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Abstract	The African continent is going through a profound period of change. For much of its recent history, its natural resources have been exploited with little consideration accorded to local communities and their environment. This situation has become intensively criticized as preventing the continent’s development and its population from benefiting fully from their natural resources. The concept of a “social license to operate” (SLO), however, has emerged, notably in the energy sector, to bridge the dire insufficiencies of the current African natural resource governance regime. Thus far, the SLO concept remains multi-sourced and englobes uncoordinated and multilayered social, environmental, and human rights concerns. The COVID-19 pandemic placed more pressure on the African natural resource governance regime. In so doing, it brought more relevancy to the SLO, a still elusive legal concept. This article examines the necessity of giving more substance to this concept in the OHADA zone, a legally dynamic and homogenous space with vast natural resources. This task is of critical relevance as the SLO may define whether the trajectory of African natural resource governance will evolve to integrate the considerations of local communities better or deepen the inadequacies of the status quo, which have been exacerbated by the pandemic.	
Keywords (separated by “-”)	Social license to operate - SLO - ECOWAS Supplementary Act on Investments - OHADA - Local content requirements - LCRs - Francophone Africa - Law and development - Human rights - African Commission - ISDS	

The "Social License to Operate" in the OHADA Zone

The Imperative of Further Substantiating an Emerging and Elusive Concept in a Post-COVID-19 Pandemic World

John Belinga and Etienne Marque

Contents

Abstract

The African continent is going through a profound period of change. For much of its recent history, its natural resources have been exploited with little consideration accorded to local communities and their environment. This situation has become intensively criticized as preventing the continent's development and its population from benefiting fully from their natural resources. The concept of a "social license to operate" (SLO), however, has emerged, notably in the energy sector, to bridge the dire insufficiencies of the current African natural resource governance regime. Thus far, the SLO concept remains multi-sourced and

Note that, while the terms "peoples" and "communities" differ in several respects, some of which are germane to the subject matter of this article. However, unless otherwise indicated, this article uses those terms interchangeably.

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englobes uncoordinated and multilayered social, environmental, and human rights concerns. The COVID-19 pandemic placed more pressure on the African natural resource governance regime. In so doing, it brought more relevancy to the SLO, a still elusive legal concept. This article examines the necessity of giving more substance to this concept in the OHADA zone, a legally dynamic and homogenous space with vast natural resources. This task is of critical relevance as the SLO may define whether the trajectory of African natural resource governance will evolve to integrate the considerations of local communities better or deepen the inadequacies of the status quo, which have been exacerbated by the pandemic.

Keywords

Social license to operate · SLO · ECOWAS Supplementary Act on Investments · OHADA · Local content requirements · LCRs · Francophone Africa · Law and development · Human rights · African Commission · ISDS

Abbreviations

ADB's IRM	African Development Bank's Independent Review Mechanism
ADR	Alternative dispute resolution
AfCFTA	African Continental Free Trade Area
AU	African Union
CCJA	Common Court of Justice and Arbitration
ECCJ	ECOWAS Community Court of Justice
ECOWAS	Economic Community of West African States
ESIAs	Economic and Social Impact Assessments
FPIC	Free, prior, and informed consent
IACHR	Inter-American Court of Human Rights
ICJ	International Court of Justice ECOWAS
IFC	International Finance Corporation
IFC's CAO	IFC's Compliance Advisor Ombudsman
IIAs	International investment agreements
ILO	International Labour Organization
IMF	International Monetary Fund
LCRs	Local content requirements
MDBs	Multilateral development banks
MFNT	Most-favored nation treatment
MIGA	Multilateral Investment Guarantee Agency
NHRIs	National Human Rights Institutions
NIEO	New International Economic Order
NT	National treatment
OHADA	Organisation for the Harmonisation of Business Law in Africa
PAIC	Pan-African Investment Code
PSNR	Permanent sovereignty over natural resources
SAI	ECOWAS Supplementary Act on Investment
SLO	Social license to operate

1 Introduction

The concept of a "social license to operate" (SLO) is more relevant than ever, as the international economic order is experiencing a profound period of distrust and criticism. This is especially the case throughout Africa, where business and its regulation have long operated with striking indifference – if not at the expense – of local peoples and communities.

Indeed, local African communities have historically been sidelined from the international economic order and viewed as peripheral or collateral considerations. As some scholars contend, Africa has in no small part been represented and "invented" by non-Africans.[1] Controversial paternalist legal narratives have long underpinned and legitimized the exclusion of Africans and their interests.[2] This explains, in part, why some aspects of the current international economic order are or are often still perceived as colonial legacies.[3]

As Africans gradually move endeavor to re-appropriate the continent and the narrative surrounding it,[4] the SLO has the potential to accelerate this movement by situating local peoples' approval and interests at the center of projects generally driven thus far by foreign capitalistic interests.

The concept of an SLO, which deals with the interest of local peoples relative to economic activities, appears in this context of great relevance. Local peoples in regions with vast natural resources across Africa are increasingly demanding a

[1] Valentin Y. Mudimbe, *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge* (Indiana University Press 1989).

[2] Some of these narratives, as the one embodied by General Charles de Gaulle's speech at the Brazzaville Conference towards the end of World War II in 1944 to discuss the future of France's African colonies, still bear a grim contemporaneity. General de Gaulle declared then that: '*We believe that the African continent should be treated as a whole so far as the development of resources and communications are concerned, but in French Africa as in all the other countries where men live under our flag, no progress will be possible if the men and women on their native soil do not benefit materially and spiritually and if they are not able to raise themselves to the point where they are capable of taking a hand in the running of their countries. It is France's duty to see this comes about. This is our aim. We know that it is a long term program.*' Dominic Richard David Thomas, *Africa and France Postcolonial Cultures, Migration, and Racism* (Indiana University Press 2013) 96.

[3] On the colonial origins of international investment law, *see* Miles Kahler, 'Political Regime and Economic Actors: The Response of Firms to the End of Colonial Rule' 33 World Pol. 383 (1981). *See also*, James Thuo Gathii, 'Imperialism, Colonialism, and International Law' 54 Buff. L. Rev. 1013 (2007); Elise Huillery, 'History Matters: The Long-Term Impact of Colonial Public Investments in French West Africa' 1(2) American Economic Journal: Applied Economics 176 (2009); Gareth Austin, 'African Economic Development and Colonial Legacies' (2010) 1 (Dossier |Africa: 50 years of independence, International Development Policy) International Development Policy | Revue internationale de politique de développement 11−32.

[4] *See* eg, Makane Moïse Mbengue and Stefanie Schacherer, 'The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Inv & Trade 414, 447.

greater share of benefits from natural resource-related projects, assurances that such operations comply with environmental and social norms, and greater public participation in decision-making.[5]

These activities often invariably involve natural resources on their lands.[6] In fact, a central feature underpinning the outcry prompting the emergence of the SLO, in this way, is the lack of recognition or outright negation of customary land rights of local communities by African states, too often together with the complicity of foreign investors.

Local land acquisition processes indeed are often very decisive in framing the relations between investors and local communities[7]. This is an issue both for local communities that purport to approve or disapprove of projects affecting them and also investors seeking to improve the legal security of their investments on those lands. Thus, in no small regards, the concept of the SLO in Africa is about the precarity surrounding local communities' land rights.

The SLO thus implicates unresolved issues regarding the precarity of land rights in Africa. However, the public expression of these unresolved issues is best reflected in the increasing blowback against the varied undesirable externalities of large projects, particularly those in the energy sector.[8] Transactional bargains where energy companies acquire the rights to exploit mineral or hydrocarbon deposits in consideration of money and royalties to the state, with little consideration accorded to local development, are indeed no longer being accepted.

Energy companies, as well as large transnational companies in other sectors, henceforth need to consider and address the negative externalities affecting the local social and economic fabric in project areas. Investors are realizing that "*neither*

[5] Jason Prno and D Scott Slocombe, 'A Systems-Based Conceptual Framework for Assessing the Determinants of a Social License to Operate in the Mining Industry' (2014) 53 Environmental Management 672, 672. *See also*, Wairimu Karanja and Nduta Njenga, 'Social Licence to Operate in the Energy Transition Era: Case Study of the East African Oil and Gas Sector' in Victoria R Nalule (ed), *Energy Transitions and the Future of the African Energy Sector: Law, Policy and Governance* (Palgrave 2021) 344.

[6] *See* eg, Lorenzo Cotula, 'Land grabbing and international investment law : toward a global reconfiguration of property?' in Andrea K Bjorklund (ed) Yearbook on International Investment Law and Policy 2014–2015 (Oxford University Press Area 2016) 177-214, 178 ("[T]*he commercial exploitation of natural resources can bring into contest competing claims to land and resources, advanced by different actors involved in uneven power relations—from indigenous peoples to transnational corporations*."); CCSI and IIED, 'COVID-19 and Land-based Investment: Changing Landscapes' (May 2021), <available at: https://ccsi.columbia.edu/sites/default/files/content/docs/publications/Covid-19%20and%20Land-based%20Investment%20-%20Changing%20Landscapes%20-%20FINAL.pdf> (stating that under pressure, from the pandemic, governments are turning to natural resource-based economic recovery strategies).

[7] Rasmus Hundsbæk Pedersen and Opportuna Kweka, 'The political economy of petroleum investments and land acquisition standards in Africa: The case of Tanzania' (2017) 52 Resource Policy 217–225, 218.

[8] On SLO definitions in various contexts and sectors, *see* generally, Jędrzej Górski and Christine Trenorden, 'Social License to Operate (SLO) in the Shale Sector: A Contextual Study of the European Union' (2020) 18(1) 115, Appendix IV at 114–115.

obtaining formal licences nor meeting regulatory requirements is enough to facilitate the smooth running of operations."[9]

This state of affairs, moreover, has been aggravated by the global outbreak of the "severe acute respiratory syndrome coronavirus 2" (SARS-CoV-2), better known as COVID-19. While accurate statistics are hard to obtain, according to Reuters' COVID-19 Tracker, there have been at least 10,115,000 reported infections and 211,000 reported deaths in Africa.[10]

With their limited resources, African states have addressed this global pandemic through a range of containment measures, which have raised worries regarding their effect on foreign investments. As a result, concerns started to abound regarding the risk of increased disputes between foreign investors and African states relative to COVID-19-related measures.

Quite remarkably, the African Union (AU), on 24 November 2020, in fact, adopted the *Declaration of the Risk of Investor-State Dispute Settlement with respect to COVID-19 related Measures* (AU Declaration on COVID-19-Related ISDS Risks), inviting inter alia:

> Member States to explore all available options under international law to mitigate against the risk of COVID-10 Pandemic related ISDS claims, considering the interaction between pandemics and international investment law.[11]

The pandemic indeed provoked a downturn in African economies. The United Nations Conference on Trade and Development (UNCTAD) estimates that, due to the pandemic, foreign direct investment (FDI) to Africa declined by 16%,[12] while the International Monetary Fund (IMF) projects that African economies shrunk by 1.9% in 2020,[13] a slowdown that will eventually have a profound impact on local communities.

The AU Declaration on COVID-19-Related ISDS Risks suggests that the concern thus far focuses on the legality of COVID-19-related measures implemented by African states, which does not necessarily implicate changes in the political economy of the investment law regime.

In fact little attention has been directed at SLO's potential to remedy shortcomings in this regime in a manner that is more considerate of local peoples' interests. This is peculiar given that nothing less than a far-reaching reform of the natural resource governance is required, where the role of all stakeholders should be

[9] Karanja and Njenga (n 6) 362.

[10] Reuters, 'COVID-19 Tracker/ regions/ Africa' <https://graphics.reuters.com/world-coronavirus-tracker-and-maps/regions/africa/> last accessed 8 January 2022.

[11] African Union, 'Declaration on the Risk of Investor–State Dispute Settlement with Respect to COVID-19 Related Measures' (24 November 2020) (on file with authors).

[12] UNCTAD, *World Investment Report 2021: Investment in Sustainable Recovery* (United Nations 2021) UNCTAD/WIR/2021 ISBN 9789211130171, 40.

[13] IMF, *Regional Economic Outlook. Sub-Saharan Africa: Navigating a Long Pandemic* (Regional Economic Outlook, UNCTAD April 2021), v.

re-assessed. To be sure, the discontent related to natural resource governance and the investment law regime is certainly well documented.[14] What is less understood is how this discontent embodies a divergence in understanding international legal principles like consent and sovereignty and their relation to property.

As with the introduction of any new concept, the emergence of the SLO may indeed reshape seemingly well-established principles of international law. In that regard, the gradual actualization and "juridification" of this concept reveal critical insufficiencies in the current international economic order.[15] Though the SLO can be said to be in its infancy, it is a subversive concept criticized as a poorly conceptualized idea, often apprehended inconsistently.[16] Barnes explains that:

> From a legal point of view, the elusive nature of this concept further complicates its full understanding, since there are no predefined parameters that a company must follow, in order to obtain the SLO, as it may be the case for obtaining the "legal" license to operate, which is usually a process administered by government agencies.[17]

Fruitful analogues may be drawn between social licenses and legal licenses.[18] The SLO concept "*has intuitive appeal for industries accustomed to meeting the conditions of formal licensing or permitting processes, and it may be this common language which accounts for its broad usage among industry stakeholders*."[19] Yet where a legal or formal license is issued by a governing authority, "*a social license is perceived as something that must be earned from a community of stakeholders*."[20] A legal license, moreover, is generally granted at the beginning of an operation and continuing throughout its life so long as its conditions are met; on the other hand, the SLO is described as "impermanent, subject to continual evaluation and renewal by" the local community and other stakeholders depending on the project's extractive activities.[21] As a result, Brett and Burnett refer to the SLO as describing the "level of acceptance or approval by local communities and stakeholders of mining companies

[14] *See* e.g., Ursula Kriebaum and Christoph Schreuer, 'From Individual to Community Interest in International Investment Law' in Ulrich Fastenrath et al (eds), *From Bilateralism to Community Interest, Essays in Honour of Bruno Simma* (OUP 2011) 1079–1096; Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015).

