a member of the Tribunal found that it lacked jurisdiction and criticised the position of the majority regarding compensation and unlawful expropriation.<sup>101</sup> On the other hand, a concurring opinion pointed out the shortcomings of the State in maintaining law and order in the communities and agreed with the conclusions of the presiding arbitrator.<sup>102</sup>

In *South American Silver Limited v Bolivia*, an assessment in principle seems to indicate a good engagement between the investor and the indigenous communities, which gave as outcome evidence on public participation by means of the environmental and social studies carried out by the investor. Nonetheless, consultations were not used for a meaningful outcome. In order to avoid superficial ways of community engagement, the investor should

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<sup>93</sup> *South American Silver Limited v Bolivia*, PCA Case No. 2013-15, Final Award (22 Nov. 2018).

<sup>94</sup> *Ibid* at paras 114 and 115.

<sup>95</sup> *Ibid* at paras 147, 157, 160 and 162.

<sup>96</sup> *Ibid* at para. 188.

<sup>97</sup> *Ibid* at para. 506.

<sup>98</sup> *Ibid* at paras 479, 480, 492 and 507.

<sup>99</sup> *Ibid* at para. 479.

<sup>100</sup> *Ibid* at para. 610.

<sup>101</sup> Trishna Menon, *Tribunal finds expropriation of investment by Bolivia due to non-payment of compensation but awards only sunk costs to British Investors* (Investment Treaty News, 23 Apr. 2019) <https://www.iisd.org/itn/> (accessed 2 Jun. 2020).

<sup>102</sup> *South American Silver Limited v Bolivia*, PCA Case No. 2013-15, 2 (Separate opinion of Professor Francisco Orrego Vicuna).

have taken follow-up actions addressing the collective concerns from the community. Looking into the Arnstein's ladder, the consultation processes carried out by South American Silver falls under the information rung, this is because the emphasis was placed on a one-way exercise. In other words, the investor seems to have taken the consultations and studies to only obtain benefits and reacted by reaching out to fragmented sections of the community, dismissing the fact that the Aymara and Quechua groups take decisions in collective consensus.

## [2] Contradictory or Incomplete Participatory Mechanisms

In *Copper Mesa v Ecuador*,<sup>103</sup> geological tests in the North-western area of Ecuador confirmed a large number of copper resources as well as the potential impact on mining. In response, a number of local communities expressed their concerns and resistance to any potential mining activity.<sup>104</sup> Despite initial concerns from the technical reports and the local community, Ecuador decided to initially grant a concession to an Ecuadorian investor, which eventually was acquired by Copper Mesa. Copper Mesa, initiated a number of geological assessments, including an environmental impact study (EIS) as well as purchased land in the surrounding areas of the concession.<sup>105</sup> In addition, the investor committed resources for social and community development. Nonetheless, three years after, the Ecuadorian Government terminated concessions explaining that mineral substances were now to be exploited according to national interests. Concessions' terminations were made without any economic compensation. In the particular context of Copper Mesa, the Secretary of Mines ordered termination of the mining projects due to lack of consultation with the local communities.<sup>106</sup>

Copper Mesa alleged breach of Canada-Ecuador BIT, in respect of their three mining concessions. The social conflict was based on allegations of illegal land acquisition and *land trafficking*, where individuals allegedly acquired community land to resell to the company.<sup>107</sup> The government documented environmental and climate assessments which highlighted the need for relocating over 140 families. In the arbitration file, there is evidence that the communities got divided into different pro-mining and anti-mining groups and protests led to clashes and acts of violence.<sup>108</sup> The Tribunal found that the Claimant's personnel responded with acts of violence to suppress the communities, which worsened the situation.<sup>109</sup> There is also evidence that local communities suffered violations in the aim of protecting their communities and priorities.<sup>110</sup> Ecuador challenged the Claimant's position by arguing that Copper Mesa was not appearing in the arbitration process with clean hands and that there were several human rights violations. Nonetheless, the Tribunal mentioned that the human rights arguments made by Ecuador were issues of admissibility, rather than anything that could have been resolved at a subsequent stage of the arbitration process. The Tribunal

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<sup>103</sup> *Copper Mesa v Ecuador* (PCA Case No. 2012-2) Award (15 Mar. 2016).

