www.ogel.org

ISSN : 1875-418X
Issue : Vol. 18 - issue 1
Published : January 2020

This paper is part of the OGEL Special Issue on *"Social Licence to Operate (SLO) in the Extractive and Energy Sectors"* edited by:


Dr. J. Górski
View profile


Dr. G. Mete
View profile


Hon. C. Trenorden
View profile

Oil, Gas & Energy Law Intelligence

The Social License to Operate in the OHADA Zone: Mapping an Emerging and Fragmented Concept in an Integrated Legal Space
by J.P. Belinga and E. Marque

About OGEL

OGEL (Oil, Gas & Energy Law Intelligence): Focusing on recent developments in the area of oil-gas-energy law, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting, including the oil-gas-energy geopolitics.

For full Terms & Conditions and subscription rates, please visit our website at www.ogel.org.

Open to all to read and to contribute

OGEL has become the hub of a global professional and academic network. Therefore we invite all those with an interest in oil-gas-energy law and regulation to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

Please contact us at info@ogel.org if you would like to participate in this global network: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an OGEL-focused republication), but rather concise comments from the author's professional 'workshop'.

OGEL is linked to **OGELFORUM**, a place for discussion, sharing of insights and intelligence, of relevant issues related in a significant way to oil, gas and energy issues: Policy, legislation, contracting, security strategy, climate change related to energy.

The Social License to Operate in the OHADA Zone: Mapping an Emerging and Fragmented Concept in an Integrated Legal Space

John P. Belinga and Etienne Marque***

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 extractive sector, to bridge the dire insufficiencies of the current African extractive governance regime. Thus far, the SLO concept remains multi-sourced and englobes uncoordinated and multi-layered social, environmental, and human rights concerns. This article aims to lay the groundwork for giving more legal substance to this still fuzzy concept. To assess better the procedural and substantive components underpinning the SLO, this article examines the SLO's articulation in the OHADA zone, a legally homogenous space with vast natural resources. This task is of critical relevance as the SLO may define whether the trajectory of African extractive governance will evolve to integrate the considerations of local communities better or perpetuate the inadequacies of the status quo.

1. Introduction

The concept of a 'social license to operate' (SLO) in the extractive sector is more relevant than ever, as the global economic order is experiencing a profound period of criticism and distrust. Local communities in regions with vast mineral resources, especially in Africa, are increasingly demanding a greater share of benefits from mining and hydrocarbon projects, more assurances that extractive operations comply with environmental and social norms, and greater public participation in decision making.[1] In short, a far-reaching reform of natural resource governance.

This discontent is certainly well documented.[2] What is less understood is how these developments embody a divergence as to the understanding of international legal principles like consent, self-determination, or even sovereignty. As with the introduction of any new concept, the emergence of the SLO, whose scope and content will be analyzed throughout this article, may reshape seemingly well-established principles of international law. Indeed, the

* John is a Judicial Law Clerk at the United States Court of Federal Claims.
** Etienne holds a Ph.D. in hydrocarbon law and is finalizing the requirements of the Paris Bar School to become an attorney.

[1] 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* Jędrzej Górski and Christine Trenorden, 'Regulatory Framework on Environmental Impacts and Community Acceptance of Shale Gas' (24 May 2018) ShaleXenvironmenT Horizon 2020 project H2020-LCE-2014-1 Grant agreement No. 640979, 10.13140/RG.2.2.20135.85921, deliverable D.11.1, sec 2.3 at 31-33; Jędrzej Górski and Christine Trenorden, 'Social License to Operate (SLO) in the Shale Sector: A Contextual Study of the European Union' (28 May 2019) OGEL 1-121 (advance publication).

[2] *See eg* Ursula Kriebaum and Christoph Schreuer, 'From Individual to Community Interest in International Investment Law' in *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).

gradual actualization of this concept reveals critical insufficiencies in the international economic order.

The SLO is criticized as an elusive and poorly conceptualized idea, often apprehended inconsistently.[3] Yet, as an emerging concept, it reflects the increasing blowback against the multifarious undesirable externalities of large projects, particularly those in the extractive sector. Transactional bargains where extractive companies acquire the right to exploit mineral or hydrocarbon deposits in consideration of money and royalties to the state, with little consideration accorded to local development, are no longer being accepted. Extractive companies, as such, must consider and address the negative externalities affecting the local social and economic fabric.[4]

These evolving considerations have drawn fruitful analogues to legal and formal licenses.[5] They explain that the SLO term "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."[6] However, 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."[7] 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.[8] Consequentially, Brett and Burnett refer to the SLO as describing the "level of acceptance or approval by local communities and stakeholders of mining companies and their operations."[9]

In the absence of this informal or intangible license, extractive companies with legal licenses are increasingly blocked or impeded by local communities.[10] As a direct consequence of conferring ownership of extractive resources to the states, consent to exploit natural resources has traditionally remained a state matter, whose terms were manifested in agreements with extractive companies.[11] In this way, the growing discontent 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.

[3] Martin Brueckner and Marian Eabrasu, 'Pinning down the social license to operate (SLO): The problem of normative complexity' (2018) 59 Resource Policy 217–18.
[4] Thierry Lauriol and Emilie Raynaud, *Le droit pétrolier et minier en Afrique* (LGJD 2016) 457–508.
[5] Kieren Moffat, Justine Lacey, Airong Zhang and Sina Leipold, 'The social licence to operate: a critical review' (2016) 89 Forestry 477, 481–82.
[6] ibid 481.
[7] ibid.
[8] ibid 482.
[9] Henry G. Burnett and Louis-Alexis Bret, *Arbitration of International Mining Disputes: Law and Practice* (OUP 2018) 121.
[10] ibid.
[11] 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.