[15] Mihaela-Maria Barnes, 'The 'Social License to Operate': An Emerging Concept in the Practice of International Investment Tribunals', (2019) 10(2) Journal of International Dispute Settlement 328, 329.

[16] Martin Brueckner and Marian Eabrasu, 'Pinning down the social license to operate (SLO): The problem of normative complexity' (2018) 59 Resource Policy 217–226, 217–18.

[17] Barnes (n 16) 332.

[18] Kieren Moffat, Justine Lacey, Airong Zhang and Sina Leipold, 'The social licence to operate: a critical review' (2016) 89 Forestry 477, 481–82.

[19] ibid 481.

[20] ibid.

[21] ibid., 482.

and their operation."[22] Henceforth, in the absence of this informal or intangible license, companies with legal licenses are increasingly blocked or impeded by local communities.[23]

Beyond its content and scope, which are intrinsically elusive, to be effective, the SLO will require adequate remedies and institutions. Deprived for so long of genuine representative institutions, however, Africa's road to real democracy remains an ongoing development.

Although certain economic rights were formally bestowed on the newly independent African states,[24] local peoples throughout the continent have yet to reap the bulk of the benefits these rights were supposed to secure. Scholars characterize this lengthy condition of underdevelopment as manifestations of a "resource curse," a "tragedy of endowment," or illustrations of the "paradox of plenty," as if this state of affairs was an inevitable fatality.[25]

But these arrested observations should not obscure the reality that this deplorable situation proceeds directly from the extractive regime forged by African states and foreign investors, with little to no participation by local peoples: a *constat* that is tolerated less and less.

It is against this background of unfulfilled expectations of development that the concept of the SLO is emerging as a way of giving local peoples a say on these natural resource projects. Illustratively, in 2012, the African Commission on Human and Peoples' Rights (African Commission), the continent's premier reporting mechanism for the promotion and protection of human rights adopted the *Resolution on Human Rights-Based Approach to Natural Resources Governance* (2012 Resolution), which calls on African states to:

> 2. Strengthen regional efforts [. . .] to promote natural resources legislation that respect human rights of all and require transparent, maximum effective community participation in a) decision-making about, b) prioritisation and scale of, and c) benefits from any development on their land or other resources or that affects them in any substantial way;
>
> 3. Set up independent monitoring and accountability mechanisms that ensure that human rights are justiciable and extractive industries and investors legally accountable in the country hosting their activities and in the country of legal domicile.[26]

[22] Henry G Burnett and Louis-Alexis Bret, *Arbitration of International Mining Disputes: Law and Practice* (OUP 2018) 174.

[23] ibid.

[24] Hugh M Arnold, 'Africa and the New International Economic Order' (1980) 2 TQW 295.

[25] Amadou Sy, Rabah Arezki and Thorvadur Gylfason, *Beyond the Curse: Policies to Harness the Power of Natural Resources* (IMF 2012); Abiodum Alao, *Natural Resources and Conflict in Africa: The Tragedy of Endowment* (University of Rochester Press 2007); Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro-States* (University of California Press 1997).

[26] African Commission on Human and Peoples' Rights (51st Session) Resolution on a Human Rights-Based Approach to Natural Resources Governance (Banjul 2012). *See also*, UNCHR, 'Guiding Principles on Business and Human Rights' (2011) UN Doc HR/PUB/11/04 [hereinafter UNGP], 30 (stating that States should provide '*non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse*').

The 2012 Resolution speaks to an uncoordinated momentum, articulated in an eclectic and growing array of instruments, which recognize social, economic, and environmental concerns in African natural resource governance, particularly in the energy and extractive sectors.[27]

These objectives have regrettably been rendered more difficult to satisfy since the outburst of the pandemic. But according to Njenga and Nalule, two of the few authors that have examined the impact of the pandemic on the SLO in the African context, this only reinforces the importance of the SLO:

> The economic disruptions post COVID-19 will leave many host communities in financial distress and these besides turning to governments, will also expect more from extractive companies. In essence, the pandemic presents a solid reason to develop the legal nature of SLO to ensure that the interests of both host communities and companies are well balanced.[28]

COVID-19 invariably put project stakeholders in a predicament. It conferred to the SLO a key importance but also the occasional opportunity to harmonize the varied interests at stake. We believe in that regard that the SLO will not merely help address deficiencies in investment regulations and natural resource governance but may reorient and restructure business operations and practices in the natural resource sector. This will be so provided this still fragmented concept is further substantiated through effective accountability and remedy mechanisms.

Our study of the SLO concept will focus on the energy sector in the 17 African member states of the Organization for the Harmonisation of Business Law in Africa, better known under its French acronym OHADA. Except for Comoros in the Indian Ocean, OHADA member states are all located in western and central Africa, a zone that abounds in energy resources and that largely follows the civil law tradition of former colonial powers.[29]

OHADA's raison d'être and specificity are to encourage investments by mitigating business and legal risks through the harmonization (or rather the uniformization) of business laws into Uniform Acts.[30] At first glance, the OHADA appears not to have a direct interest in the ongoing developments regarding the SLO. This

[27] 2012 Resolution (n 27) (identifying the 2009 ECOWAS Mining Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector as a reference). See also Annex (listing primary SLO-related international and regional instruments and identifying their relevant provisions).

[28] Nduta Njenga and Victoria Nalule, 'What is the Future of Social Licence to Operate in the Extractive Industries post the COVID-19 Pandemic in East Africa?' (August 2020) 1(2) *Global Energy Law and Sustainability* 156, 165–63.

[29] Bruno Zeller, 'Mining Projects in OHADA: The Legal and Judicial Climate' in Gabriel A. Moens and Philip Evans (eds) *Arbitration and Dispute Resolution in the Resources Sector: An Australian Perspective* (Springer 2015) 231.

[30] Olivier Chambord and Allison Soihini, 'OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires)' in Oil & Gas in Africa: A Legal and Commercial Analysis of the Upstream Industry (Globe Business Publishing 2015) 117.

inattention is rather quite peculiar as the first preambular of the 1993 OHADA Treaty provides that member states are determined to "*instill confidence*" in their economies in order "to create a new pole of development in Africa."[31]

Yet, the emergence of the SLO as a primary risk for investors has not influenced the OHADA Uniform Acts. In fact, since OHADA's creation, the attraction of foreign capital has remained the principal, if not the only, policy tool of development to instill confidence in the region. The SLO's imminence, however, is perhaps on the verge of shifting this paradigm.

Not only has the OHADA produced a preliminary draft Uniform Act on Labour Law, but scholars have also called for a Uniform Act on Mining,[32] where the SLO appears most appropriate. Whether the OHADA embraces the SLO, the shift may nonetheless come from the business sector itself. As local peoples increasingly oppose natural resource projects adversely impacting their communities, their concerns are integrated and internalized by investors as an additional risk to be addressed.[33] At the same time, it is now increasingly accepted in the western legal systems that inspired the OHADA's creation[34] that companies, especially large ones,[35] should have a role beyond the sole generation of profit. For instance, France revised its Civil Code in 2017 and added the requirement that French corporations must now "consider the social and environmental stakes of its activity".[36] However, this idea of corporate social responsibility in "western" corporate law is still in its earliest stages in the OHADA zone.[37]

Accordingly, mapping the content of the emerging SLO concept in the OHADA zone seems particularly appropriate, as this regional and integrated legal space may

[31] Treaty on the Harmonization in Africa of Business Law, signed in Port-Louis on 17 Oct. 1993, as revised in Quebec on 17 Oct. 2008, Preamble. Pursuant to Arts. 3 and 41, the OHADA Treaty established five institutions: the Conference of Heads of State and Government, the Council of Ministers, the Common Court of Justice and Arbitration (CCJA), the Permanent Secretariat, and the Advanced Regional Training School of Magistracy (ERSUMA), which is attached to the Permanent Secretariat.

[32] Thierry Lauriol, 'L'OHADA, le temps pour un Acte Uniforme Minier' (2015) 892 Penant 281.

[33] Paul Mitchell, 'Top 10 business risks facing mining and metals in 2019-20' (E&Y 30 January 2020) <https://www.ey.com/en_gl/mining-metals/10-business-risks-facing-mining-and-metals> accessed 10 June 2019 (indicating that the number one risk reported by CEOs and Board of Directors of extractive companies is the license to operate).

[34] Rachael Ajomboh Ntongho, 'Political Economy of the Harmonisation of Business Law in Africa' (2012) 5 J Pol & L 58.

[35] *See* also, UNGP (no. 27), 1, 17 (stating that companies of all sizes should respect human rights and that their human right diligence '*will vary in complexity with the size of the business enterprise*').

[36] Code Civil, art 1833 (Fr.).

[37] Karounga Diawara and Sophie Lavallée, 'La responsabilité sociale de l'entreprise (RSE) dans l'espace OHADA :pour une ouverture aux considérations non économiques' (2014) 28 RIDE 43, Doumagay Donatienne Moskolaï, Victor Tspai and Jules Roger Feudjo, 'État des lieux de la Responsabilité Sociétale des Entreprises au Cameroun' (2016) 68(4) Revue Management Prospective 139–162, Cheikh Mbacké Diop and Angélique Ngaha Bah, 'Peut-on parler de l'émergence d'un modèle RSE africain : la situation du Sénégal ?' (2018) 25 Revue congolaise de gestion .67–96.

provide the requisite institutional leverage to render the SLO concept truly effective and transformative. The OHADA has been acknowledged as introducing much needed legal and judicial security in the region.[38] Conversely, the SLO has been articulated in an uncoordinated fashion through a disparate set of instruments and has raised concerns regarding the legal security of investments in the energy sector. The SLO, as such, may benefit from the OHADA system.

OHADA member states not only share a common legal base, through which the SLO's various formulations could be harmonized, but they also benefit from an organized, dynamic, and innovative legal order. This integrated legal zone, in our view, is equipped to assimilate and give the much-needed substance that the SLO requires to become effective.

This contribution will explore the components encapsulated by the SLO concept in the OHADA zone. It will be demonstrated that, thus far, a social license is an elusive and complex concept, which needs to be analyzed and further substantiated. Yet it reflects a popular support prerequisite for which the state remains the proxy, not only to express its approval or consent to projects but also to monitor and ensure that local communities share in the benefits of a project (2) Unless a state can be held accountable for failing or neglecting its stewardship obligations toward its peoples, the SLO will remain a legally empty shell; As such, it is of utmost importance to assess the accountability mechanisms established in the OHADA zone that safeguard the rights of local communities that underpin the SLO (3).

2 Deconstructing and Substantiating the Elusive SLO Concept

At first glance, the SLO appears to be an ambiguous, if not obscure, legal concept. To have a meaningful impact, it needs to be deconstructed, analyzed, and substantiated. The SLO has not historically been expressly part of a legal conversation, as the consent of local peoples was deemed to be granted indirectly through the local sovereign state. This consent was and is often understood as an expression of the people's right to self-determination in the international order. But it was soon realized that such consent could result in decisions by a state that were at the expense of its people. Thus, a state stewardship approach containing state's duties to its people started to develop (2.1). In parallel, an uncoordinated and eclectic set of mechanisms emerged that sought to include local peoples more directly in projects impacting them and to provide greater substance to what is referred to as the SLO (2.2).

[38] Pierre Meyer, 'La sécurité juridique et judiciaire dans l'espace OHADA' (2006) 116 (855) Penant 151 (discussing the notion of legal and judicial security).

2.1 State Stewardship as an Enduring Expression of Local Peoples' Consent

The approval or consent to exploit natural resources has traditionally remained a state matter, whose terms were manifested in agreements with foreign companies.[39] This has been a direct consequence of conferring ownership of energy resources to states. However, the growing discontent in natural resource sectors reveals that the interests of states when signing extractive agreements are not always aligned with the interests of local peoples. This divergence is a direct reflection of the current and fundamental structure of the international economic order.

The international economic order is a liberal legal regime based on the consent of its constituents,[40] who are considered to be economic right-holders.[41] Under this liberal economic order and regime, nature is apprehended as a stock of assets or resources, subject to being invested in and traded.[42] As the traditional sole legitimate structures to represent and defend the peoples' will and interests on the international stage, states are the primary holders and beneficiaries of these economic rights over natural resources.[43] Based on this foundational legal premise of international law, states have been vested with "permanent sovereignty over natural resources" (PSNR), which is understood as the inalienable and reaffirmed competence to regulate any activity related to natural resources in their territories.[44]

On the international plane, the relationship between a state and its people has traditionally remained unquestioned, as the state is itself the expression of the people's right to self-determination.[45] Issues involving the sovereignty and will of the people are particularly delicate in Africa, however. It is worth recalling that the so-called

[39] For a discussion of extractive agreements in the oil and gas sector, *see* Keith W Blinn, Claude Duval, Honoré Le Leuch and André Pertuzio, *International Petroleum Exploration and Exploitation Agreements: Legal, Economic and Policy Aspects* (2nd edn, Barrows Company 2009), 57–124.

[40] Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1989) 12 Aust. YBIL 22; Matthew Lister, 'The Legitimating Role of Consent in International Law' (2011) 11 Chi J Int'l L 663; Ernst-Ulrich Petersmann, 'Need for a New Philosophy of International Economic Law and Adjudication – Symposium in Honor of John H. Jackson' (2014) 17 J Int'l Econ L 639.

[41] Matthias Herdegen, *Principles of International Economic Law* (2nd edn OUP 2016) 27–54.

[42] Ian Brownlie, 'Legal Status of Natural Resources in International Law (Some Aspects)' (1979) 162 RCADI 247; Rudolph Dolzer, 'International Co-Operation in Energy Affairs' (2014) 372 RCADI 395; Etienne Marque, *L'accès aux énergies fossils en droit international économique* (PUAM 2018) 21–52.