<sup>104</sup> Investment Treaty News, *Ecuador ordered by PCA tribunal to pay \$24 million to Canadian mining company*, <https://cf.iisd.net/itn/2016/12/12/ecuador-ordered-by-pca-tribunal-to-pay-24-million-to-canadian-mining-company-copper-mesa-mining-corporation-v-republic-of-ecuador-pca-2012-2/>, accessed 26 August 2020.

<sup>105</sup> *Copper Mesa v Ecuador*, *supra* n. 103.

<sup>106</sup> Investment Treaty News, *supra* n. 104.

<sup>107</sup> *Ibid* at paras 1.96, 1.97, 4.158 and 5.29.

<sup>108</sup> *Ibid* at paras 4.12, 4.95 and 4.297.

<sup>109</sup> *Ibid* at para. 6.99.

<sup>110</sup> Columbia Centre on Sustainable Investment, *Impacts of the International Investment Regime on Access to Justice*, [https://www.ohchr.org/Documents/Issues/Business/CCSI\\_UNWGBHR\\_InternationalInvestmentRegime.pdf](https://www.ohchr.org/Documents/Issues/Business/CCSI_UNWGBHR_InternationalInvestmentRegime.pdf) (accessed 26 August 2020).

awarded about USD 19.4 million in favour of the Claimant, as compensation for expropriation of two of the mineral concessions.

In *Copper Mesa v Ecuador*, there seems to be contradictory evidence regarding the consultation process and the extent to which the communities' concerns were followed through. Therefore, most of the evidence points out to the manipulation rung of Arnstein's ladder. Manipulation is found when the investor behaved in a hostile manner, as the purpose of the geographical and environmental studies was only an *information-gathering* exercise with no objective of engaging or addressing communities' concerns on home relocation. The most relevant aspect to notice in this case is that the actions of manipulation and human rights violations were given a *light-weight* value in the arbitration decision-making process, evidencing limited access to justice for local communities under the international investment regime. Consequently, local communities affected by an investment project faced barriers in taking their priorities forward, and with no access to effective remedies - no liability to the investor- despite the sound evidence presented to the tribunal.

### **[3] Denial of Justice or Absence of Legal Venue**

In the case of *Pac Rim v Salvador*,<sup>111</sup> the Claimant challenged a decision denying request for an environmental permit and mining, only after the investor had allegedly invested millions of dollars at the exploration phase.<sup>112</sup> The Claimant argued that it had invested in the mining exploration and provision of social amenities in the host communities, based on the promises made by the government to induce investments.<sup>113</sup> On the other hand, the State contended that the Claimant did not meet the requirements of the existing law and was only lobbying for a more favourable legal regime.<sup>114</sup> The State argued that there is no obligation under the international law, to change the domestic law for the sake of a foreign investor.<sup>115</sup> The Tribunal dismissed the Claimant's claims and decided not to consider the *amicus curiae* brief because the third party was not allowed access to the vital documents and the oral hearing.<sup>116</sup>

It is important to note that *Pac Rim v Salvador* did not involve agitation or protests, the notable point is that the host community sought to participate in the arbitration process, but it was denied access to public participation. The refusal of local communities to participate in the arbitration process reflects the lack of effectiveness in treaty design to address the barriers for a legitimate exchange of power between the investor, government and affected communities. Looking into the Arnstein's ladder, it is important to notice that in this case the power exchange was between the two power holders (i.e. investor and State) and there is no genuine engagement with the communities as a right holder.