The international economic order is a liberal legal regime based on the consent of its constituents,[12] who are considered to be economic right-holders.[13] Under this liberal economic order and regime, nature is apprehended as a stock of assets or resources, subject to being invested in and traded.[14] States, as the sole legitimate structures to represent and defend the peoples' will and interests on the international stage, are the primary holders and beneficiaries of these economic rights over natural resources.[15] 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.[16]

On the international plane, the relationship between a state and its peoples has traditionally remained unquestioned, as the state is itself the expression of the people's right to self-determination.[17] Issues involving the sovereignty and will of the people are particularly delicate in Africa, however. It is worth recalling that the so-called consent given by local African chiefs to European powers and their chartered companies, through treaties signed in the 1880s,[18] was instrumentalized as justification for the colonization of the continent.[19] This invariably led to local peoples' rights being curtailed and denied. Lamentably, considerations for the will or interests of local peoples— their consent—has been more fiction than reality in modern African history.

---

[12] 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.

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

[14] 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.

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

[16] 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.

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

[18] 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).

[19] Though oft 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.

It is no less important to realize that, deprived for so long of genuine representative institutions, Africa's road to real democracy remains an on-going development. Although certain economic rights were formally bestowed on the newly-independent African states,[20] 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.[21] These arrested observations, however, should not obscure the reality that this deplorable situation is a direct result of the current extractive regime forged by 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 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."[22]

The 2012 Resolution speaks to an uncoordinated momentum, articulated in an eclectic and growing array of instruments, which recognizes social, economic, and environmental concerns in the extractive sector.[23] Our study of the SLO concept will focus on the extractive sector in the seventeen African member-states of the Organization for the Harmonization of Business Law in Africa, better known under its French acronym "OHADA." With the exception of Comoros in the Indian Ocean, OHADA member-states are all in western and central Africa, a zone that abounds in extractive resources and that largely follows the civil law tradition of former colonial powers.[24]

---

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

[21] 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); and Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro-States*, (University of California Press 1997).

[22] 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").

[23] 2012 Resolution (n 22) (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).

[24] 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

OHADA's *raison d'être* and specificity is to encourage investments by mitigating business and legal risk through the harmonization (or rather uniformization) of business laws into Uniform Acts.[25]At first glance, the OHADA institutions appear not to have a direct interest in the ongoing developments regarding the SLO. This inattention is quite peculiar as the first preambular of the 1993 OHADA Treaty provides that member-states are determined to "instill confidence" for their economies "to create a new pole of development in Africa."[26] Yet, the emergence of the SLO as a primary risk for investors and the various concerns that underpin it have not had an influence on the OHADA Uniform Acts. As a result, 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 OHADA adopted a preliminary draft Uniform Act on Labour Law, scholars have also called for a Uniform Act on Mining,[27] 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 extractive projects adversely impacting their communities, their concerns are integrated and internalized by investors as an additional risk to be addressed.[28] At the same time, is it now widely accepted in the western legal systems that inspired OHADA's creation,[29] that companies, especially large ones,[30] have a role that goes beyond the sole generation of profit. For instance, in 2017, France revised its Civil Code and added that French corporations must "consider the social and environmental stakes of its activity."[31] This idea of a corporate social responsibility in 'western' corporate law is still very much in its infancy in the OHADA zone.[32]

Mapping the content of the emerging SLO concept in the OHADA zone, accordingly, seems particularly appropriate, as this regional and integrated legal space, may 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.[33] 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 extractive sector. The SLO, as such, may benefit from the OHADA system. Indeed,

---

2015) 231.

[25] 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.

[26] 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 provides for 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.

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

[28] EY, 'Top 10 business risks facing mining and metals in 2019-20' <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).

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

[30] *See also* UNGP (n 22) 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").

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

[32] Karounga Diawara and Sophie Lavallée, 'La Responsabilité Sociale de l'Entreprise (RSE) dans l'Espace OHADA. Pour une Ouverture aux Considérations non Economiques' (2014) 28 RIDE 431.

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

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 space, in our view, is equipped to assimilate and give more substance to the SLO.

This article will examine the components encapsulated by the SLO concept in the OHADA zone. A social license reflects a popular support prerequisite for which the state remains the proxy, not only to express its approval or consent to an extractive project but also to monitor and ensure that local peoples and communities share in the benefits of the project (2). Unless a state can be held accountable for failing or neglecting its stewardship obligations towards its peoples, the SLO will remain a legally empty shell. It is thus of utmost import to assess the accountability mechanisms established in the zone that safeguard the rights of local peoples, which underpin the SLO (3).

2. Mapping the SLO in the OHADA Zone

Obtaining local approval is essential to the exploitation of natural resources in sub-Saharan Africa. Such approval thus far has been under the purview of the state. This has been understood as an affirmation of its authority to manage natural resources for the benefit of the people (2.1.). If integrated in this classical understanding, the SLO may result in truly empowering the people (2.2.).

2.1. State Stewardship as the Enduring Expression of the Consent and Will of the People to Grant a SLO

States derive their legitimacy from the fact that they represent the people exercising their right to self-determination.[34] This right of self-determination was reaffirmed during the period of decolonization against colonial powers.[35] Its reaffirmation and expression during this period coalesced into a movement known as the New International Economic Order (NIEO), from which emerged the PSNR principle. 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,[36] the contours and content of the PSNR principle remain equivocal.

Gilbert, for instance, remarks that PSNR was ambiguously conferred to states *and* to 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

[34] 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).

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

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

> 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."[37]

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.[38] 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 inconsistency.[39] Art 21 states that "all peoples shall freely dispose of their wealth and natural resources."[40] At the same time, art 21 provides that: States "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."[41]

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* ("*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."[42]

The foregoing reflects an underlying and foundational principle that the state is sovereign because it serves the peoples' will and interests. In the extractive sector, a sovereign state is to also exercise its competence for the general benefit of its peoples. Up until recently, this understanding seemed implicitly understood. But in reaction to local peoples' discontent

---

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

[38] 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.").