[43] Nico Schrijver, *Sovereignty over Natural Resources – Balancing Rights and Duties* (CUP 1997) 306–7.

[44] Eduardo Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159 RCADI 1, 297; Georges Abi-Saab, 'La souveraineté permanente sur les ressources naturelles' in Mohammed Bedjaoui (ed), *Droit international. Bilan et perspectives* (Tome II, Pedone 1999) 642; Arghyrios A. Fatouros, 'An International Legal Framework for Energy' (2008) 332 RCADI 355, 388.

[45] James Crawford, 'The Rights of Peoples: 'Peoples' or 'Governments'' in James Crawford (ed), *The Rights of Peoples* (OUP 1992) 55.

consent given by local African chiefs to European powers and their chartered companies, through treaties signed in the nineteenth century,[46] was instrumentalized to legitimatize colonization.[47] This invariably led to local peoples' rights being curtailed and denied. Lamentably, considerations for the will of local peoples, their consent, have been more of a fiction than reality in modern African history.

In international law, states derive their legitimacy from the fact that they represent the peoples exercising their right to self-determination.[48] In the African context, this right to self-determination has been reclaimed by contemporary African states, often classified as post-colonial. But this right to self-determination remains ambivalent. Indeed, while this principle originally served as a *sword* to end colonization, it is now sometimes used as a *shield* by African states to pursue policies that infringe local peoples' rights.[49] In this regard, an effective SLO can redress this subverted application of the self-determination principle and reconnect with its initial aims of serving the will of peoples against authoritarian regimes.

[46] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2012); Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013); Mieke Vab Der Linden, *The Acquisition of Africa (1870-1914) – The Nature of International Law* (Brill 2016).

[47] Though often overlooked, foreign chartered companies played a key role in the ensuing appropriations on the African continent. These companies are worth mentioning, given the historic presence of foreign western capital with the backing of colonial powers, which echo aspect of the present relationship between investors and local peoples. *See generally*, Rosa Luxembourg, 'L'expropriation des terres et la pénétration capitaliste en Afrique' (1952) Présence Africaine 137; Janet McLean, 'The Transnational Corporation in History: Lessons for Today?' (2004) 79 Ind L J 363; Carlson Anyangwe, 'International Law and the Acquisition of Colonial Territories in Africa' (2005) 37 Zam L J 1; Jérémie Gilbert and Valérie Couillard, 'International Law and Land Rights in Africa: The Shift from States' Territorial Possessions to Indigenous Peoples' Ownership Rights' in *Essays in Africa Land Law* (PULP 2011) 52–53; Walter Rodney, *How Europe Underdeveloped Africa* (Pahamzuka Press 2012); Benoît Henriet, 'Colonial law in the making: Sovereignty and property in the Congo Free State (1876–1908)' (2015) 83 The Legal History Review 202; Christina Binder, 'Investment, development and indigenous peoples' in *International Investment Law and Development: Bridging the Gap* (Edward Elgar Publishing 2016); Judith Levine, 'The interaction of international investment arbitration and the rights of indigenous peoples' (2017) 1 TDM 106.

[48] Ricardo Pereira and Orla Gought, 'Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law' (2013) 14 Melbourne J Int'l L 452; Dominique Rosenberg, 'La renaissance du droit des peuples à l'autodétermination économique' in *L'homme dans la société internationale: Mélanges en hommage au Professeur Paul Tavernier* (Bruylant 2013).

[49] *See* special issue 'Colloque sur « La problématique de l'État en Afrique Noire' (1983) 127–128 (3–4) Présence Africaine 1–416; Jean-François Bayart, L'Etat en Afrique: La politique du ventre, Fayard, 1989, Mwayila Tshiyembe, 'L'État post-colonial: facteur d'insécurité en Afrique' (1990) Présence africaine: Moïse Léonard Jamfa Chiadjeu, *Comment comprendre la "crise" de l'Etat postcolonial en Afrique? – un essai d'explication structurelle à partir des cas de l'Angola, du Congo-Brazzaville, du Congo-Kinshasa, du Liberia et du Rwanda*, (Peter Lang 2005); Joseph Tonda, *Le Souverain moderne. Le corps du pouvoir en Afrique Centrale, Congo, Gabon* (Karthala, 2005).

At the time of decolonization, the reaffirmation of self-determination by newly independent states coalesced into a movement known as the New International Economic Order (NIEO), from which the PSNR principle emerged.[50] Notwithstanding the International Court of Justice (ICJ), in a case involving African states, recently affirming in dicta that this principle is part of customary international law,[51] the contours and contents of the PSNR principle remain unclear. Gilbert, for instance, remarks that PSNR was ambiguously conferred to states *and* peoples, as he notes that:

> [T]here is a fundamental ambiguity in the language of international law when it comes to sovereignty over natural resources as it is proclaimed as both fundamental elements of Statehood and as a right of the people. It is one of the very few legal principles that has two rights-holders: States and peoples.[52]

This ambiguity or distinction can be reconciled by recognizing that while sovereignty is *internationally* conferred on states, this right comes with correlated duties expressed *domestically* through the mandate that binds the state to its people.[53] Interestingly, Art. 21 of the 1981 *African Charter on Human and Peoples' Rights* (African Charter) is one of the first legal instruments in the world to reflect and incorporate this distinction or ambiguity.[54]

Art. 21 states that "*all peoples shall freely dispose of their wealth and natural resources.*"[55,56]

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[50] Madjid. Benchikh, *Droit international du sous-développement Nouvel ordre dans la dépendance* (Berger-Levrault 1983).

[51] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, para 244.

[52] Jérémie Gilbert, *Natural Resources and Human Rights: An Appraisal* (OUP 2018), 12–13.

[53] ibid 13 ('*Sovereignty over natural resources has two facets: one external, which ensures control of resources of States against external actors, and one internal, defining the governance of natural resources between the government and its citizens*.').

[54] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 Oct. 1986) (1982) 21 ILM 58 [hereinafter African Charter], art 21.

[55] However, the African Charter does not define the concept of 'peoples'; *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya* (2009), African Comm on Human and Peoples' Rights, No 276/2003, 27th Activity Report of the ACHPR, para 151 (discussing the notion of 'peoples' in the African Charter) ('*The African Commission is thus aware that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as 'peoples', viz: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under arts 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights. What is clear is that all attempts to define the concept of indigenous peoples recognise the linkages between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people*.').

[56] African Charter (n 55) art 21.

On this point, it is worth quoting the African Commission's landmark decision in *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria* (the *Ogoni Case*), which outlined the African origins and purpose of Art. 21:

> The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the [African] Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.[57]

The foregoing reflects an underlying and foundational principle that the state is sovereign because it serves the people's will and interests.[58] Up until recently, this understanding seemed implicitly understood. But in reaction to discontent regarding state management of natural resources, this principle has been reasserted through the concept of stewardship.

For instance, the Economic Community of West African States (ECOWAS), a regional economic community whose membership includes nine OHADA member states,[59] promulgated a mining directive consistent with the community's efforts to further economic development and foster economic integration.[60] The 2009 ECOWAS *Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector* (ECOWAS Mining Directive) recognizes the role of stewardship as it states that: "The mineral is vested in the State to be held and managed in trust for the people of the Member States."[61]

Likewise, the African Commission's 2012 Resolution reaffirms that:

> [T]he State has the main responsibility for ensuring natural resources stewardship with, and for the interest of, the population and must fulfill its mission in conformity with international human rights law and standards.[62]

[57] *The Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria* (2002), African Comm on Human and Peoples' Rights, No 155/9, 15th Activity Report of the ACHPR para 56 [hereinafter *Ogoni Case*].

[58] Evaristus Oshionebo, *Mineral Mining in Africa – Legal and Fiscal Regimes* (Routledge 2021) 5.

[59] The nine OHADA member-States that are also ECOWAS member-States are: Benin, Burkina Faso, Ivory Coast, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo.

[60] Revised Treaty of the Economic Community of West African States (adopted 24 July 1993, entered into force 23 Aug. 1995) 2373 UNTS 233, Preamble.

[61] ECOWAS, Directive C/DIR.3/05/09, *On the Harmonization of Guiding Principles and Policies in the Mining Sector*, Preamble (emphasis added) [hereinafter ECOWAS Mining Directive].

[62] 2012 Resolution (n 27).

Yet, expressed as such, this concept of stewardship would tend to be hardly opposable against a state. Nevertheless, the ideas expressed through these regional instruments paved the way for Senegal, an ECOWAS member state largely considered a future African energy hub, to shift from a domanial system, where petroleum resources are the state's property, to a stewardship system. Senegal's Petroleum Code highlights the stewardship relationship that exists between a state and its people, as it provides that:

> All the deposits or natural hydrocarbon accumulations on the territory of the Republic of Senegal *are the property of the Senegalese people*. The State assures its management and valorisation in accordance with the conditions provided by the present Code. The management of petroleum revenues guarantees notably intergenerational savings and that meets the developmental needs through the promotion of public investments in sectors, which are susceptible of increasing the country's economic growth potential.[63]

This emerging concept of stewardship in international law, as reflected in the Senegalese Petroleum Code, is in direct opposition to the model of natural resources as property belonging to states.[64] To be sure, however, under this stewardship model, states retain the "sovereign rights" to determine the modalities to explore and exploit those natural resources.[65]

The shifting paradigm regarding the very notion of sovereignty is creating an opening for a dialogue between local administrative authorities and communities to address and align stakeholders' interests. For instance, the 2009 *African Mining Vision* adopted by the AU calls for a *New Social Contract to Mine*.[66] This New Social Contract to Mine can be understood as an implementation of this idea of stewardship and the promotion of peoples' rights for more integrative and participative extractive governance. However, more effective legal mechanisms, where the people, as beneficiaries of these resources, can act against the proxy or trustor (i.e., the state), would better address discontent and forgotten communities.

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[63] Loi n°2019-03 du 1er février 2019 portant Code pétrolier, art 5 (emphasis added) (our translation from French to English).

[64] Anita Rønne, 'Public and Private Rights to Natural Resources and Differences in their Protection?' in A McHarg, B Barton, A Bradbrook and L Godden (eds), *Property and the Law in Energy and Natural Resources* (OUP 2010) 65.

[65] In this context, an illustration of a State' sovereign rights can be observed in art 18-3 of the 2003 ECOWAS Energy Protocol A/P4/1/03, which provides that: *'Each state continues to hold in particular the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, the optimization of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and reclamation within its Area, and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises*.'

[66] African Union, 'African Mining Vision' (2009) 39–43 <http://www.africaminingvision.org/> accessed on 10 June 2019.

2.2 The Gradual Substantiation of a SLO for Local Peoples

The concept of a SLO may be divided into two main categories of rights whose legal substance and enforceability still need to be clarified and affirmed: procedural and substantive. The former procedural rights bestow onto local communities the right to consent to extractive projects (2.2.1). And the latter substantive rights consist of the rights to benefit from these projects, which is encapsulated by the term "local content" (2.2.2).

2.2.1 Local Consent as an Expression and Procedural Safeguard of the SLO

The SLO functions as a much-needed procedural safeguard for the evolving expectations in the present natural resource governance regime. One of the essential elements of this evolving procedural safeguard can be found in the increasingly recognized principle of "free, prior and informed consent" (FPIC). Two major international instruments lay the foundations for the FPIC principle and the community consultations it requires: the International Labour Organization's (ILO) 1989 *Convention concerning Indigenous and Tribal Peoples in Independent Countries* and 2007 *UN Declaration on the Rights of Indigenous Peoples*.[67] While the 1989 ILO Convention may be legally enforceable, the only African State to have ratified it is the Central African Republic, an OHADA member-state. For a discussion of this topic, see Newman (2010).)

The recognition of indigenous peoples' rights brings more complexity to the governance of natural resources, long a domain solely reserved to states, as it enlarges the community of direct stakeholders. States have traditionally only been constrained by what they subjectively considered most beneficial for their people. With the emergence of FPIC, however, this margin of subjectivity is attenuated.

Significantly, in 2012, the Inter-American Court of Human Rights (IACHR) issued an important decision in *Kichwa Indigenous People of Sarayaku v Ecuador*, a finding that the obligation to consult with indigenous people regarding the exploitation of natural resources is, in addition to being a treaty-based provision, also a general principle of international law.[68] The IACHR, whose case law has been

[67] Henry G Burnett and Fernando Rodriguez-Cortina, 'Arbitration of Social Disputes in Connection with Mining Projects' in Jason Fry and Louis-Alexis Brett (eds), Global Arbitration Review: The Guide to Mining Arbitration (David Samuels 2019) 41. While the 1989 ILO Convention may be legally enforceable, the only African State to have ratified it is the Central African Republic, an OHADA member-State. For a discussion of this topic, see Dwight G Newman, 'Africa and the United Nations Declaration on the Rights of Indigenous Peoples' in Solomon Dersso (ed), Perspectives on the rights of minorities and indigenous peoples in Africa (PULP 2010) 141–54.

[68] *Kichwa Indigenous People of Sarayaku v Ecuador, Merits and Reparations*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, para 164 (27 June 2012) [hereinafter *Kichwa Case*].

invoked to address similar issues in Africa,[69] has on several occasions framed the effective participation of local communities in decision-making as a procedural safeguard against resource development that threatens their survival.[70]

FPIC was initially recognized as belonging to indigenous peoples, who are not assimilable to and distinct from national peoples.[71] However, the recognition of the FPIC principle today may go beyond indigenous peoples and encompass local communities. In fact, in the African context, the ECOWAS Mining Directive incorporates the FPIC principle and extends it to local peoples, irrespective of their indigenousness character.[72] Art. 16(3) and (4) of the ECOWAS Mining Directive, entitled *Sustainable Development and Local Community Interests*, provide that:

> 3. Companies shall obtain free, prior, and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post-mining operations.
>
> 4. Companies shall maintain consultations and negotiations on important decisions affecting local communities throughout the mining cycle.[73]

Greenspan contends that, because this provision is legally binding, it is arguably "the most significant FPIC policy requirement in Africa".[74] She cautions, however,

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[69] ican Charter (n 55) art 60 (stating that the African Commission '*shall draw inspiration from international law on human and peoples' rights*'). *See also Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya* (2009), African Comm on Human and Peoples' Rights, No 276/2003, 27th Activity Report of the ACHPR, para 298.