In the case of *Urbaser v Argentina*, the investment was for a concession on public water and sewage.<sup>117</sup> This case introduced a new dimension by which the State filed a counterclaim seeking relief and compensation for alleged breach of human rights of its citizens. Initially, the investor commenced arbitration to challenge measures taken by Argentina, including fiscal and financial regulatory changes which led to the termination of the concession. The investor argued that the measures constituted a breach of fair and equitable treatment

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<sup>111</sup> *Pac Rim v Salvador*, ICSID Case No. ARB/09/12, para. 3.30.

<sup>112</sup> *Ibid* at para. 3.6.

<sup>113</sup> *Ibid* at paras 3.6 and 3.8.

<sup>114</sup> *Ibid* at para. 3.22.

<sup>115</sup> *Ibid* at para. 3.23.

<sup>116</sup> *Ibid* at para. 3.30.

<sup>117</sup> *Urbaser v Argentina*, ICSID Case No. ARB/07/26, Final Award (8 Dec. 2016).

standard, expropriation and other protections under the Argentina-Spain BIT.<sup>118</sup> The State argued that the measures were justifiable in view of the financial crisis, where the investor failed to make an investment which would have improved access to public water; amounting to a breach of the citizen's human rights.<sup>119</sup> The Tribunal dismissed the counterclaim and held that while the State's counterclaim was premised on the investor's failure to invest, the State agencies were responsible for the delay and inconsistencies that ultimately led to deprivation of access to water. The Tribunal also found that the State was in breach of fair and equitable treatment, but it refused to award compensation to the investor, on the grounds that the investor also failed to make necessary investment for the project.<sup>120</sup>

There are noteworthy conclusions drawn by the Tribunal which opened up the opportunity to further elaborate the extent to which investors are obliged to respect communities' concerns when undertaking an investment project. First, the Tribunal noted that the investment treaty is not a closed system and as such, corporations are subjects of international law and they bear obligations.<sup>121</sup> Among other instruments, the Tribunal made reference to the Universal Declaration on Human Rights (**UDHR**) and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) to establish that there were human rights obligations associated with a right to water. Therefore, the approach taken by the Tribunal reflects acceptance of the investor's obligations to engage into a meaningful relationship with the local communities which makes the investor accountable for social and environmental obligations attached to the investment project. This approach also serves to identify the need for further clarity in the content of investment treaties as there is currently very limited guidance on the scope of community rights that should be respected during the life of an investment project.

### **[E] Social License to Operate as a Medium for Public Participation**

The debate about obtaining and maintaining a certain level of social acceptance in the investment project is crystalized in the notion of SLO, which appeared in detail for the first time in the case of *Beer Creek v Peru*.<sup>122</sup> This case involved a mining project in Santa Ana.<sup>123</sup> Under Peruvian Constitutional law, the investor required the Peruvian Government to make a 'Declaration of Necessity' so that the investor could acquire mining concessions in the region.<sup>124</sup> The investor first acquired a mining concession through a Peruvian national and just after the Government issued a declaration of necessity, Bear Creek took over the concession agreement.<sup>125</sup> The investor sought to consult the host community and engaged it in the discussion regarding the impacts and benefits of the project. However, NGOs stated that the consultations were not effective, due to language barrier, insufficient opportunity for public participation and lack of transparency on the investor's approach.<sup>126</sup> The NGO declaration was followed by violent opposition and agitations against the project by the host community, which led to food shortage, poor sanitation and physical injuries.<sup>127</sup> The

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<sup>118</sup> *Ibid* at para. 35.

<sup>119</sup> *Ibid*.

<sup>120</sup> *Ibid* at paras 1214 - 1216.

<sup>121</sup> *Ibid* at paras 1191 and 1194.

<sup>122</sup> *Beer Creek v Peru*, ICSID Case No. ARB/14/21.

<sup>123</sup> *Ibid* at para. 123.