[39] 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.

[40] ibid. *See also* Emily Greenspan, 'Free, Prior, and Informed Consent in Africa: An emerging standard for extractive industry projects' (2013) Oxfam America Research Backgrounder 1, 12 (stating that 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.").

[41] African Charter (n 22) art 21.

[42] *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*].

regarding state management of natural resources, this principle needed to be reasserted through the emerging stewardship concept.

Illustratively, the Economic Community of West African States (ECOWAS), a regional economic community whose membership includes nine OHADA member-states,[43] promulgated a mining directive consistent with the community's efforts to further economic development and foster economic integration.[44] The 2009 *ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector* (ECOWAS Mining Directive) recognizes the role of stewardship and provides that: "The mineral is vested in the State to be held and managed *in trust for the people* of the Member States." [45] 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."[46]

Yet, expressed as such, this idea of stewardship is hardly opposable against a state. The ideas expressed through these regional instruments, nevertheless, paved the way for Senegal, an ECOWAS member-state largely considered to be 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 underscores 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 valorization 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." [47]

In this way, despite what many African Constitutions may proclaim, this emerging concept of stewardship in international law, as reflected in the Senegalese Petroleum Code, renders obsolete the model of natural resources as property belonging to states. [48] States retain and enjoy, however, the 'sovereign rights' to determine the modalities to explore and exploit natural resources.[49]

---

[43] 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.

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

[45] 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].

[46] 2012 Resolution (n 22) (emphasis added).

[47] Law N° 2019 - 03 dated 1 Feb. 2019 establishing a Petroleum Code, art 5 (emphasis added) (our translation).

[48] 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.

[49] 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

As a result of the shifting paradigm regarding the very notion of sovereignty, a dialogue is emerging between local administrative authorities and communities to address and align stakeholders' interests. In that regard, the 2009 African Mining Vision adopted by the AU calls for a New Social Contract to Mine.[50] 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. More effective legal mechanisms, where the people, as beneficiaries, could act against the proxy/trustor (i.e. the State), would better address discontent and forgotten communities. Depending on how this idea of state stewardship develops and whether effective legal mechanisms are established to safeguard local communities against the state where it does not fulfil its duties as a steward to its peoples, could bring a transformative and meaningful change to extractive governance, or conversely, a cosmetic one. Nevertheless, this idea of stewardship is an important and welcomed safeguard at every step of an extractive project.

2.2. Towards an Integrated Participation of Local Peoples in Extractive Projects

The SLO concept can be divided into two main categories of rights whose legal substance and enforceability still need to be affirmed: procedural or substantive. The former bestows onto local peoples and communities the right to consent to extractive projects (2.2.1.). And the latter consists 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 a Procedural Safeguard of the SLO

The emerging social license to operate functions as a much-needed procedural safeguard for the evolving expectations in the present extractive 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). There are two major international instruments that 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 the 2007 UN Declaration on the Rights of Indigenous Peoples.[51]

Significantly, in 2012 the Inter-American Court of Human Rights (IACHR) issued an important decision in *Kichwa Indigenous People of Sarayaku v. Ecuador*, finding that the obligation to consult with indigenous people regarding the exploitation of natural resources is in addition to

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.

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

[51] 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 *Perspectives on the rights of minorities and indigenous peoples in Africa* (PULP 2010) 141–54.

being a treaty-based provision, also a general principle of international law.[52] Moreover, the IACHR, whose jurisprudence has been invoked to address similar issues in Africa,[53] has on several occasions framed the effective participation of local peoples and communities in decision making, as a procedural *safeguard* against resource development that threatens their survival as a people.[54]

As observed above, the recognition of indigenous peoples' rights over their territories 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, this margin of subjectivity is attenuated. FPIC was initially recognized as belonging to indigenous peoples, who are not assimilable to and distinct from national peoples.[55] The recognition of the FPIC principle today, however, goes beyond indigenous peoples and encompasses local peoples.

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.[56] Art 16(3) and (4) of the ECOWAS Mining Directive, entitled "Sustainable Development and Local Community Interests," provides 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."[57]

---

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

[53] African Charter (n 39), 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).

[54] *Kichwa Case* (n 52) 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 (Nov. 28, 2007).

[55] The recognition of collective rights to autochthonous peoples against the state came historically from common law jurisdictions, including Australia and, more recently for African continent, South Africa. Together these states all have a history of settler colonialism history 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 *Oxford Research Encyclopaedia of African History* (OUP 2018).

[56] ECOWAS Mining Directive (n 45) art 16. Greenspan (n 40) 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 pollical difficulties).

[57] ECOWAS Mining Directive (n 45) art 16.

Greenspan contends that because this provision is legally binding it is arguably "the most significant FPIC policy requirement in Africa." [58] She cautions, however, that state discretion is maintained in determining how the objectives of the ECOWAS Mining Directive will be met.[59]

Based on the developing practice in the extractive 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 extractive projects.[60] As a result, extractive companies are required to gather local peoples' observances, one way or another, as to how they view the contemplated projects and its potential consequences.[61] The aim of these assessments is to track, mitigate, and compensate, as much as possible, the impacts on local communities and their environment.[62] If properly designed and implemented, which ideally would involve in-depth and in good faith back and forth negotiations, these could allow the local community to express its expectations and give its final consent to a planned extractive project.