[70] *Kichwa Case* (n 69) paras 166, 180, 201–2, 204–5 (stating that conducting environmental impact assessments constitutes a safeguard to guarantee that the constraints imposed on indigenous or tribal communities do not entail a denial of their survival as people); *Saramak People v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser C.) No. 172, paras 129, 130, 133, 137, 147 (28 November 2007).

[71] The recognition of collective rights to autochthonous peoples against the state came historically from common law jurisdictions, including Australia, and, more recently for the African continent, South Africa. These states both have a history of settler colonialism that enabled the implantation of European peoples and the marginalization of colonized local peoples. Western and central Africa, however, did not have the same experience of colonialism; it experienced more of an extractive one. This region has been deeply influenced by French political concepts. *See* Elise Huillery, 'History Matters: The Long-Term Impact of Colonial Public Investments in French West Africa' (2009) 1 American Economic Journal: Applied Economics 176; Elise Huillery, 'The Impact of European Settlement within French West Africa: Did Pre-colonial Prosperous Areas Fall Behind?' [2010] J Afr Econ 1; A. G. Hopkins, 'The New Economic of Africa' (2009) 50 JAH 155; Alois Mlambo, 'African Economic History and Historiography' in Thomas Spear et al (eds), *Oxford Research Encyclopaedia of African History* (OUP 2018).

[72] ECOWAS Mining Directive (n 62) art 16. Greenspan (n 56) 10. *See* also, Lorenzo Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of grey in the shadow of the law* (Routledge 2012) (stating that distinguishing between indigenous and non-indigenous peoples in the African context tends to be associated with significant practical and political difficulties).

[73] ECOWAS Mining Directive (n 62) art 16.

[74] Greenspan (n 56) 10.

that state discretion is maintained in determining how the aims of the ECOWAS Mining Directive will be met.[75]

Based on the developing practice in the energy sector in the OHADA zone, therefore, one can observe that the FPIC requirements are increasingly incorporated through "economic and social impact assessments" (ESIAs), which are to be conducted prior to and during energy projects.[76] As a result, energy companies must gather local peoples' observations to assess how they view the contemplated projects and their potential consequences.[77] These assessments aim to track, mitigate, and compensate, as much as possible, their impacts on local communities and their environment.[78] If properly designed and implemented, which ideally involves in-depth and good faith negotiations, these could allow local communities to express their expectations and serve as one of key approvals or consents to a planned project.

These developments on procedural safeguards have been integrated into the 2012 Resolution, which calls on African states to establish:

> independent social and human rights impact assessments that guarantee free prior informed consent; effective remedies; fair compensation; women, indigenous and customary people's rights; environmental impact assessments; impact on community existence including livelihoods, local governance structures and culture, and ensuring public participation; protection of the individuals in the informal sector; and economic, cultural and social rights.[79]

Olawuyi characterizes this text as "the most significant regional attempt so far by African governments to recognise, adopt, and mainstream human rights language into the development and use of natural resources."[80] This text is key as it suggests a continuity between procedural safeguards and the sharing of benefits through the SLO. The outcome of well-designed and well-implemented procedural safeguards, which enable local peoples to express their interests directly through mechanisms like ESIA, would give substance to the SLO.[81]

In practice, however, the reality is rarely idyllic at the consultation table. Often residing in remote areas, local peoples are in a fragile position against extractive companies and state officials, whose interests are too often aligned, and push to obtain formal consent. When consent is arrogated in this manner, the resulting

[75] ibid.

[76] *See* e.g., Democratic Republic of Congo (DRC) Law N° 18/001 dated 9 Mar. 2018 modifying and completing Law N° 007/2002 of 11 July 11 2002 establishing a Mining Code, art 1.19 (discussing ESIA): Cameroon Law N° 2019-008 dated 25 Apr. 2019 establishing a Petroleum Code, art 2–19.

[77] ibid.

[78] ibid.

[79] 2012 Resolution (no. 27).

[80] Damilola S Olawuyi, 'The Increasing Relevance of Rights-Based Approaches to Resource Governance in Africa: Shifting from Regional Aspiration to Local Realization' (2015) 11 McGill Int'l J Sust Dev L & Pol'y 293, 300.

[81] Sara Bice and Kieren Moffat, 'Social licence to operate and impact assessment' (2014) 32 Impact Assessment and Project Appraisal 257, 257–62.

extractive agreement, even if formally agreed upon by all stakeholders, often leads to the discontent of local communities.

Furthermore, the procedural safeguards deployed through the FPIC/ESIA approach can be constrained by two important limitations: firstly, the consent obtained is often more of a reflection of asymmetrical balance of powers among the stakeholders, and secondly, it does not accord local peoples a veto right to oppose local extractive projects impacting their communities.[82] Contrary to what one might infer from the terms of the FPIC principle or the SLO, the absence of local peoples' consent may not necessarily result in the termination of an extractive project. Indeed, states remain the sole sovereign steward competent to act in the interest and on behalf of national populations, of which local peoples are but a portion.

While local peoples may tend to be interested in reaping the benefits resulting from the exploitation of natural resources, it is also worth considering that they may also not be so interested. As Glenn underscores in his seminal work, *Legal Traditions of the World*, it is inconceivable for peoples hailing from a chthonic legal tradition to consider nature as a stock of natural resources or assets to be exploited. Glenn writes that:

> Living close to the land and in harmony with it means limiting technology which could be destructive of natural harmony. So there is no incentive for the development of complex machines, and no way of accumulating wealth through their use. There is therefore little reason to accumulate land, or map it (other than to show trails); there is nothing to be done to it or with it, except enjoy its natural fruits. Chthonic notions of property are therefore those of a chthonic life, and the human person is generally not elevated to a position of domination, or dominium, over the natural world.[83]

As Holmes explains, chthonic peoples perceive land as:

> not merely a possession and a means of production, but an intrinsic part of Africans' social, economic, political, and spiritual being, something to be cherished, preserved, and responsibly enjoyed by present and future generations.[84]

This chthonic legal tradition is irreconcilable with the exploitation of natural resources. While Africa is a continent with several legal traditions, this tradition is not formally recognized in the positive laws of African states, which have generally adopted a common or a civil law tradition.[85] As Prof. Oshionebo states, "a

[82] Hans Morten Haugen, 'The Right to Veto – Or Emphasising Adequate Decision – Making Processes? Clarifying the Scope of the Free, Prior and Informed (FPIC) Requirement' (2016) 34 NHQR 272–73.

[83] Patrick H. Glenn, *Legal Traditions of the World: Sustainable Diversity Law* (OUP 2014) 69.

[84] Robert Home, "Culturally Unsuited to Property Rights?': Colonial Land Laws and African Societies' (2013) 40 Journal of Law and Society 403, 405.

[85] ibid 419; Salvatore Mancuso, 'African Law in Action' (2014) 58 J Afr L 1; Mieke Van Der Linden, 'The Neglected Colonial Root of the Fundamental Right to Property: African Natives' Property Rights in the Age of New Imperialism and in Times Thereafter' (2015) 75 ZaÖRV 791.

preeminent legacy of colonialism in Africa is the vesting of ownership of natural resources in the central governments of African countries".[86] As a result, informal and unwritten chthonic legal traditions are restricted to the margins of legal systems in Africa, together with rare references to customary law found in certain laws and constitutions.[87] Though certain peoples in the OHADA zone may qualify as chthonic or indigenous, a characterization that is in and of itself the source of much controversy, no legal mechanisms thus far, whether domestic or international, to our knowledge accords them a veto right to oppose the exploitation of their local environment.

Togo's 2018 Code on Private and State-Owned Lands is illustrative in this regard. It recognizes local peoples' rights to their land and the need for considering all stakeholders, as it provides that:

> The State and local authorities, as guarantors of the general interest, must:
> 1) ensure equitable access to land for all actors, individuals and legal entities under public and private law,
> 2) secure real property rights established or acquired according to custom,
> 3) organise the effective legal recognition of the legitimate local or customary land rights of the populations,
> 4) fight against land speculation in urban, peri-urban and rural areas and promote the effective development of land for the wellbeing of the population,
> 5) ensure the sustainable use of land in the interests of present and future generations,
> 6) to fight against the anarchic and abusive parcelling out of land,
> 7) to ensure in a general way the protection of the national interests and the preservation of the national land heritage,
> 8) to ensure the respect of the equality of men and women in the access to land.[88]

Whether local peoples have the effective right to grant their social license to operate will depend nonetheless on whether we are witnessing a democratization of international economic law. The FPIC/ESIA as a procedural safeguard for the SLO is undeniable. What remains unclear, however, is the scope of the substantive rights that proceed from this emerging procedural safeguard.

2.2.2 Local Content as an Outcome and Substantive Safeguard of the SLO

Alongside the procedural safeguards described above, there are safeguards whose aims are more focused on the substantive outcome of extractive projects. These can be characterized as local content requirements (LCRs). Contrary to procedural safeguards, which emphasize public participation or consultations with locals,

[86] Evaristus Oshionebo, *Mineral Mining in Africa – Legal and Fiscal Regimes* (Routledge 2021), 3.

[87] Katrina Cuskelly, 'Customs and Constitutions: State recognition of customary law around the world' (IUCN 2011), 6–11, <http://www.burmalibrary.org/docs21/Cuskelly-2011-red.pdf> last accessed on 10 June 2019.

[88] *Loi n°2018-005 du 14 juin 2018 portant Code foncier et domanial*, art 8 (our unofficial translation).

LCRs are outcome-oriented to the sharing of benefits. While these two SLO components are the products of legally different imperatives, we submit that they are joined through the elaboration and implementation of the ESIA. In fact, Karanja and Njenga for their part apprehend LCRs as a tool to acquire SLO in Africa.[89]

Theorized in the 1950s, local content provisions or requirements were first implemented successfully in the 1970s by the United Kingdom and Norway during the oil exploitation of the North Sea.[90] The Extractive Industries Transparency Initiative aptly describes LCRs as:

> policies and provisions [that] are generally aimed at supporting more jobs for the local population, boosting the economy, facilitating technology transfer and building skills among the local workforce. They are often directed at increasing local employment and training for local staff, providing subcontracting or service provision opportunities for extractive projects to national companies, or sourcing of local products used in extractive operations.[91]

LCRs therefore can take diverse forms: preferences given to local companies in the award of petroleum licenses, mining rights, or the procurement of goods and services; the employment and training of locals; or the transfer of technologies and know-how to local companies.

As sovereigns, states have the sole and direct competence to reform the legal extractive regime. Olawuyi identifies five key drivers for adopting LCRs: the desire to (1) increase domestic capacities and competences, (2) create a level playing field for citizens, residents, and home-based industries, (3) maximize economic benefits to citizens through employment opportunities, (4) improve endogenous technological capacity, and (5) mitigate and manage social and political risks resulting from rising domestic expectations.[92] LCRs can be seen as elements of the extractive grand bargain, outputs of direct benefits to local populations.

Several OHADA member states have adopted norms or legislations on local content.[93] Yet Senegal appears to be the most advanced country in the region on

[89] Karanja and Njenga (n 6) 358.

[90] Chambord and Soihini (n 31).

[91] Extractive Industries Transparency Initiative (EITI), 'EITI and opportunities for increasing local content transparency' (EITI International Secretariat March 2018), 3 <https://eiti.org/files/documents/brief_on_eiti_and_local_content_transparency_-_formatted.pdf>.

[92] Damilola S Olawuyi, *Extractives Industry Law in Africa* (Springer 2018).

[93] Mohamadou Fallou Mbodji, 'Les obligations dites de « local content » dans les législations minières et pétrolières des Etats membres de l'OHADA' (2019) 908 Penant 348.

this issue,[94] with a developed institutional framework and numerous application decrees regarding its local content law relative to the hydrocarbon sector. Moreover, Senegal promulgated in 2021 a law on private-public partnerships, which provides that:

> Depending on the purpose of the project and the social, economic and environmental context, the contracting authorities may include, among the award criteria set forth in the bidding documents, requirements related to the local content of the proposed public-private partnership project, including:
> (a) employment and vocational training initiatives,
> (b) initiatives for the integration of local artisans and small and medium-sized enterprises,
> (c) concrete actions and proposals for sustainable development.[95]

But preferences accorded to nationals could violate international obligations and trigger costly disputes before investment or commercial dispute settlement bodies. That kind of dirigism is indeed rather counterintuitive in an international economic order ubiquitously aimed at protecting against certain forms of discrimination. For one, the various trade and investment instruments that African states have adopted generally include national treatment (NT) and/or most favored nation treatment (MFNT) clauses to protect foreign investors from discriminatory measures favoring locals or other foreign investors.