<sup>124</sup> Political Constitution of Peru 1993, art. 71.

<sup>125</sup> *Beer Creek v Peru*, ICSID Case No. ARB/14/21, paras 127 - 150.

<sup>126</sup> *Ibid* at paras 218 - 227 and 254.

<sup>127</sup> *Ibid* at paras 189 - 190 and 251.

Government reacted by revoking the declaration of public necessity, thereby rendering the mining concessions ineffective.<sup>128</sup> In the arbitration process, the Tribunal found that the Claimant's approach to community engagement was defective, but noted that these were initially approved by the State.<sup>129</sup> The Tribunal therefore held that the State was liable for indirect expropriation and it awarded compensation to the Claimant, accordingly.<sup>130</sup>

## [1] Legal Nature

*Beer Creek v Peru* raises different issues regarding communities' rights and public participation, including questions on the legal nature of SLO, who is obliged to apply for it and under which legal framework SLO should be established. On the question of legal nature, it has been argued that SLO does not really have a legal footing but it relies on extra-legal and social norms.<sup>131</sup> From a policy perspective, the UN SDG 16.7 target shows broad and universal acceptance of concepts like SLO and therefore it provides to the international investment law regime an opportunity to pay closer attention to the rights of the host communities. In the particular case of *Beer Creek v Peru*, the Claimant argued that SLO is not part of the domestic law nor part of international law; while Peru contended that the legal duty to obtain SLO is a well-accepted obligation under the international law.<sup>132</sup> At this juncture, it is important to note that there are other notions which perhaps might be more familiar to investors and arbitration tribunals, including Corporate Social Responsibility (CSR), social impacts assessment, legitimacy, stakeholder engagement and energy justice, among other things.<sup>133</sup>

## [2] Obligation to Obtain and Maintain SLO and Applicable Legal Framework

On the question of which party has an obligation to obtain SLO, a dissenting opinion in *Beer Creek v Peru* argues that investors also have obligations to obtain and maintain the social approval from the community in accordance with international investment law.<sup>134</sup> It has also been noted that in the context of investment law, it is possible that SLO can be used instinctively from FPIC by placing the obligation of public participation on the host- state of the investments rather than the investor.<sup>135</sup> In *Beer Creek v Peru*, the tribunal confirmed that the investor had an obligation to obtain SLO and that the steps taken by the investor were inadequate. Nonetheless, the Tribunal held that the State was responsible for approving the investor's steps and the failure to raise objections or queries.<sup>136</sup> The Tribunal also held that in the circumstances, the investor was entitled to assume that its activities of consulting the communities were sufficiently compliant with the legal requirements.<sup>137</sup> Therefore, an effective implementation of SLO into the investment treaty regime would require a legal triangulation between state-investor-community. This triangulation would create the States' obligation to review the steps taken by the investors and raise queries where the approach of

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<sup>128</sup> *Ibid* at para. 202.

<sup>129</sup> *Ibid* at para. 412.

<sup>130</sup> *Ibid* at paras 415 - 416 and 738.

<sup>131</sup> Henry G (Harry) Burnett and Fernando Rodriguez-Cortina, *Arbitration of Social Disputes in connection with mining projects*, in Jason Fry and Louis-Alexis Bret, *Global Arbitration Review: The Guide to Mining Arbitrations*, 40 (1<sup>st</sup> ed., Law Business Research 2019).

<sup>132</sup> Jean-Michael Marcoux and Andrew Newcombe, *Beer Creek Mining Corporation v republic of Peru: Two sides of a 'Social Licence' to Operate*, 33(3) ICSID Review, 653-659 (2018).

<sup>133</sup> Heffron, *supra* n. 21, at 3.

<sup>134</sup> *Ibid*.

<sup>135</sup> Barnes, *supra* n. 16.

<sup>136</sup> *Beer Creek v Peru*, ICSID Case No. ARB/14/21, Final Award, para. 412 (30 Nov. 2017).