These developments on procedural safeguards in the extractive sectors have been integrated concretely in 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."[63]

Olawuyi characterizes this text as "the most significant regional attempt so far by African governments to recognize, adopt, and mainstream human rights language into the development and use of natural resources."[64] This provision is key as it suggests a continuity between procedural safeguards and the sharing of benefits through the SLO. In this way, the outcome of well designed and implemented procedural safeguards, such as the ESIA, would give substance to a SLO delivered by locals to investors.[65] In practice, however, the reality is rarely

---

[58] Greenspan (n 40) 10.
[59] ibid.
[60] *See eg* 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): "*Etude d'Impact Environnemental et Social— processus systématique d'identification, de prévision, d'évaluation et de réduction des effets physiques, écologiques, esthétiques et sociaux préalable au projet d'aménagement, d'ouvrage, d'équipement, d'installation ou d'implantation d'une exploitation minière ou de carrière permanente, ou d'une entité de traitement, et permettant d'en apprécier les conséquences directes ou indirectes sur l'environnement"*; Cameroon Law N° 2019 - 008 dated 25 Apr. 2019 establishing a Petroleum Code, art 2-19: "*examen systémique visant à déterminer les effets favorables et défavorables susceptibles d'être causés par un projet sur renvironnement naturel et humain. Elle permet d'atténuer, d'éviter, d'éliminer ou de compenser les effets néfastes d'un projet tant sur l'environnement que sur les personnes affectées par ce lui-ci*."
[61] ibid.
[62] ibid.
[63] 2012 Resolution (n 22).
[64] 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.
[65] Sara Bice and Kieren Moffat, 'Social licence to operate and impact assessment' [2014] 32 Impact Assessment and Project Appraisal 257, 257–62.

idyllic at the consultation table. Local people, often residing in remote area, 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 extractive agreement, even if formally agreed to by all stakeholders, oft leads to discontent in local peoples and 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 the asymmetrical balance of powers between the stakeholders; and secondly, it does not accord local peoples a veto right to oppose local extractive projects impacting their communities and environment.[66] 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 worth noting that they may also not be so interested. As Glenn underscores in his seminal work, *Legal Traditions of the World*, it is even 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."[67]

As described by Holmes, 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."[68]

This chthonic legal tradition is irreconcilable with the exploitation of natural resources. While Africa is a continent with a pluralist legal tradition, the chthonic legal tradition is not formally recognised in the positive law of African states, which have generally adopted a common or civil law tradition.[69] Indeed, the chthonic legal tradition is informal, unwritten, and therefore

---

[66] 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.
[67] Patrick H. Glenn, *Legal Traditions of the World: Sustainable Diversity Law* (OUP 2014) 69.
[68] Robert Home, "'Culturally Unsuited to Property Rights?': Colonial Land Laws and African Societies" (2013) 40 Journal of Law and Society 403, 405.
[69] 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.

limited to the rare references to customary law found in certain African domestic laws and constitutions.[70]

Certain peoples in the OHADA zone might qualify as chthonic or indigenous, a characterization that is in itself the source of much controversy. However, thus far, legal mechanisms, whether domestic or international, do not accord them a veto right to oppose the exploitation of their surroundings. Whether local peoples have the effective right to grant a SLO will depend on whether we are assisting at a democratization of international economic law or a perpetuation of their deprivation. The FPIC/ESIA as a procedural safeguard for the SLO is undeniable. What remains unclear is the scope of the substantive rights that flow from this procedural safeguard.

2.2.2. Local Content as a Substantive Safeguard of the SLO

Alongside the procedural safeguards described above, other approaches whose objectives are more focused on the substantive outcome of extractive projects have been explored, which can be characterized as local content requirements (LCRs). Contrary to procedural safeguards, which emphasize public participation or consultations with locals, LCRs are outcome-oriented to the sharing of benefits. While these two SLO components are the product of legally different imperatives, we submit they are joined through the elaboration and implementation of the ESIA.

Theorized in the 1950s, local content provisions or requirements (LCRs) were first implemented successfully in the 1970s by the United Kingdom and Norway during the oil exploitation of the North Sea.[71] LCRs are aptly described by the Extractive Industries Transparency Initiative 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."[72]

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

As sovereigns, states have the sole and direct competence to reform the legal extractive regime. Olawuyi identifies five keys 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 that may result from rising domestic expectations.[73] LCRs, as such,

[70] 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.
[71] Chambord and Soihini (n 25).
[72] EITI International Secretariat, *EITI and opportunities for increasing local content transparency* (2018) 3.
[73] Damilola S. Olawuyi, *Extractives Industry Law in Africa* (Springer 2018).

can be apprehended as elements of the extractive grand bargain, outputs of direct benefits to national populations.

Through LCRs, African states limited by their resource and management constraints are outsourcing their public developmental policies to private foreign interests. That kind of *dirigisme* is rather counterintuitive in an international economic order aimed at protecting against discrimination. Indeed, the various trade and investment instruments, which African states have adopted, generally include National Treatment and/or Most Favoured Nation clauses to protect foreign investor from discriminatory measures favoring locals or other foreign investors. Preferences accorded to nationals, however, could violate these obligations and trigger costly disputes before investment tribunals or before the World Trade Organization.[74] Thus, the mere existence of this issue suggests that aspects of the SLO may disrupt the global economic legal order and could potentially be challenged by foreign investors if not properly implemented.

To mitigate these concerns, however, requires states to engage with stakeholders and elaborate a comprehensive plan regarding the sharing of benefits, which would include plans for how the company expects to satisfy local content requirements,[75] and the impacts of extractive projects. Indeed, we observed previously that there is continuity between local consent and local content bridged by the ESIA. Though much has been said of the environmental component of the ESIA,[76] the social component of the ESIA, has received comparatively less attention.[77] 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.[78]

Part 2 of this article has mapped the emerging and fragmented components of the social license to operate in the OHADA zone. Whether apprehended as a procedural or a substantive safeguard, and despite what its intitulation might otherwise suggest, the state remains preeminent regarding the implementation of the SLO. Even if the emerging and fragmented components of SLO are not optimally designed to redress the social deficiencies of the current African extractive regime, law or rule making remains an ever-evolving tool and process, which reflects the diverse interests of all stakeholders. It is therefore of utmost importance to assess the accountability mechanisms that serve to safeguard the SLO in the OHADA zone and whether they provide an effective remedy.