In that regard, it bears noting that, though the AU's 2018 agreement establishing the African Continental Free Trade Area (AfCFTA), which entered into force in 2019, adopts a more progressive stance vis-à-vis African states' rights and interests, it remains in continuity with the liberal philosophy and view of discrimination captured by the NT and MFNT clauses.[96]

Aspects of the local content component of the SLO consequentially could potentially be challenged by states and investors if not properly implemented. Mitigating these concerns requires states to engage with stakeholders and elaborate a comprehensive plan regarding the sharing of benefits, including plans for how prospective companies expect to satisfy local content requirements and the impacts

[94] Loi n°2019-04 du 1 février 2019 relative au contenu local dans le secteur des hydrocarbures ; Décret n°2021-248 du 22 février 2021 fixant les modalités d'alimentation et de fonctionnement du FADCL; Décret n°2020-2065 du 28 octobre 2020 fixant les modalités de participation des investisseurs sénégalais dans les entreprises intervenant dans les activités pétrolières et gazières et classement des activités de l'amont pétrolier et gazier dans les régimes exclusif, mixte et non exclusif; Décret n°2021-249 du 22 février 2021 modifiant le décret n° 2020-2065 du 28 octobre 2020 fixant les modalités de participation des investisseurs sénégalais dans les entreprises intervenant dans les activités pétrolières et gazières et classement des activités de l'amont pétrolier et gazier dans les régimes exclusif, mixte et non exclusif; Décret n°2020-2047 du 21 octobre 2020 portant organisation et fonctionnement du Comité national de suivi du Contenu local.

[95] *Loi n°2021-01 du 22 février 2021 relative aux contrats de Partenariat Public-Privé*, art 32 (our translation from French to English).

[96] Agreement Establishing the African Continental Free Trade Area, arts 4, 5, 20, 21 (Mar. 2018) 58 I.L.M. 102 (entered into force 30 May 2019).

of contemplated projects.[97] Indeed, we observed previously that there is a relationship or continuity between local consent and local content that is bridged by the ESIA. Though much has been said of the environmental component of the ESIA,[98] the social component of the ESIA has received comparatively less attention[99]. There is an apparent but underexplored linkage, indeed, between social impact assessments and the growing prominence of LCRs in the mining and petroleum codes in the sub-Saharan African region.[100]

This part of our analysis deconstructed and provided more substance to the components of the SLO. These are more relevant than ever in the COVID-19 context and beyond. Whether apprehended as a procedural or a substantive safeguard, and despite what its intitulation might otherwise suggest, the state remains pre-eminent as to the implementation of the SLO components. Even if the present elusive character of the SLO may render it less effective at redressing the social deficiencies of the current African natural resources regime, it bears reminding that law or rulemaking remains an ever-evolving tool and process, which must reflect the diverse interests of all stakeholders. In our view, the SLO has the flexibility to adapt in any context where social acceptance is at stake, provided relevant safeguard mechanisms are enforced.

3 In search of the Right Remedies to Safeguard the SLO

Notwithstanding the various ways the SLO concept has been incorporated in the OHADA zone, as we shall observe, the effectiveness of these SLO safeguards is hindered by the implementation gap between what these instruments say and how resource governance works in practice. Since the accountability mechanisms giving effect to these norms lag, the SLO requires an effective remedy for vindication. As noted by Barnes:

> The legal enforcement of the SLO can be achieved by taking appropriate regulatory measures such as the adoption of legislation that allows citizens to file suits against

[97] The Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development reports that the enforcement of a mining project ESIA must lead to the development of an Environmental Social Management Plan (ESMP) which: "should include at least: (i) the mitigation, compensation and enhancement implementation plan; (ii) the environmental and social monitoring program; (iii) the Stakeholder Capacity Building Plan; (iv) the ESMP's budget; and (v) the process by which the ESMP will be integrated into the project." *See* H Suzy Nikièma et al., 'Legal Framework of Environmental and Social Impact Assessment in the Mining Sector' (International Institute for Sustainable Development/ IISD, January 2019) 5 (describing ESMP).

[98] *See* e.g., Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (CUP 2008).

[99] Rabel J Burdge, 'The practice of social impact assessment background' (2003) 21 Impact Assessment and Project Appraisal 84.

[100] *See* Nikièma (n 98) 5 (defining ESMP). *See* DRC Mining Law and Cameroon Law (nos 105, 106) (discussing ESIAs).

companies or legislation that enables communities to be at the centre of the permitting process.[101]

The necessity of identifying right remedies to safeguard the SLO echoes the AU Declaration on COVID-19-Related ISDS Risks. This Declaration indicates suggests that African states do not believe that ISDS is the appropriate mechanism to settle investment disputes related to COVID-19-related measures and that the well-being of peoples and local communities should not be compromised by ISDS mechanisms, particularly where their health is concerned.

Accountability mechanisms play an indispensable role in safeguarding the norms that underpin the SLO.[102] Though essential, the accountability mechanisms presently established in the OHADA zone that reinforce SLO-related norms, are insufficient, as is, to achieve these aims. Drawing from the terminology of the 2011 UN Guiding Principles on Business and Human Rights, these mechanisms can be described as (3.1) state-based and (3.2) non-state-based accountability mechanisms.[103]

3.1 Overview of the SLO's State Accountability Mechanisms

To safeguard the SLO, domestic state-based mechanisms have been set up, which, depending on the norm and/or forum, must be exhausted before aggrieved parties may accede to regional state-based mechanisms. The SLO implicates interrelated norms whose nature is legally separate, ranging from human rights norms to corporate social responsibility norms.

Mindful of the preponderance of human rights considerations in the present-day SLO conversation, this section will assess the (3.1.1) domestic and (3.1.2) regional accountability mechanisms established throughout the OHADA zone, including the local exhaustion of remedies rules that often determines access to them.

[101] Barnes (n 16) 338.

[102] In referring to accountability mechanisms, we echo Stewart's understanding of the term accountability as "*institutionalized mechanisms, under which an identified account holder has the right to obtain an accounting from an identified account or for his conduct, evaluate that conduct, and impose a sanction or obtain another appropriate remedy for deficient performance*". *See* Richard B Stewart, 'Accountability and the Discontents of Globalization: US and EU Models for Regulatory Governance' (September 2006) (discussion draft), 2 <https://www.iilj.org/wp-content/uploads/2016/11/Stewart-Accountability-and-the-Discontents-of-Globalization-2006.pdf> accessed 10 June 2019.

[103] *See generally*, UNGP (n 27); Rae Lindsay and Anna Kirkpatrick, 'Human Rights and International Mining Disputes' in Jason Fry and Louis-Alexis Brett (eds), *Global Arbitration Review: The Guide to Mining Arbitration* (David Samuels 2019) 109–129, 116–17 (stating that the UNGP identifies three categories of mechanisms available for the resolution of business-related human rights disputes: state-based judicial mechanisms, state-based non-judicial mechanisms, and non-state based mechanisms).

3.1.1 Domestic Accountability for the SLO in the OHADA Zone

Since the SLO has emerged as a key concern for stakeholders in the energy sector, compliance with the intertwined components of the SLO, local consent, and local content is increasingly monitored by investors, states, independent observers, and civil society organizations. Several of the more recently promulgated energy or energy-related codes in the OHADA zone, namely, in the DRC, Cameroon, and Senegal, call for the establishment of local mechanisms to monitor compliance with and enforce the various norms underpinning the SLO:

- In 2018, DRC established a regulatory authority tasked with regulating sub-contracting in the private sector (*Autorité de régulation de la sous-traitance dans le secteur privé*), under the supervision of the Minister of Small and Medium-Sized Enterprises. The authority's mission is to monitor the LCRs that Congolese companies were favored in subcontracting matters involving the private sector.[104]
- In 2019, Cameroon and Senegal, through the Revised Petroleum Code of Cameroon and the Senegalese Law on Local Content in the Hydrocarbon Sector, respectively, called for the establishment of special bodies aimed at enforcing and monitoring the imperatives of local content in the petroleum sector. Both of these bodies, when established, will exercise their prerogatives under the authority of the national ministry in charge of hydrocarbons.[105]

The creation and reinforcement of monitoring and compliance mechanisms administered by executive bodies are welcomed. But doing so does not address the potential lack of impartiality, where state interests and the public interest are not aligned. Nor does it contend with the non-negligible critiques that LCRs in developing countries are often susceptible to elite capture, whereby the "*jobs created at local companies and in local communities become an asset that can be used to generate political benefits, consolidate the authority of ruling elites and ensure their continued position of power*".[106] Critically, a state's failure to ensure that FPIC or ESIAs are respected might constitute a violation of its human rights obligations, as executive ministries are tasked with ensuring compliance with those underlying norms.

Moreover, such national remedies might raise peculiar procedural issues at the international level such as satisfying local exhaustion of remedy rules, cornerstones to

[104] DRC *Decret N°18/19 Portant Création, Organisation et Fonctionnement de l'Autorité de Régulation de la Sous-Traitance dans le Secteur Privé* (24 May 2018), established by Law N°17/001 (8 Feb. 2017). Art 5-4 of the Decree states that the mission of this authority is to settle disputes conventionally through arbitration or as amiable compositor.

[105] Cameroon Law N°2019/008 (25 April 2019), establishing a Petroleum Code, section 90; Senegal Law on Local Content in the Hydrocarbons Sector, established by Law N°2019-04 (24 January 2019), arts 5–7.

[106] Michael W Hansen, Lars Buur, Anne Mette Kjaer, and Ole Therkildsen, 'The Economics and Politics of Local Content in African Extractives: Lessons from Tanzania, Uganda and Mozambique' (2016) 43 Forum for Development Studies 201, 208.

human rights instruments. Consistent with the subsidiary nature of human rights.[107] This rule requires aggrieved parties seeking to file a complaint before the African Commission or the African Court on Human and Peoples' Rights (African Court) to exhaust local or domestic remedies before accessing these regional mechanisms.[108]

Based on the African Commission's jurisprudence,[109] it is unlikely that executive bodies tasked with enforcing SLO norms would qualify as local remedies.[110] It appears to be the case too for National Human Rights Institutions (NHRIs), (African Commission on Human and Peoples' Rights (60th session) Resolution on the Granting of Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa[111] with affiliate status before the African Commission,[112] whose responsibility is to assist it in promoting and protecting human

[107] Samantha Besson, 'Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights' (2016) 61 Am. J of Juris. 69, 78–20 (discussion *inter alia* the notion of procedural subsidiarity); Cesare PR Romano, 'The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures' in Nerina Boschiero et al (eds), *International Courts and the Development of International Law* (TMC Asser Press 2013) 563–64 ('*The subsidiarity of international courts to domestic ones is not only a structural matter, made inevitable by the nature of the international legal system, but also a matter of logical and practical convenience. Logically, it ensures that claims are always first addressed at the lowest possible level of complexity. Without the domestic remedies rule an essentially domestic matter would become prematurely internationalized. Practically, domestic courts are generally better placed to determine the facts of, and the law applicable to, any given case, and, where necessary, to enforce an appropriate remedy.*').

[108] African Charter (n 55) arts 50, 56; Rules of Court of the African Court on Human and Peoples' Rights, arts 34, 40 (stating that application to the African Court shall be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged).

[109] While the African Charter regrettably does not expressly provide for the right to an effective remedy, the African Commission in *Jawara v The Gambia* set forth three elements that would constitute a remedy: availability, effectiveness, and sufficiency. *See* Godfrey M Musila, 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) AHRLJ 441, 446 (citing *Jawara v The Gambia* (2000) AHRLR 107, para 31).

[110] Frans Viljoen, 'Admissibility under the African Charter' in Malcom D Evans and Rachel Murray (eds), *African Charter on Human and Peoples' Rights: The System in Practise, 1986-2000* (CUP 2002) 81–91.

[111] African Commission on Human and Peoples' Rights (60th Session) Resolution on the Granting of Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa (Niamey 2017).

[112] ibid. For a discussion of NHRIs, *see* Bonolo R Dinokopila, 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2010) 10 AHRLJ 26. Seven out of the seventeen OHADA member-States have established NHRIs with affiliate status with the African Commission: Mali (Commission nationale des droits de l'homme du Mali); Cameroon (National Commission for Human Rights and Liberties of Cameroon & National Commission on Human Rights and Freedoms); DRC (L'Observatoire National des Droits de l'Homme de la Republique Démocratique du Congo); Burkina Faso (Commission Nationale des Droits Humains du Burkina Faso); Togo (Commission Nationale des Droit de l'Homme du Togo); Chad (Commission Nationale des Droits de l'Homme du Tchad); Senegal (Comité Sénégalais des Droits de l'Homme); Niger (Commission Nationale des Droits de l'Homme et des Libertés Fondamentales). *See* African Commission, National Human Rights Institutions <http://www.achpr.org/network/nhri/> accessed 10 June 2019.

rights at the national level.[113] Indeed, the African Commission determined in 2000 that complainants that had only approached the Commission on Human Rights and Administrative Justice of Ghana, an organization that obtained affiliate status before the African Commissions in 2015, did not meet the local remedies requirements. See Musila (2006), 446 (citing *Cudjoe v Ghana* (2000) AHRLR 127 (ACHPR 1999), para 13).) Indeed, the African Commission has in its "*admissibility jurisprudence adopted the view that domestic mechanisms that meet the effectiveness yardstick for admission of a matter must be of judicial provenance*".[114] Local remedies that are not of a "judicial character, including of a quasi-judicial nature, will not suffice."[115]

Furthermore, several scholars assessing the prospect of public interest litigation in francophone Africa, which largely covers the OHADA zone, concluded that their "legal context is not conducive to it."[116] But, as Kamga underscores in his assessment of public impact litigation in francophone Africa, states in the region often do not give effect to international human rights norms in their domestic courts.[117] This is so despite states in the region subscribing to a monist approach to international law, whereby treaties automatically become part of domestic law upon ratification and publication in national gazettes, Human rights treaties rarely play a significant role in litigation proceedings in francophone Africa.[118] Given these various limitations, the domestic mechanisms in the OHADA zone are likely insufficient, as is, to enforce the SLO.

However, unlike the African Commission or the African Court, the ECOWAS Community Court of Justice (ECCJ) does not require parties to exhaust local remedies.[119] In fact, the ECCJ has held numerously that the local remedies rule is

[113] African Commission on Human and Peoples' Rights (60th Session) Resolution on the Granting of Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa (Niamey 2017). Indeed, the African Commission determined in 2000 that complainants that had only approached the Commission on Human Rights and Administrative Justice of Ghana, an organization that obtained affiliate status before the African Commissions in 2015, did not meet the local remedies requirements. *See* Musila (n 0) 446 (citing *Cudjoe v Ghana* (2000) AHRLR 127 (ACHPR 1999) para 13).