<sup>137</sup> *Ibid*.

an investor is ineffective, before the relationship with the host communities degenerates to complete mistrust. It will also help to ensure that the State insists on the standard of protection provided in the existing laws for the vulnerable groups.

For example, the case of *Alvarez y Marin Corporation SA and others v. Republic of Panama*<sup>138</sup> involved a direct conflict of property ownership rights, between the investor and indigenous people and it shows the need for the administrative implementation of statutory protections for indigenous groups. It was a claim that the indigenous people invaded the investor's property.<sup>139</sup> The claimant was the sole shareholder of a real estate company which invested in a tourism project and acquired 685 hectares of land for the project.<sup>140</sup> The Panamanian land authority issued an administrative decision that a large part of the investor's project land fell within the indigenous people's protected area.<sup>141</sup> The investor challenged the decision, arguing that it contradicts an earlier judicial decision and it is inconsistent with the right of the investor under international law.<sup>142</sup> The investor alleged that the administrative decision led to severe opposition by the indigenous people and it effectively frustrated the project.<sup>143</sup> However, the Tribunal declined jurisdiction and granted the preliminary objection filed by the State.<sup>144</sup> The Tribunal found that the investment was tainted with substantial illegality, involving breach of the statutory provisions that protect the indigenous land area.<sup>145</sup> The Tribunal also found that the judicial decision relied upon by the investor was tainted by fraudulent witness statements and substantial irregularities, in breach of the law.<sup>146</sup> Even though the legality requirement is not expressly provided for in the applicable investment treaties, the Tribunal found that it is a requirement of general international law.<sup>147</sup> Effectively, the Tribunal found support for the administrative decision in the reasoning that an investor cannot ignore statutory provisions in the domestic law to exercise his rights of protection under the international investment law.

## **[F] Institutional Initiatives on Transparency and Public Participation**

In consistency with the requirements of public participation envisaged by the SDGs, arbitration institutions have been paying attention to public participation, transparency and matters of public interest. For example, the 2013 UNCITRAL Rules on Transparency provide for the publication of documents filed in the proceedings and decisions made by tribunals,<sup>148</sup> subject to the exception of protecting confidential information.<sup>149</sup> These rules also make

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<sup>138</sup> ICSD Case No. ARB/15/14.

<sup>139</sup> Stephanie Schacherer, *International investment law and sustainable development: Key cases from the 2010s*, International Institute for Sustainable Development 5 (2018).

<sup>140</sup> Investment Policy Hub, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/619/-lvarez-y-mar-n-corporaci-n-and-others-v-panama> (accessed 9 Sep. 2020).

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> Juan Carlos Herrera-

Quenguan, *ICSID tribunal upholds Panama's plea of illegality in the making of an investment in a tourism project located in an indigenous area*, Investment Treaty News (27 Jun. 2019) <https://cf.iisd.net/itn/2019/06/27/icsid-tribunal-upholds-panamas-plea-of-illegality-in-the-making-of-an-investment-in-a-tourism-project-located-in-an-indigenous-area-juan-carlos-herrera-quenguan/> (accessed 9 Sep. 2020).

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> Kai-chieh Chan, *Alvarez y Marin Corporacion and others v. Panama, ICSID Case No ARB/15/14, Award, 12 October 2018*, 4(1) EILA Rev. 227 (2019).

<sup>148</sup> UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, art. 3 (2013).