---

[74] Franck Latty, 'Discrète mais envahissante: la clause de libre exploitation', in Les techniques conventionnelles du droit international des investissements' (2015) 119 RGDIP 179, 181.

[75] 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 Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, *Legal Framework of Environmental and Social Impact Assessment in the Mining Sector* (Jan. 2019) 5 (describing ESMP).

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

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

[78] *See* Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, Legal Framework of Environmental and Social Impact Assessment in the Mining Sector (Jan. 2019) 5 (defining ESMP). *See* DRC Mining Law and Cameroon Petroleum Law (n 60) (discussing ESIAs).

3. In Search of a Right Remedy to Safeguard the SLO

Notwithstanding the various ways the SLO concept has been incorporated, 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.

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 accountee for his conduct, evaluate that conduct, and impose a sanction or obtain another appropriate remedy for deficient performance."[79]

Accountability mechanisms play an indispensable role in safeguarding the norms that underpin the SLO. Though essential, the mechanisms presently established in the OHADA zone that reinforce the norms that underlie the SLO, especially the ESIAs, are insufficient, as is, to realize their aims. Drawing from the terminology of the 2011 UN Guiding Principles on Business and Human Rights, these mechanisms include (3.1.) state-based and (3.2.) non-state-based accountability mechanisms.[80]

3.1. Overview of State-Based Accountability Mechanisms that Safeguard the SLO

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 apparent preponderance of the human rights' dimension in the SLO, however, this section will assess the (3.1.1.) domestic and (3.1.2.) regional accountability mechanisms established in the OHADA zone.

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 extractive 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. Most notably, several of the more recently promulgated extractive or extractive-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:

---

[79] Richard B. Stewart, 'Accountability and the Discontents of Globalization: US and EU Models for Regulatory Governance' (Sept. 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.

[80] *See generally* UNGP (n 22); 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) 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).

- 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 local content requirement that Congolese companies be favoured in subcontracting matters involving the private sector [81]; and
- 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.[82]

To be sure, the establishment and reinforcement of monitoring and compliance mechanisms administered by executive ministries are welcomed. Doing so, however, does not address the potential lack of impartiality, alluded to in the previous section, where state interests and the public interest are not aligned. Nor does it contend with the non-negligible critique that local content requirements in developing countries are 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."[83]

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 norms. It is unclear, however, whether proceedings before regulatory authorities would satisfy the local remedies rule typically found in human rights instruments. Indeed, consistent with the subsidiary nature of human rights, [84] under the local remedies rule, aggrieved parties seeking to file a complaint before the African Commission or the African Court on Human and Peoples' Rights (African Court) must exhaust local remedies before accessing these regional mechanisms.[85]

---

[81] 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.

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

[83] 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.

[84] 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 P.R. Romano, 'The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures' in N. Boschiero et al. (eds), *International Courts and the Development of International Law* (T.M.C. 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.").

[85] African Charter (n 39) 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).

Based on the African Commission's jurisprudence,[86] it is unlikely that executive ministries tasked with enforcing compliance with SLO norms would qualify as local remedies.[87] It appears to be the case too for National Human Rights Institutions (NHRIs),[88] with affiliate status before the African Commission,[89] whose responsibilities is to assist the African Commission in the promotion and protection of human rights at the national level.[90] 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."[91] Local remedies that are not of a "judicial character, including of a quasi-judicial nature, will not suffice."[92]

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."[93] 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 right norms in their domestic courts.[94] Despite subscribing to a monist approach to international law, whereby treaties automatically become part of domestic law upon ratification and publication in national gazettes, human right treaties rarely play a significant role in litigation

[86] 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).

[87] 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.

[88] 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).

[89] 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); and 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.

[90] 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 86) 446 (citing *Cudjoe v. Ghana* (2000) AHRLR 127 (ACHPR 1999) para 13).

[91] Musila (n 86) 450.

[92] 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.

[93] 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.

[94] Kamga (n 93) 470.

proceedings.[95] Given these various limitations, the domestic mechanism in the zone are insufficient, as is, to enforce the SLO.

Unlike the African Commission or the African Court, however, the ECOWAS Community Court of Justice (ECCJ) does not require parties to exhaust local remedies.[96] In fact, the ECCJ has held on several instances that the rule of exhaustion of local remedies is not applicable before it.[97] 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 and sub-regional level, the mechanisms in the OHADA zone, which protect the norms underpinning the SLO, have enabled remarkable developments to emerge. Through its Measures of Safeguards, the African Charter established the African Commission, which was created in 1987.[98] It is a quasi-judicial body and the premier mechanism to promote human and peoples' rights and to ensure their protection.[99] Yet, with the creation of the African Court in 2004 and the expansion of the jurisdiction of the ECCJ in 2005,[100] the African Commission ceased being the sole supranational supervisory body for the implementation of the African Charter.[101] With the emergence of the ECCJ as an alternative and potential forum for

---

[95] ibid.

[96] 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.

[97] 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).

[98] African Charter (n 39) art 30.

[99] ibid.

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

[101] *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). The regional courts in other RECs with OHADA member-states are presently not viable accountability mechanisms. Indeed, 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. 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 <ttps://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.

vindicating SLO norms, parties can now also rely on the ECOWAS Mining Directive, which includes several vital safeguards.