[114] Musila (2006) 450.

[115] ibid. Musila contends, however, that this '*insistence on judicial remedies is unduly narrow and injudicious as it does not contemplate all possible deployable measures as disclosed by state practice*.' ibid 451.

[116] Serges Djoyou Kamga,'An assessment of the possibilities for impact litigation in Francophone African countries' (2014) 14 HRLJ 449, 473; Magnus Killander and Horace Adjolohoun, 'International law and domestic human rights litigation in Africa: An introduction' in Magnus Killander (ed), *International law and domestic human rights litigation in Africa* (PULP 2010) 3–4.

[117] Kamga (n 117) 470.

[118] ibid.

[119] ECOWAS, Supplementary Protocol A/SP1/01/05 Amending the Protocol (A/P1/7/91) Relating to the Community Court of Justice (Jan. 2005). Art 10(d) of the protocol of the ECCJ states that: Access to the ECCJ is open to individuals on application for relief for violation of their human rights. For a discussion of the ECCJ's human rights mandate, *see* Solomon T. Ebobrah, 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice' (2010) 54(1) J Afr L 1.

not applicable before it.[120] Though complainants can avoid issues with local accountability mechanisms and go directly to the ECCJ, it is vital to assess how the ECCJ compares with other regional mechanisms available.

3.1.2 Regional Accountability for the SLO in the OHADA Zone

At a regional level, the mechanisms which protect the norms underpinning the SLO, have enabled remarkable developments. The African Charter notably established the African Commission, which was created in 1987.[121] It is a quasi-judicial body and the premier mechanism to promote human and peoples' rights and ensure their protection.[122] Yet, with the creation of the African Court in 2004 and the expansion of the jurisdiction of the ECCJ in 2005,[123] the African Commission ceased being the sole supranational supervisory body for the implementation of the African Charter.[124]

The African Commission hears complaints, known as communications, through which individuals, civil society, and states may file grievances against other states

[120] Amos O Enabulele, 'Sailing Against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice' (2012) 56 J Afr L 268, 270 n.7 (citing *Etim Moses Essien v The Republic of the Gambia and the University of Gambia* (unreported) suit no ECW/CCJ/APP/05/05 delivered 14 March 2007, at para 27; and *Hadijatou Mani Koraou v The Republic of Niger* judgment no ECW/CCJ/JUD/06/08 of October 2008).

[121] African Charter (n 55) art 30.

[122] ibid.

[123] ECOWAS, Supplementary Protocol A/SP1/01/05 to Protocol on the Community Court of Justice, adopted in 2005.

[124] *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Nigeria* (2009) AHRLR 331 (ECOWAS 2009), para 19 (stating that it is well established that the rights guaranteed by the African Charter are justiciable before this court).

Unfortunately, the regional courts in other RECs with OHADA member-States are however presently not viable accountability mechanisms. For example, the Community of Sahel-Saharan States (CEN-SAD), which includes twelve OHADA member-States (Benin, Burkina Faso, CAR, Chad, Comoros, Ivory Coast, Guinea Bissau, Guinea, Mali, Niger, Senegal, and Togo) has not established a communal court of justice. Likewise, the Economic Community of Central African States (ECCAS), which includes seven OHADA member-States (Cameroon, CAR, Chad, Congo, DRC, Equatorial Guinea, and Gabon) has called for, but not established a communal court of justice. *See* Treaty Establishing the Economic Community of Central African States (adopted on 18 Oct. 1983, entered into force on 18 Dec. 1984) art 16. For its part, the Southern African Development Community's (SADC), which includes two OHADA member-States (DRC and Comoros), suspended its Tribunal in 2008 following its ruling in *Mike Campbell (Pvt) Limited v. Zimbabwe* [2008] SADCT 2. *See* International Justice Resource Center, 'Southern African Development Community Tribunal' <https://ijrcenter.org/regional-communities/southern-african-development-community-tribunal/> accessed on 10 June 2019. And the Court of Justice for the Common Market for Eastern and Southern Africa's (COMESA), which includes two OHADA member-States (DRC and Comoros), does not have jurisdiction to hear individual complaints of alleged human rights violations. *See* International Justice Resource Center, 'Common Market for Eastern and Southern Africa Court of Justice' <https://ijrcenter.org/regional-communities/common-market-for-eastern-and-southern-africa-court-of-justice/> accessed on 10 June 2019.

suspected of violating rights arising from the African Charter.[125] The African Commission has issued pioneering decisions regarding the substantive rights of autochthonous peoples, often most vulnerable to the negative externalities of the extractive sector. Some of these landmark decisions found that African states had violated Art. 21 and 22 of the African Charter, which deal respectively with peoples' "right to free disposal of wealth and natural resources" and the "right to economic, social and cultural development."[126]

Yet, the African Commission's decisions, styled as recommendations, are not legally binding.[127] On the other hand, The African Court and the ECCJ are equipped to mitigate this issue as they are empowered to render binding decisions. But in practice such compliance remains wanting.

For instance, in response to a communication brought by NGOs on behalf of the Ogoni People, the Commission issued a decision in 2001 finding that Nigeria had facilitated the destruction of land belonging to the Ogoni people and given the green light to oil companies to devastatingly affect the well-being of the Ogoni.[128] The Commission explained that by any measure of standards, Nigeria's practice fell short of the minimum conduct expected of a state and violated Art. 21.[129] This was the Commission's first decision on the merits involving Art. 21.[130] Importantly, despite the Commission's landmark decision, it bears noting that Nigeria did not participate in the proceedings and the oil companies avoided scrutiny.[131]

Similarly, in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/Kenya*, the Endorois people, an autochthonous community, complained that they were unable to access resources on their ancestral land since their eviction by the Kenyan government in violation of

[125] African Charter (n 55) arts 47, 55. Morten Peschardt Pedersen, 'Standing and the African Commission on Human and People's Rights' (2006) 6 Afr Human Rts L J 407, 408 (stating that arts 47 and 55 of the Charter respectively provide for a complaint mechanism between States and a complaint mechanism between individuals and States).

[126] African Charter (n 55) arts 21 and 22. *See* e.g., *Ogoni Case* (n 60); *Centre for Minority Rights Development (Kenya) and* Minority *Rights Group (on behalf of Endorois Welfare Council)/Kenya* (2009), African Comm on Human and Peoples' Rights, No 276/2003, 27th Activity Report of the ACHPR.

[127] Greenspan (n 56) 11. *See* also, Manisuli Ssenyonjo, 'Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)' (2018) 7 Int'l Human Rts L Rev 10–11 (stating that though the legal status of the Commission's recommendations is debatable, the Commission considers them legally binding).

[128] *Ogoni Case* (n 58) para 58.

[129] id.

[130] Fons Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 Int'l & Comp L Q 749, 749 (stating that it was the first time the Commission was able to deal in a substantive way with alleged violations of economic, social, and cultural rights).

[131] ibid 759–60 (stating that the Commission was not competent to give its views about the conduct of the private oil companies).

Art. 21.[132] They claimed that the consultations undertaken by Kenya were inadequate and that they were excluded from participating or sharing in the benefits of development in violation of Art. 22.[133] Despite Kenya's claim that the Endorois people had benefitted immensely from the tourism and mineral prospecting activities,[134] the Commission found that it had violated Art. 21 and 22.[135]

In its 2009 decision, the Commission referred to the Endorois peoples' right to development under Art. 22 and found it had been violated.[136] Drawing on the jurisprudence of the Inter-American Court of Human Rights,[137] the Commission found that Kenya had a duty to evaluate whether a restriction of the property rights granted to mining companies was necessary to preserve the survival of the Endorois people.[138] It found that Kenya bore the burden of their displacement and recommended inter alia that it pay adequate compensation and royalties to the Endorois.[139] Despite the Commission's landmark decision, to our knowledge, Kenya has yet to implement the decision fully and compensate the Endorois.[140]

Though the African Court is equipped to mitigate this issue. However, compliance with its decisions has been found problematic,[141] and access to the court is limited to the African Commission, African states, and intergovernmental organizations.[142] While it may entitle NHRIs before the Commission and individuals to submit a case, it may do so only where states have consented to suit.[143] However,

[132] *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/Kenya* (2009), African Comm on Human and Peoples' Rights, No 276/2003, 27th Activity Report of the ACHPR).

[133] ibid., paras 120, 123.

[134] ibid., para 253.

[135] ibid., paras 2, 20, 130–32, 135.

[136] ibid., paras 267–68, 298.

[137] ibid., para 298.

[138] ibid., para 267.

[139] ibid., paras 297–98.

[140] African Commission on Human and Peoples' Rights (54th Session) Resolution Calling on the Republic of Kenya to Implement the Endorois Decision (Banjul 2013). *See also*, Lucy Claridge, 'The approach to UNDRIP within the African Regional Human Rights System' (2019) 23 Int'l J Human Rts 267, 277. Though the African Commission may refer cases of noncompliance to the African Court, it has never invoked this discretion. *See* Ssenyonjo (n 128) 37–40 (discussing the African Commission's discretion to refer cases of state non-compliance to the African Court).

[141] Minority Rights Group International, 'Two years on, Kenya has yet to implement judgment in Ogiek case – MRG Statement' (5 June 2019) <https://minorityrights.org/2019/06/05/two-years-on-kenya-has-yet-to-implement-judgment-in-ogiek-case-mrg-statement/> (stating that Kenya has yet to implement a 2017 judgment from the African Court finding that Kenya had violated the African Charter).

[142] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art 5(1). Abdi Jibril Ali, 'The Admissibility of Subregional Courts' Decisions Before the African Commission or African Court' (2012) 6 Mizan L Rev 241, 261.

[143] Ali (n 143) 261.

only four OHADA states have made a declaration under Art. 34(6) of the Protocol establishing the African Court, which would allow individuals and NGOs to submit cases directly to the African Court. Thus far, the protocol establishing the African Court has been ratified by 31 AU states, 10 of which are OHADA states.

However, in March and April 2020, Benin and Côte d'Ivoire, respectively, announced the withdrawal of their declaration under Art. 34 of the Protocol to the African Charter. This leaves Burkina Faso and Mali as the sole countries in the OHADA zone to allow individuals and NGOs to have direct access to the African Court.[144] Needless to say, the African Court is not as accessible and affords few avenues for needed civil society organizations to participate.

As for the ECCJ, though its subject matter jurisdiction did not initially include human rights, it was amended and enlarged in 2005. The ECCJ has been praised for its landmark human rights decisions and touted as holding perhaps the most promise from the African sub-regional courts.[145] Parties before the ECCJ, moreover, may submit claims for violations of the ECOWAS Mining Directive, which provides at Art. 15, in relevant part, that:

> 1. Member States, Holders of mining rights and other mining-related business entities have a primary obligation to respect and promote recognised human rights including the rights of women, children and workers arising from mining activities.
>
> 2. Member States and Holders of mining rights shall ensure that the rights of the local communities are respected at all times. Where such Human Rights legislations do not exist, Member States shall enact appropriate legislation to ensure respect for human rights.

Though violations of the ECOWAS Mining Directive may be submitted to the ECCJ,[146] the ECCJ, as the African Court, is in its relative infancy. Like their counterparts in the Americas and Europe, it will take time for their authorities to be established.[147] As it stands, commentators have remarked that the ECCJ "*faces an ongoing challenge of securing compliance with its judgments*."[148] For this reason, several complainants have sought, unsuccessfully, to advance claims against private

[144] The International Justice Resource Center, 'Benin and Côte d'Ivoire to Withdraw Individual Access to African Court' (6 May 2020) <https://ijrcenter.org/2020/05/06/benin-and-cote-divoire-to-withdraw-individual-access-to-african-court/>

[145] Daniel Abebe, 'Does International Human Rights Law in African Courts Make a Difference?' (2017) 56 Va J Int'l L 527, 557.

[146] ECOWAS Mining Directive (n 62) art 17. On this point, *see* Ali (n 143) (explaining that decisions by sub-regional courts are final and that trying a respondent State before two international institutions would contradict the principle of *res judicata*).

[147] Abebe (n 146) 557.

[148] ibid (quoting Karen J. Alter, Laurence R. Helfer and Jacqueline R. McAllister, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 Am J Int'l L 737).

individuals.[149] But the ECCJ has repeatedly held that the only proper defendants before it are ECOWAS member states.[150]

In short, African Court, the ECCJ, and the African Commission mimic the state-centric approach that disfavors more direct means of holding non-state economic actors accountable. Effectively preventing and redressing the harm caused to local peoples by extractive operations through traditional human rights legal recourses, a fortiori, seems doubtful.

3.2 Overview of the SLO's Non-State-Based Accountability Mechanisms

If procedural and substantive approaches are to safeguard the SLO effectively, they need to escape the arbitrariness surrounding a state's stewardship to its people.

From the web of legal instruments governing extractive activities in the African energy sector, several non-state-based accountability mechanisms escape purely domestic mechanisms and favor alternative dispute resolution (ADR) tools such as conciliation, mediation, and/or arbitration. These, namely, include mechanisms established by multilateral development banks (MDBs) like the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) (3.2.1). Moreover, the ADR mechanisms in international investment agreements (IIAs), the primary instruments of international economic law regulating investments in the natural resources sector, may unearth overlooked remedies (3.2.2).