<sup>149</sup> *Ibid.* art. 7.

provisions for the participation of third parties, which may have significant interests in the proceedings and can file written submissions into the arbitration process.<sup>150</sup>

The ICC Commission on Climate Change observed further that transparency concerns are also gaining more traction in commercial arbitration cases involving state enterprises.<sup>151</sup> On climate change-related disputes, the Commission predicted that the transparency concerns would be more significant due to public interests involved in climate change.<sup>152</sup> It therefore recommended that proceedings in climate change-related cases should be open to the public and decisions also published.<sup>153</sup> More importantly, the ICC Task Force recognised that there are potential disputes arising from energy and natural resources projects, which can involve impacted groups or populations who are not party to the arbitration agreement. A procedural solution, the ICC presents, is the possibility of including a unilateral offer to arbitrate in the form of a possible future submission agreement. A submission agreement in place for a local group or population impacted by the establishment of an energy project can prevent multiple, multi-jurisdictional and court proceedings with inconsistent outcomes.<sup>154</sup>

Earlier in 2001, the Permanent Court of Arbitration (**PCA**) had published PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment. It provides for an optional list of arbitrators and experts, in the field of natural resources and environmental law.<sup>155</sup> The rules empower the tribunal to conduct the proceedings in the manner it sees fit, provided that parties are provided full and equal opportunities.<sup>156</sup> It also enables the tribunal to consider the merit of an application by either party to classify information or documents as confidential.<sup>157</sup> This indirectly leaned towards transparency since information and documents are not to be automatically regarded as confidential, unless the tribunal classifies them after a careful consideration of the application of either party.<sup>158</sup> It shows an indication with respect to which the ICC Commission observed that it is possible to make some parts of the proceedings public, while maintaining confidentiality where disclosure will cause serious harm to a party or the parties.<sup>159</sup> The PCA optional arbitration rule provides that the tribunal can appoint a confidentiality adviser to manage the confidential aspect of the information and report to the tribunal.<sup>160</sup>

## **[G] Proposal: Constitutional Source as a Drive of Investment Interests and Effective Procedures**

Using the Arnstein's ladder to measure the level of public participation in international investment law, through cases, there is evidence of fluctuations running through the different rungs of the ladder. There are some common trends existing in the indications shown in the different cases and among the reasoning of the tribunals. For example, both *Gold Reserve v*

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<sup>150</sup> *Ibid* art. 4.

<sup>151</sup> International Chamber of Commerce, *Resolving climate change related disputes through Arbitration and ADR* (ICC Commission Report) 41 (2019).

<sup>152</sup> *Ibid*.

<sup>153</sup> *Ibid* at 42.

<sup>154</sup> For example, the Report makes reference to IndustriALL Global Union and UNI Global Union v Respondent in PCA Case No. 2016-36 (Private entity), PCA 2016-36; 2016-37, *Ibid* at 11.

<sup>155</sup> PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, Articles 8(3) and 27(5) (2001).

<sup>156</sup> *Ibid*, art. 15.

<sup>157</sup> *Ibid*, art. 15 (4 - 6).

<sup>158</sup> International Chamber of Commerce, *supra* n. 133, at 44.

<sup>159</sup> *Ibid*. See also PCA, *supra* n. 155, art. 15(5).

<sup>160</sup> PCA, *supra* n. 155, arts 15(6) and 27.

*Venezuela* and *Quiborax v Bolivia* show placation while *Clayton v Canada* and *Glamis Gold v USA* both show how a case may interact with two or more rungs of the ladder. A common trend concerning the reasoning of the tribunals in the cases is the indication of lack of sufficient basis to grant procedural access to the communities for participation in decision-making. The approach of the tribunals in the cases of *Glamis Gold v USA* and *Pac Rim v Salvador*, for example, show the evidence of lack of access to effective. There is also a lack of sufficient opportunity for the protection of the substantive rights of the communities, since the States are yet to provide clarity in the law, even at domestic levels.

From the survey of investment treaty cases conducted in this paper, it is possible to identify the necessary elements to create a normative proposal to effectively formalize public participation in international investment law. First, looking into the analysis of the behaviour taken by states as respondents, it seems that the most important key source to take action on protecting community rights is a constitutional mandate or legislative framework. This means that states, in principle, need to be motivated by national interests which are recognized in the law, including: ecology, biodiversity and the protection of communities' rights, including vulnerable groups of the nation, such as indigenous groups. This also implies that when states have positivised a protected value in their laws, it is more likely that they would ensure this same principle is followed in the performance of international investments. Moreover, a strong legislative mandate places the state hosting the investment in a duty of protecting the public order, which is monitored by public pressure and opposition if this duty is not followed.