The African Commission hears complaints, known as communications, through which individuals, civil society, and states may file grievances against other states suspected of violating rights arising from the African Charter.[102] 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. It has issued landmark decisions finding notably that states had violated arts 21 and 22 of the African Charter dealing respectively with peoples' "right to free disposal of wealth and natural resources" and the "right to economic, social and cultural development."[103]

Yet, the African Commission's decisions, styled as recommendations, are not legally binding.[104] The African Court and the ECCJ, in theory, are equipped to mitigate this issue as they are empowered to render binding decisions. In practice, such compliance remains wanting, however.

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.[105] 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.[106] This was the Commission's first decision on the merits involving art 21.[107] Importantly, however, Nigeria did not participate in the proceedings and the oil companies avoided scrutiny.[108]

Similarly, in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, again brought by an NGO, the Endorois people, an autochthonous community, complained that they were unable to access resources on their ancestral land since their eviction from the land by the Kenyan government in violation of art 21.[109] 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

[102] African Charter (n 39) 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).
[103] African Charter (n 39) arts 21, 22. *See eg Ogoni Case* (n 42); *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.
[104] Greenspan (n 40) 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).
[105] *Ogoni Case* (n 42) para 58.
[106] ibid.
[107] 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).
[108] ibid 759–60 (stating that the Commission was not competent to give its views about the conduct of the private oil companies).
[109] *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).

22.[110] Despite Kenya's claim that the Endorois people had benefitted immensely from the tourism and mineral prospecting activities,[111] the Commission found that it had violated art 21 and 22.[112]

In its 2009 decision, the Commission referred to the Endorois peoples' right to development under art 22 and found it had been violated.[113] Drawing on the jurisprudence of the Inter-American Court of Human Rights,[114] the Commission found that Kenya had a duty to evaluate whether a restriction of the property rights granted to mining companies were necessary to preserve the survival of the Endorois people.[115] It found that Kenya bore the burden of their displacement and recommended *inter alia* that it pay adequate compensation and royalties to the Endorois. [116] Despite this landmark decision, Kenya has yet to fully implement it and compensate the Endorois.[117]

Though the African Court is equipped to mitigate this issue, compliance with its decisions has been found to be problematic,[118] and access to the court is limited to the African Commission, African states, and intergovernmental organizations.[119] 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.[120] Only four OHADA states, however, have made 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.[121] Moreover, the Protocol establishing the African Court has not been ratified by twenty-four AU states, five of which are OHADA states.[122] Thus, in effect, 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

[110] ibid paras 120, 123.
[111] ibid para 253.
[112] ibid paras 2, 20, 130–32, 135.
[113] ibid paras 267–68, 298.
[114] ibid para 298.
[115] ibid para 267.
[116] ibid paras 297–98.
[117] 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 104) 37–40 (discussing the African Commission's discretion to refer cases of state non-compliance to the African Court).
[118] 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/> accessed on 27 July 2019 (stating that Kenya has yet to implement a 2017 judgment from the African Court finding that Kenya had violated the African Charter).
[119] 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.
[120] Ali (n 119) 261.
[121] ibid. As of this article, only four OHADA member-states have deposited the declaration required under art 34(6) of the Protocol on the African Court to allow NGOs and individuals to access the African Court directly: Benin, Burkina Faso, Ivory Coast, and Mali <http://en.african-court.org/index.php/news/press-releases/item/41-cameroon-becomes-29th-au-member-state-to-ratify-protocol-on-establishment-of-the-african-court> (last modified 1 Sept. 2015) accessed on 10 June 2019.
[122] African Court, available at: http://www.african-court.org/en/ (indicating that Guinea Bissau, Guinea, Equatorial Guinea, CAR, and DRC have not ratified the protocol).

rights decisions and touted as holding perhaps the most promise out of the African sub-regional courts.[123] 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 recognized 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,[124]the ECCJ and the African Court are in their relative infancy. Like their counterparts in the Americas and in Europe, it may take some time for their authorities to be established.[125] But as it stands, some commentators have remarked that the ECCJ "faces an ongoing challenge of securing compliance with its judgments."[126] It is for this reason that several complainants have sought, unsuccessfully, to advance horizontal claims against private individuals.[127] The ECCJ, however, has held on repeated occasions that the only proper defendants before it are ECOWAS member-states.[128]

The 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 suffered by local peoples as a result of extractive operations through the traditional human rights legal recourse, *a fortiori*, seems doubtful. It is befitting then that we examine non-state based or non-judicial accountability mechanisms that reinforce the SLO.

3.2. Overview of Non-State Based Accountability Mechanisms that Safeguard the SLO

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. Non-state-based mechanisms that stress a procedural approach further public participation and assist with monitoring compliance with SLO norms. Yet, if the SLO's components are to be truly effective, a procedural approach should be coupled with a substantive approach that facilitates the enforcement of SLO norms.

---

[123] Daniel Abebe, 'Does International Human Rights Law in African Courts Make a Difference?' (2017) 56 Va J Int'l L 527, 557.
[124] ECOWAS Mining Directive (n 45) art 17. On this point, *see* Ali (n 119) (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*).
[125] Abebe (n 123) 557.
[126] 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).
[127] 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).
[128] ibid.

From the web of legal instruments governing extractive activities in the African extractive sector, there are several non-state-based accountability mechanisms, which favor alternative dispute resolution (ADR) mechanisms 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.). Furthermore, the dispute settlement alternatives found in international investment agreements (IIAs), the primary instruments of international economic law regulating investments in the extractive sector, may unearth overlooked *sources* of judicial and non-judicial remedies (3.2.2.).