3.2.1 MDBs' Complaint Mechanisms

The complaint mechanisms established by MDBs are underexplored accountability mechanisms set up to address grievances from communities affected by projects.[151] Whether in the form of World Bank's Inspection Panel established in 1993; IFC/MIGA's Compliance Advisor Ombudsman (IFC's CAO) established in 1999; or African Development Bank's Independent Review Mechanism (ADB's IRM) established in 2004, these mechanisms emphasize a procedural approach where local communities can express their grievances regarding extractive projects, often together with the assistance of NGOs.[152]

[149] Enyinna S. Nwauche, 'The ECOWAS Community Court of Justice and the horizontal application of human rights' (2013) 13 AHRLJ 30, 33–34 (explaining that the ECOWAS Community Court of Justice has ruled on three separate occasions that only ECOWAS member-States and community institutions may be defendants sued before it).

[150] ibid.

[151] Benjamin M Saper, 'The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective' (2012) 44 NYU J Int'l L & Pol 1279, 1281.

[152] ibid., 1291, 1307–8.

However, MDBs have an ambivalent engagement with human rights as they extol their contribution to human rights while avoiding mention of having any human rights obligations.[153] Although IFC's and the ADB's complaint mechanisms do not explicitly acknowledge having human rights obligations, they "provide [. . .] an opportunity for greater consideration of human rights obligations and implementation of practical human rights outcomes" than the Inspection Panel the World Bank.[154] This is likely due to the possibility of mediation and their emphasis on dispute resolution rather than apportioning blame. Conversely, the review of World Bank's Inspection Panel is less flexible and limited to assessing whether its agencies are compliant.[155] Importantly, moreover, the World Bank only lends to governments,[156] whereas the IFC and the ADB lend to private companies, whose activities, as the SLO's emergence suggests, may severely impact local communities.[157]

Because of their lending activity to private companies in the extractive sector, IFC's and ADB's complaint mechanisms are of particular interest to assessing non-state-based mechanisms that safeguard the SLO. Though both of these complaint mechanisms perform similar functions,[158] due to space limitations, we will only provide a brief overview of IFC's CAO.

IFC's CAO is a grievance mechanism introduced to reduce the accountability gap between IFC-funded and MIGA-insured projects and affected non-state individuals and groups.[159] It was established because local communities were being adversely affected by these projects but lacked a contractual relationship to hold the IFC accountable.[160]

IFC's CAO has three roles: (1) an ombudsman role, which consists of a flexible approach to resolving the issues of affected person or groups through dialogue, mediation, and settlement; (2) a compliance role, which consists of auditing IFC's and/or MIGA's performance to assess whether they are in line with their own

[153] Adam McBeth, 'A Right by Any Other Name: The Evasive Engagement of International Financial Institution with Human Rights' (2009) 40 Geo Wash Int'l L Rev 1101, 1103.

[154] ibid 1151 (cautioning that this "flexibility also can understate the importance of human rights as entitlements that cannot simply be bartered away").

[155] ibid.

[156] Saper (n 152) 1292 (stating that CAO deals "with private-sector projects where the government is no longer a contractual party to the transaction").

[157] African Development Bank, 'Activities' <https://www.afdb.org/en/topics-and-sectors/sectors/private-sector/activities> accessed 10 June 2019 (indicating that with respect to the ADB's private lending activities, it considers projects in the extractive sector).

[158] *Compare* IFC's CAO Operational Guidelines (2013), <http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines_2013.pdf> accessed 10 June 2019 (indicating that IFC's CAO performs a dispute resolution role, a compliance role, and an advisory roles); *with* ADB's IRM, Operating Rules and Procedures (2015), <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/Revised_IRM_Operating_Rules_and_Procedures_2015.pdf> accessed on 10 June 2019 (indicating that ADB's IRM performs a problem solving, compliance review, and an advisory function).

[159] Saper (n 152) 1281.

[160] ibid 1280.

environmental and social policies, which emphasize the primary role of borrowers, with the IFC performing more of an oversight role; and (3) and an advisory role, which consists of advising the executive bodies of both the IFC and MIGA and reviewing their environmental and social policies.[161]

The IFC and MIGA are governed by their Policy on Social and Environmental Sustainability and by the Performance Standards on Social and Environmental Sustainability, which are a series of eight standards.[162] The Performance Standards establish the procedures that borrowers, which often include energy companies, must follow during the life of an IFC-financed project.[163]

Yet these standards stop short of acknowledging having any human rights obligations.[164] But it should be noted that the accompanying guidance notes to these standards retain congruence between human rights law and IFC requirements.[165] For instance, Guidance Note 1 requires borrowers to prepare a social and environmental impact assessment and Guidance Note 7 "acknowledges that international human rights law forms the appropriate framework for addressing the particular vulnerabilities of indigenous peoples."[166]

In particular, IFC's CAO in its ombudsman and compliance role can assist in scrutinizing the actions of non-state economic actors.[167] As Saper explains[168]:

> The CAO can use flexible methods to address issues from complaints, including facilitation and information sharing, joint fact-finding, dialogue and negotiation, and conciliation and mediation. In each of these processes, the CAO works with the stakeholders and uses its dispute resolution expertise to try to bring the parties to an agreement and resolve the problems.[169]

Though underexplored, IFC's CAO might be a fruitful tool to safeguard the SLO, which emphasizes a procedural approach that promotes public participation and monitors compliance with SLO's emerging, social, environmental, and human rights requirements.

Indeed, it opens the possibility for local communities to bring claims directly to the perceived offenders, MDBs, and extractive companies and scrutinize their

[161] Macbeth (n 154) 1136–37; Saper (n 152) 1136–37, 1296.

[162] They notably include Social and Environmental Assessment and Management Systems (Performance Standard 1) and Indigenous Peoples (Performance Standard 7). See Macbeth (n 154) 1139–44.

[163] Saper (n 152) 1285.

[164] McBeth (n 154) 1144.

[165] ibid.

[166] ibid., 1143.

[167] Saper (no. 152), 1286.

[168] ibid., 1288.

[169] ibid., 1299.

actions.[170] However, an important limitation to accessing IFC's complaint mechanism is that it is limited to projects financed by the IFC. Moreover, unless IFC's CAO in its compliance role is empowered to make findings of fault or determinations as to liability (i.e., to declare a project non-compliant and to determine whether compensation and/or cancellation of the project would be warranted),[171] this mechanism, alone, will not be sufficient. In parallel with these mechanisms, issues involving the effect of extractive projects on local communities are increasingly raised in investor-state arbitrations brought on the basis of IIAs.

3.2.2 IIAs' Dispute Settlement

IIAs are the primary international legal instruments that regulate cross-border. IIAs notably contain dispute settlement provisions, which protect foreign investors and enable them to pursue claims in arbitration against states.[172] But unlike the complaint mechanism of MDBs, the dispute settlement alternatives of IIAs are more adversarial. While the AU Declaration on COVID-19-Related ISDS Risks expressed a general distrust for ISDS, IIAs may enable the use of SLO-related claims by states as defenses or counterclaims in arbitration and may be the source of overlooked remedies.[173]

While they might appear foreign to each other, the human rights norms that underpin the SLO and the protection of investments are not in *separate worlds*.[174] The ultimate concern at the basis of these areas of international law is the same: protection against the powers of the state.[175] Yet, investment treaties traditionally do not mention human rights.[176] Several arbitral tribunals, in fact, refuse to recognize

[170] *See also*, Lindsay and Kirkpatrick (n 104) 117–18 (discussing operational level grievance mechanisms established by private companies to address local peoples' complaints).

[171] Saper (n 152) 1326 (adding that the ombudsman role '*would not fit well with a fault-finding compliance review function because the IFC and the project company would be unwilling to participate in the problem-solving (Ombudsman) phase if information from that phase were likely to be used to find fault in future Compliance proceedings*').

[172] Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 135 (stating that IIAs operate on the basis of a *quid pro quo* with potential third-party beneficiaries).

[173] Yasmine Lahlou, Rainbow Willard, and Meredith Craven, 'The Rise of Environmental Counterclaim in Mining Arbitration' in Jason Fry and Louis-Alexis Brett (eds), *Global Arbitration Review: The Guide to Mining Arbitration* (David Samuels 2019) 51–67; Lindsay and Kirkpatrick (n 104) 125–29.

[174] Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights' (2011) 60 ICLQ 573, 576.

[175] ibid; Paula F Henin, 'The Jurisdiction of Investment Treaty Tribunals over Investors' Human Rights Claims: The Case against Roussalis v. Romania' (2012) 51 Colum J Transnat'l L 224, 224.

[176] Eric de Brabendere, 'Human Rights and International Investment Law' in Markus Krajewski and Rhea Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar 2018) 1; Clara Reiner and Christoph Schreuer, 'Human Rights and International Investment Arbitration' in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petermann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 132.

the relevance of human rights claims in the context of investment disputes.[177] However, as Barnes underscores:

> [b]y taking into consideration the SLO in their decisions, arbitrators would not only ensure that both investors and States respect the most fundamental values of the international community, but they would also directly contribute to the reform of international investment law in a way that takes into account the interests of a multitude of stakeholders.[178]

The investment law landscape on the African continent is, however, going through a profound evolution, which has influenced a new generation of bilateral investment treaties and inspired a new set of regional IIAs.[179] Indeed, though not binding, the AU adopted a Pan-African Investment Code (PAIC) in 2017,[180] which has been drafted with a view to promoting sustainable development.[181] Besides containing more progressive provisions considerate of local communities, it notably includes a clause entitled "Obligations as to the use of natural resources," which requires investors to respect the rights of local populations and avoid land-grabbing practices vis-à-vis local communities.[182] Moreover, the PAIC provides that member states "may introduce performance requirements to promote domestic investments and local content."[183] Whether such provisions would ultimately survive scrutiny in international law remains unclear. What is clear is that this new generation of IIAs clearly aims to streamline social, environmental, and human rights requirements into African IIAs.[184]

Based on the PAIC and this new generation of IIAs, the region is evolving toward a better balance between the public and private sector, as well as between local and foreign interests. These IIAs introduce additional layers of

[177] Brabendere (n 177) 8 (citing *inter alia Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, (1994) 95 International Law Reports 184).

[178] Barnes (n 16), 359.

[179] Odysseas G Repousis, 'Multilateral Investment Treaties in Africa and the Antagonistic Narratives of Bilateralism and Regionalism' (2017) 52 Tex Int'l L J 361; Makane Moïse Mbengue and Stefanie Schacherer, 'The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Inv & Trade 446; and Mohamed Salahudine Abdel Wahab, 'Glocalizing Africa in a Globalized Worlds: Trade, Investment and the Changing Landscape of International Arbitration: A Promise to Fulfill?' in International Arbitration and the Rule of Law : Contribution and Conformity (Kluwer Law International 2017), 912; Alec. R Johnson, 'Rethinking Bilateral Investment Treaty in Sub-Saharan African' (2010) 59 Emory L J 966.

[180] United Nations, Economic and Social Council and the African Union, 'Draft Pan-African Investment Code' E/ECA/COE/35/18, AU/STC/FMEPI/EXP/18(II) (26 March 2016).

[181] Makane Moise Mbengue and Stephanie Schacherer, 'The Africanisation of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Inv & Trade 414, 446.

[182] Pan-African Investment Code (n 186) arts 4(1), 7, 9, 23.

[183] ibid., art 17.

[184] *See* Mbengue and Schacherer (n 187).

considerations and alter the paradigm. Instead of merely examining whether a state complied with its treaty obligations vis-à-vis investors, they require investors to comply with environmental and social obligations and may expressly allow for counterclaims.[185] The rise in investment disputes, which involve more considerations of the impacts of investments, is a positive sign that the interests of local communities are rightfully inserting themselves into the debate between investors and states.

But based on the present framework of IIAs, local peoples' rights and interests will largely remain a tool for states and investors to promote their own claims. Where SLO-related claims are submitted to tribunals, these claims are only indirect means of safeguarding the SLO, which are generally deployed as defenses by respondent states, with mitigated or largely undistinguished direct benefits to local peoples thus far. Indeed, as local peoples will tend not to be able to satisfy the jurisdictional requirements of IIAs they cannot avail themselves of investors' and states' rights to raise claims. On this point, the 2009 ECOWAS Supplementary Act on Investment (SAI) seems to provide an ignored remedy.

The SAI presents an overlooked *source* for more direct means of safeguarding the SLO. The SAI is a multilateral instrument that applies to the 15 ECOWAS member

[185] Despite these promising developments, the same problematic remains for local peoples and communities: compelling an investor to comply with its investment obligations still depends on how a State perceives its interests, when it weighs the benefits and downsides of filing a counterclaim. A State's decision to sue an investor will likely remain remote, given that such a decision may discourage future investments. Yet sub-Saharan African States, are increasingly raising social and environmental defenses to investors' claims in the context of energy-related disputes. While there is no consensus, the jurisprudence suggests that, depending on the treaty and whether the alleged violation of the host-State's legislation occurred pre-establishment of the investment or during the investment project, it may result in the violation being assessed in terms of admissibility or jurisdiction or in terms of contributary fault, which would affect the quantum of the award. At last, while most IIAs in the regions are silent regarding counterclaims and very few of them succeed as they are rejected on jurisdictional or admissibility grounds. Yet, there is a trend suggesting that the orthodoxy regarding an international law-based responsibility for corporations may be unfolding. *See* Peter Muchlinski,'Caveat Investor'? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard' (2006) 55 *The International and Comparative Law Quarterly* 527; Philippe Hameau, Janice Feigher, Marc Robert and Chloé Deydier, 'Mining Arbitration in Africa' in Jason Fry and Louis-Alexis Brett (eds), *Global Arbitration Review: The Guide to Mining Arbitration* (David Samuels 2019) 153–55; Brabendere (n 182) 14 (explaining that certain tribunals have read a legality requirement into IIAs even in the absence of such clause); Arif Ali, Erica Franzetti, Jose Manuel Garcia Represa, and Eduardo Silva Romeo, 'Mining Arbitration in Latin America: Social and Environmental Issues in Investment Arbitration Cases' in Jason Fry and Louis-Alexis Brett (eds) *Global Arbitration Review: The Guide to Mining Arbitration* (David Samuels 2019) 191–94; Yasmine Lahlou, Rainbow Willard, and Meredith Craven, 'The Rise of Environmental Counterclaim in Mining Arbitration' in Jason Fry and Louis-Alexis Brett (eds), *Global Arbitration Review: The Guide to Mining Arbitration* (David Samuels 2019) 52. *See also*, Tomoko Ishikawa, 'Counterclaims and the Rule of Law in Investment Arbitration' (2019) 113 AJIL Unbound 33, 37 (stating that '[e]*ven when jurisdiction over counterclaims is established, counterclaims have rarely succeeded on their merits, with the important exceptions of Burlington v Ecuador and Perenco v. Ecuador,*' where the claimant investors actually consented to jurisdiction over the counterclaim).

states, 8 of which are also OHADA member states. Like other instruments in this new generation of IIAs, it requires investors to conduct an ESIA and allows states, pursuant to Art. 18, to initiate counterclaims against an investor for violating its obligations under the SAI. Most notably and unlike any treaty that we are aware of, Art. 18(6) of the SAI provides that:

> In accordance with the applicable domestic law, a host State or private person or organisation, may initiate actions for damages under the domestic law of the host Member State, or the domestic law of the home Member State where such an action relates to the specific conduct of the investor, for damages arising from an alleged breach of the obligations set out in this Supplementary Act. The proceedings in the domestic law Court shall conform to the procedures applicable in the Community Court of Justice.