Having identified the key elements of public participation at domestic level, the next question that arises is how these constitutional values and public duty can be transposed to international investment law? A preliminary suggestion is that states would work more effectively if certain instruments that are recognised at national level, also form part of the content of investment agreements. For example, when states have procedural clarity at domestic level, on mechanisms such as a joint review panel, it is more likely that these processes are timely followed at the pre-investment stage. Most importantly, it seems advisable that investment agreements make explicit reference to those national interests but also the preferable mechanism to enforce public participation. In contrast, when certain notions are not duly recognised as a matter of national interest and there is lack of clarity on the adequate methods to enforce those priorities; it is ineffective to place that burden on investment agreements.

While there are different possible notions that can encapsulate public participation rights; there are already salient characteristics that should be contemplated, these include:

1. Definition, scope and requirements of representation in order to be considered an affected community
2. System of notification to the affected communities
3. Number and format of consultations and expected outcomes
4. Standards for consensus
5. Feedback exchange between communities and foreign investor
6. Actions to be taken in order to give effective enforcement to the concerns and priorities identified in the consultations
7. Principles to avoid one-way communications
8. Assessment of the actions taken to follow through concerns

9. Possibility of economic compensation as a trade-off in exchange of investment performance
10. Sanctions, including warning and conditions to reframe the investment project
11. Withdrawal of investment permit in cases where the process failed to deliver the expected outcomes

## **[H] Conclusion**

It has been shown that a paradigm shift has begun on the inclusion of the host communities' rights in the dynamics of the international investment law. As evidence of the beginning of the paradigm shift, reference has been made to some investment arbitration cases and new investment treaties such as the Canada-EU Free Trade Agreement and the Netherlands Model Investment Agreement. With the main focus on Latin America, this Chapter has used the Arnstein's ladder to measure and classify public participation and host community engagement in investment projects, as shown in arbitration cases that are publicly available. The level of involvement and engagement of the host communities varies in different instances leading to the disputes presented to the arbitration tribunals. At the minimum, there are cases in which the investor and the government merely sought to educate the host communities without conceding any power to the host communities in the process of decision-making. In some cases, a certain level of power is conceded to the communities and they are more involved in the decision-making processes. At the top of the Arnstein's ladder is a situation where the host communities have managerial or decision-making control, including the power to veto the investment project. Furthermore, the reasoning of the tribunals in the cases considered also shows some common trends. The most notable among the common trends are the indications of the absence of clarity in the law and the lack of access to proceedings by the communities that wish to articulate their concerns. This leads to lack of opportunities to moderate a balance of powers in the growing triangulation among the States, the investors and the host communities. This Chapter has also considered the use of the concept of SLO to achieve the requirements of the SDG on public participation in decision-making. It is submitted that the need for the inclusion of the rights of the host communities and the indigenous groups alters the binary approach to the international investment law, as it leads to a triangulation among the states, the investors and the host communities. The triangulation fully aligns with the SDG's requirement for public participation and it helps to enhance the public legitimacy of the ISDS. It is expected that the trend will grow gradually. However, it is submitted that it is better that the reform is premised on a solution which is firmly rooted in the constitutional values and legislative frameworks at the domestic level, as the foundation. Investment agreements then need to make references to the constitutional values and legislative frameworks as matters of national interests. While investment agreements need to pay attention to the values of the host communities and rights of public participation, there is a limit to how much details can be contained in such agreements. Also, provisions in domestic constitutions and laws call for more accountability on the part of the States and the approach has the potential to address the relevant issues at pre-investment stages.