3.2.1. The Complaint Mechanisms of MDBs as an SLO Safeguard

The complaint mechanisms established by MDBs are underexplored accountability mechanisms set up to address grievances from peoples and communities affected by projects, including extractives ones, which are co-sponsored by MDBs. [129] Whether in the form of the World Bank's Inspection Panel established in 1993; the IFC/MIGA's Compliance Advisor Ombudsman (IFC's CAO) established in 1999; or the African Development Bank's Independent Review Mechanism (ADB's IRM) established in 2004, these mechanisms emphasize a procedural approach where locals can express grievances regarding extractive projects, often with the assistance of NGOs.[130]

MDBs and their complaint mechanisms have an ambivalent engagement with human rights, however, as they extol their contribution to human rights while avoiding mention of having any human rights obligations.[131] Although the IFC and the ADB's complaint mechanisms do not explicitly acknowledge having human right obligations, they "provide[] an opportunity for greater consideration of human rights obligations and implementation of practical human rights outcomes" than the Inspection Panel of the World Bank.[132] This is likely due to the possibility of mediation and their emphasis on dispute resolution rather than apportioning blame; whereas the review of the World Bank's Inspection Panel is less flexible and more limited to assessing whether its agencies are compliant.[133] Importantly, moreover, the World Bank only lends to governments[134]; whereas the IFC and the ADB lend to private companies, including those in the extractive sector, whose activities, as the SLO's emergence suggests, may severely impact local communities.[135]

Because of their lending activity to private companies in the extractive sector, the IFC's and ADB's complaint mechanisms are of particular interest to assessing non-state-based mechanisms that safeguard the SLO. These complaint mechanisms perform similar

---

[129] 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.
[130] ibid 1291, 1307–8.
[131] 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.
[132] ibid 1151 (cautioning that this "flexibility also can understate the importance of human rights as entitlements that cannot simply be bartered away").
[133] ibid.
[134] Saper (n 129) 1292 (stating that CAO deals "with private-sector projects where the government is no longer a contractual party to the transaction").
[135] 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).

functions.[136] Due to space limitations, however, this section will only provide a brief overview of the IFC's CAO, as it is more utilized and discussed than the ADB's IRM. The 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.[137] It was established because local communities were adversely affected by projects, but lacked a contractual relationship to hold the IFC accountable.[138]

The 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 the IFC's and/or MIGA's performance to assess whether they are in line with their own 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 with reviewing its environmental and social policies, based on its experience in its other roles.[139]

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, which include Social and Environmental Assessment and Management Systems (Performance Standard 1) and Indigenous Peoples (Performance Standard 7).[140] The Performance Standards establish the procedures that borrowers, which often include extractive companies, are required to follow throughout the life of an IFC financed project.[141] Yet, these standards stop short of acknowledging having any human rights obligations.[142] The accompanying guidance notes to these standards, however, retain congruence between human rights law and IFC requirements.[143] 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."[144]

In particular, the IFC's CAO's in its ombudsman and compliance role can assist in scrutinizing the actions of non-state economic actors.[145] The IFC's CAO is meant "to provide a voice to project-affected people, so that the host state, the project company, and the IFC itself are not the only voices in the conversation."[146] As Saper explains:

> "The CAO can use flexible methods to address issues from complaints, including facilitation and information sharing, joint fact-finding, dialogue and negotiation, and

[136] *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).
[137] Saper (n 129) 1281.
[138] ibid 1280.
[139] Macbeth (n 131) 1136-37; Saper (n 129) 1136-37, 1296.
[140] McBeth (n 131) 1139–44.
[141] Saper (n 129) 1285.
[142] McBeth (n 131) 1144.
[143] ibid.
[144] ibid 1143.
[145] Saper (n 129) 1286.
[146] ibid 1288.

> 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. The CAO has the flexibility to work on resolving issues that arise during these processes, even if those issues were not stated in the complaint. The goal of the process is to walk away with an agreement between the complainant and the IFC/MIGA and/or the project sponsor. Such an agreement may include proposals for future action, including remedial action by the IFC/MIGA or the sponsor, and may entail timelines and/or incentives."[147]

Though underexplored, the IFC's CAO is a critical safeguard to the SLO, which emphasizes a procedural approach that promotes public participation and monitors compliance with the 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 actions.[148] An important limitation to accessing the IFC's complaint mechanism, however, is that it is limited to projects financed by the IFC. Moreover, unless the IFC's CAO in its compliance role is empowered to make findings of fault or determinations as to liability (i.e. "declare a project noncompliant and to determine whether compensation and/or cancelation of the project would be warranted),[149] 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 international investment disputes.

3.2.2. The Dispute Settlement Alternatives of IIAs as an SLO Safeguard

IIAs are the primary international legal instruments that regulate investments in the extractive sector. Though the preamble of IIAs typically indicate that they are meant to promote and protect foreign investments, IIAs are best known for introducing dispute settlement provisions, which protect foreign investors and enable them to pursue claims in arbitration against states.[150] Unlike the complaint mechanism of MDBs, however, the dispute settlement alternatives of IIAs are more adversarial. IIAs may enable the use of SLO-related claims by states as defenses or counterclaims in investment arbitration proceedings and may be the source of overlooked remedies.[151]

While they might appear to be foreign to each other, the human right norms that underpin the SLO and the protection of investments are not in "separate worlds."[152] The ultimate concern at

---

[147] ibid 1299.

[148] *See also* 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) 117–18 (discussing operational level grievance mechanisms established by private companies to address local peoples' complaints).

[149] Saper (n 129) 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").

[150] 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).

[151] 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; 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) 125–29.