Though evidently overlooked, the SAI may serve to overcome some of the main challenges of protecting social, environmental, and human rights in the civil law monist states of the OHADA zone: the horizontal application of human rights by natural persons and NGOs against non-state actors before domestic courts. The SAI may present a solution to the invocation and application of human rights treaties and case law before domestic courts – a significant departure from the status quo in many OHADA states, where invoking or giving effect to such international norms is wrought with procedural and constitutional obstacles.

Because the SAI allows parties to raise, as part of their cause of action, the violation of an international norm before a domestic court, important developments in the jurisprudence of the African Commission can be relied on and given more teeth. Against this background, we observe that access to mediation and possibly more contentious dispute resolution alternatives like arbitration can be extended to locals. The SAI gives teeth to investors' obligations, as the risk of being dragged into local courts for breaches of social and environmental obligations is real. Indeed, scholars argue that, depending on a state's legal system, ECOWAS texts can be directly applicable before local courts.[186] If locals can invoke the SAI, this risk may incentivize investors to reconsider their reluctance to consent to human rights-based mediation and arbitration.

The mediation and arbitration of social, environmental, and human rights is largely unchartered territory in practice. A significant challenge, among others, with the mediation and arbitration of these issues, is that these modes of ADR

[186] Enyinna S Nwauche, 'Enforcing ECOWAS Law in West African National Courts' (2011) 55 J Afr L 181, 186 (stating that it is the '*constitutional measures, applicable for incorporation in each member state, that will determine the direct applicability and effect of*' ECOWAS treaties); Jerrry Ukaigwe, *ECOWAS Law (*Springer 2016) 211–14 (discussing the principle of direct applicability and direct of effect as it relates to ECOWAS law and cautioning that ECOWAS texts '*cannot be directly applicable in all jurisdictions because of the restrictive effect of sovereignty. These legal restrictions play out in the kind of language used in the constitutions of some of the Member States*').

depend on the parties' consents.[187] But there is rarely an incentive, appreciable in direct and immediate business and economic terms, for consenting to such mediation or arbitration. The SAI appears to offer an alternative, which may compel non-state economic actors to reconsider these disincentives.

4 Conclusion: The Call for a Specialized OHADA Institution to Safeguard Local Peoples' Rights in a Post Pandemic World

Our mapping of the safeguarding components of the SLO, as articulated in the OHADA zone, reveals that the social, environmental, and human rights considerations encompassed by this concept ultimately remain state-centered, with few actionable remedies for local peoples.

There is little doubt that the SLO is and will likely remain a composite legal concept,[188] which encompasses cross-cutting issues. As a concept adaptive to local particularities, the SLO may bring together disparate and neglected interests and challenge the current international economic order. The necessity of giving more substance and effectiveness to the SLO is critical, particularly as the devasting toll of the pandemic continues across Africa.

The AU Declaration on COVID-19-Related ISDS Risks confirms that African states are concerned with ISDS. The pandemic may bring an opportunity for much-awaited changes, provided there is a strong and concerted political will. However, more concrete ISDS reforms or a more explicitly SLO-focused declaration by African states does not appear in sight.

We observed, however, that OHADA member states are gradually giving more effect incorporating a stewardship approach to natural resource governance, which elevates the interest of local communities in energy projects. Even if undeniable progress has been made in that regard, the momentum captured by the SLO replicates certain blind spots of the classic international legal order, as the vindication of local peoples' rights ultimately still requires validation by states. Indeed, whether states are apprehended as stewards, they can still justify the mismanagement of natural resources if no adequate accounting mechanisms are available.

We also showed that no existing mechanism is presently designed to address these issues comprehensively, irrespective of whether the problem is framed as the state's failure to protect its peoples or energy companies' failure to respect SLO norms, including human rights. These mechanisms are deficient in several respects:

[187] Diane Desierto, 'Why Arbitrate Business and Human Rights Disputes? Public Consultation Period Open for the Draft Hague Rules on Business and Human Rights Arbitration' (EJIL:Talk, 12 July 2019) <https://www.ejiltalk.org/public-consultation-period-until-august-25-for-the-draft-hague-rules-on-business-and-human-rights-arbitration/> (stating that consent is the cornerstone of arbitration and discussing the release of the Draft Hague Rules on Business and Human Rights Arbitration).

[188] Barnes (n 16)344.

in terms of considering local peoples' rights and interests; in terms of structural neutrality, being state or investor-oriented; or in terms of being competent and empowered to address these issues. Giving more legal substance to the SLO concept will remain fanciful if no adequate institution is simultaneously competent to hear the grievances of project-impacted communities, designed to be structurally neutral and empowered to prevent and remedy harms caused by projects effectively. As Karanja and Njenga contend, "governments need to dedicate adequate manpower, finances, as well as create the institutional integrity that is necessary for building and maintaining credible SLO".[189]

Achieving institutional integrity, in a context often opposing foreign and local parties, would be facilitated by removing disputes among stakeholders to a regional or international forum, as any domestic court, ombudsman, or domestic regulatory authority would remain organically tied to the state and hence under the suspicion of being neither independent nor impartial vis-à-vis the state or locals. In this regard, we noted that the regional accountability mechanisms in the zone, including the African Court, the African Commission, and the ECCJ, are not designed to accommodate nor optimally safeguard the SLO.

The OHADA zone, on the other hand, offers an integrated and dynamic legal system that has proven its capacity to innovate. Not only has it produced ten Uniform Acts, it has also established the Common Court of Justice and Arbitration (CCJA), an original and unique regional body, which ensures a uniform interpretation of these acts and administers arbitration proceedings in the region. The CCJA has demonstrated strong independence through its activity over the last 20 years, which was reinforced with the revisions to the Uniform Act on Arbitration that allow CCJA's arbitration center to administer investor-state disputes and the SLO considerations they increasingly implicate.

The SLO will likely remain a hybrid concept nurtured by diverse sources and exigencies. This concept has a centripetal force as it covers uncoordinated, multi-sourced, and multilayered social concerns, as it aims to promote local peoples' rights during any economic project. Therefore, its content cannot be precisely enunciated but will conform to the local specificities of any contemplated project. That said, we consider that the protection of local communities would be secured better through an independent and adaptive institution than simply the adoption by OHADA member states of a Uniform Act on mining or labor that would harmonize regional norms or even the SLO concept itself.

With the framework of the OHADA in mind, an additional institution could be conceived and established in the OHADA zone that would be tasked with addressing and conciliating the concerns of local peoples, OHADA states, and foreign investors. This regional ombudsman, for instance, could be competent for emergency hearings when local peoples' rights are neglected by a project impacting their surroundings. Such an institution could also operate as a conciliator and a mediator, in the mold of the IFC ombudsman, and facilitate the revendication of local peoples' rights, so that

[189] Karanja and Njenga (n 6) 366.

the various stakeholders can walk away with an agreement. And if necessary, it could refer cases to the CCJA to obtain provisional measures, which in line with the CCJA's authority, would be applicable throughout the OHADA zone.

Whether independent or attached to the CCJA, such an institution would require the revision of the OHADA Treaty and not a mere adoption of a new Uniform Act. If this institution were to be established, it would, of course, be of direct benefits to local communities. However, it would also benefit all stakeholders, including investors, states, and civil society organizations. It goes without saying that such an institution would constitute a leap forward to protect local peoples' rights and strengthen the rule of law in the OHADA zone. Indeed, by providing more predictability at a regional level to the SLO, an emerging and inchoate concept, which has been identified as one of the major risks in the natural resource sector, such an institution would help fulfil OHADA's aims of fostering development and instilling confidence in the zone. Better integrating the SLO through adapted mechanisms would therefore redress many issues confronting the OHADA zone, including the constraints aggravated by the COVID-19 pandemic.

Annex

International and regional norms	Primary SLO-related provisions
International Covenant on Economic, Social and Cultural Rights, 1966	All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. (Art. 1.2)
African Charter on Human and Peoples' Rights, 1981	1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it 2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law 4. State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity

(continued)

International and regional norms	Primary SLO-related provisions
	5. State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources (Art. 21)
International Labor Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries (no.169), 1989 (only applicable in the CAR)	1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures (Art. 6)
United Nations Economic and Social Council, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17–19 January 2005), E/C.19/2005/3	Free should imply no coercion, intimidation or manipulation Prior should imply that consent has been sought sufficiently in advance of any authorisation or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes Informed should imply that information is provided that covers (at least) the following aspects: a. The nature, size, pace, reversibility and scope of any proposed project or activity b. The reason(s) for or purpose(s) of the project and/or activity c. The duration of the above d. The locality of areas that will be affected e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that

(continued)

International and regional norms	Primary SLO-related provisions
	respects the precautionary principle f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others) g. Procedures that the project may entail
United Nations Declaration on the Rights of Indigenous Peoples, 2007	1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonisation and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests (Art. 15) 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned (Art. 26)

(continued)

International and regional norms	Primary SLO-related provisions
	1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact (Art. 32)
Supplementary Act A/SA 3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, 2009	(1) Investors and Investments shall conduct an environmental and social impact assessment of the potential investment. Investors or the investments shall comply with environmental assessment screening criteria and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host Member State for such an investment or the laws of the home State for such an investment. The investor shall comply with the minimum standards on environmental and socio-cultural impact assessment and screening that the Member States shall adopt at the first meeting of the Parties, to the extent that these are applicable to the investment in question (2) Investors or the investments shall make the environmental and social impact assessments accessible in the local community and to affected interests in the host State where the investment is intended to be made prior to the completion of the host State measures prescribing the formalities for establishing such investment (3) Investors, their investments and host State authorities shall apply the precautionary principle to their environmental and social impact assessment. The application of the precautionary principle by investors and investments shall be described in the environmental and social impact assessment they undertake (Art. 12: Pre-Establishment Impact Assessment)

(continued)

International and regional norms	Primary SLO-related provisions
ECOWAS Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector, 2009	The mineral is vested in the State to be held and managed in trust for the people of the Member States (Art. 3.3) Qualifications for acquiring a mining right in Member States must meet international best practices in the mining industry and shall include but not limited to respect for the environment; the rights of mining communities, a plan approved by the competent authority for the mining company to utilise local goods, services and manpower (Art. 5.3) Member States shall ensure that Corporate Social Responsibility (CSR) and Alternative Livelihoods Programmes (ALP) to be submitted under this article shall be part of the conditions for granting a mining right. Such CSR and ALP shall enhance the livelihoods of the mining communities and shall be drawn up with the active participation and agreement with the local communities (Art. 11.2) A Holder of a mining right shall in all phases of its operations give preference in employment to citizens of Member States especially affected communities to the maximum extent possible and consistent with safety, efficiency and economy (Art. 11.4) Member States and Holders of mining rights shall ensure that the rights of the local communities are respected at all times. Where such Human Rights legislations do not exist, Member States shall enact appropriate legislation to ensure respect for human rights (Art. 15.2) 1. Mining Rights holders in Member States shall conduct their mining activities in a manner that respects the right to development in which peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development in a sustainable manner 2. Mining Rights holders in Member States shall respect the rights of local communities. They shall particularly respect the rights of local people and similar communities to own, occupy, develop, control, protect, and use their lands, other natural resources, and cultural and intellectual property 3. Companies shall obtain free, prior, and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post-mining

(continued)

International and regional norms	Primary SLO-related provisions
	operations 4. Companies shall maintain consultations and negotiations on important decisions affecting local communities throughout the mining cycle (Art. 16)
Resolution on a Human Rights-Based Approach to Natural Resources Governance, 2012	Mindful of the disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary rights of access and control of various resources, including land, minerals, forestry and fishing Reaffirm that, in accordance with the Rio Declaration and African Charter principle of State sovereignty over natural resources, the State has the main responsibility for ensuring natural resources stewardship with, and for the interest of, the population and must fulfill its mission in conformity with international human rights law and standards Confirm that all necessary measures must be taken by the State to ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resources governance (Preamble)
Draft Pan-African Investment Code, 2016	1. Investors shall not exploit or use local natural resources to the detriment of the rights and interests of the host State 2. Investors shall respect rights of local populations, and avoid land grabbing practices vis-à-vis local communities (Art. 23: Obligations as to the use of Natural Resources) 1. Member States may develop national policies to guide investors in developing human capacity of the labor force. Such policies may include incentives to encourage employers to invest in training, capacity building and knowledge transfer 2. Member States should develop national policies that pay particular attention to the special needs for youth, women and other vulnerable groups (Art. 36: Human Resources Development)