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

the basis of these areas of international law is the same: protection against the powers of the state.[153] Yet, investment treaties traditionally do not mention human rights.[154] Several arbitral tribunals, in fact, refuse to recognize the relevance of purely human rights claims in the context of investment disputes.[155]

The investment law landscape on the African continent, however, is going through a profound evolution, which has influenced a new generation of bilateral investment treaties and inspired a new set of regional IIAs.[156] This movement aims to incorporate social, environmental and human rights requirements into IIAs.[157] As a result, the region is evolving towards a better balance between the public and private sector, but also between local and foreign interests. These IIAs introduce additional layers of 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.[158]

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. To be clear, states in investment arbitration proceedings, including sub-Saharan African states, are increasingly raising social and environmental defenses to investors' claims in the context of mining-related disputes.[159] Generally, where IIAs allow for such arguments,[160] these defenses are raised to "bar the application of the treaty to investments made in breach of host State's legislation, and as consequence bar an arbitral tribunal from establishing jurisdiction to hear a claim based on an 'illegal' investment."[161] While there is no consensus, the jurisprudence suggests that, depending on the treaty and whether the alleged violation of the host-state's legislation

[153] 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.
[154] Eric de Brabendere, 'Human Rights and International Investment Law' in Markus Krajewski and Rhea Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Cheltenham: 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.
[155] Brabendere (n 156) 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).
[156] 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 Journal of World Investment & 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.
[157] *See* authorities above (n 158).
[158] 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.
[159] 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.
[160] Brabendere (n 156) 14 (explaining that certain tribunals have read a legality requirement into IIAs even in the absence of such clause).
[161] Brabendere (n 156) 13–14.

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 and/or in terms of contributory fault, which would affect the quantum of the award.[162]

As for counterclaims by states alleging that investors violated SLO-related norms, most IIAs are silent regarding counterclaims and very few of them succeed as they are rejected on jurisdictional or admissibility grounds because tribunals are unable to establish, "consent to arbitrate counterclaims in investment treaty language, particularly in the case of counterclaims that are not directly related to the investor's claims."[163] Yet, there is a trend suggesting that the orthodoxy regarding an international law-based responsibility for corporations may be unfolding.[164]

The rise in investment disputes, which involve more considerations of the impact of extractive projects, is a positive sign that the interests of local communities are rightfully inserting themselves into the debate between investors and states. Based on the present framework of IIAs, however, local peoples' interests will largely remain a tool for states and investors to promote their own claims. As a matter of fact, where SLO-related claims are submitted to investment tribunals, these claims are only indirect means of safeguarding the SLO, which tend to be deployed as defenses by respondent states, with mitigated or largely undistinguished direct benefits to local peoples thus far. Indeed, local peoples and communities cannot satisfy the jurisdictional requirements of IIAs; thus, they cannot avail themselves of investors' and state's rights to raise claims. On this point, the 2009 ECOWAS Supplementary Act on Investment (SAI) appears to provide an ignored remedy.

The ECOWAS SAI presents an overlooked *source* for more direct means of safeguarding the SLO. The SAI is a multilateral instrument that applies to the fifteen ECOWAS member-states, eight 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 ECOWAS SAI provides that:

> "In accordance with the applicable domestic law, a host State or private person or organization, 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."

---

[162] ibid 15–16; 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.

[163] 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).

[164] Brabendere (n 156) 3.

Though evidently overlooked, the ECOWAS SAI may serve to overcome some of the principal 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 ECOWAS SAI may present a solution to the invocation and application of human rights treaties and jurisprudence before domestic courts—a significant obstacle and departure from the status quo in many OHADA states, where invoking or giving effect to international norms is wrought with procedural and constitutional obstacles.

Because the ECOWAS 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. It is against this background that 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 investor's 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.[165] If locals are able to invoke the SAI, this risk may provide the incentives for 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 alternative dispute resolution depend on the parties' consent.[166] There is rarely, however, 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 in western Africa, which may compel non-state economic actors to reconsider these disincentives.

4. Conclusion: The Call for a Specialised OHADA Institution to Safeguard Local Peoples' Rights

Our mapping of the safeguarding components of the "social license to operate," as articulated in the jurisdictions of the OHADA zone, reveals that the social, environmental, and human rights considerations encompassed by this concept ultimately remain state-centered. Gradually, however, OHADA member-states are incorporating a stewardship approach to natural resource governance, which elevates the interest of local communities in extractive 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 the state. Indeed, whether states are

[165] 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").

[166] 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).

apprehended as stewards, they can justify the mismanagement of natural resources, if there are no accounting mechanisms available.

In that regard, we demonstrated 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 extractive companies' failure to respect SLO norms, including human rights. As we observed, these mechanisms are deficient in several respects: in terms of considering local peoples' 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 therefore remain fanciful, if there is no adequate institution that is simultaneously competent to hear the grievances of project-impacted communities, designed to be structurally neutral, and empowered to effectively prevent and remedy harms caused by extractive projects.

Achieving neutrality, in a context, which often opposes foreign and local parties, is often facilitated by removing disputes among stakeholders to a regional or international forum, as any domestic court, ombudsman, or regulatory authorities would remain organically tied to the host state and would therefore be under the suspicion of being neither independent nor impartial *vis-à-vis* the state or locals. In this regard, however, 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 and protect local peoples and communities.

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 a strong independence through its activity, which was reinforced with the revised Uniform Act on Arbitration that allows the 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 multi-layered social concerns, as its aim is to promote local peoples' rights during any economic project. Its content cannot therefore be precisely enunciated but will conform to the local specificities of any contemplated project. That being said, we consider that the protection of local communities would be better secured through an independent and adaptive institution than simply through a Uniform Act on Mining or Labour 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 the various stakeholders can walk away with an agreement. And if necessary, it could refer cases to the CCJA to obtain provisional measures applicable throughout the 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 benefit to local communities. However, it would also be beneficial to all stakeholders, including investors, the state, and civil society organizations. It goes without saying that such an institution would constitute a leap forward for the protection of local peoples' rights and would 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 extractive sector, such an institution would help fulfill OHADA's aims of fostering development and instilling confidence in the zone.

ANNEX

INTERNATIONAL & 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. (art1.2)
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. 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 authorization 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:

INTERNATIONAL & REGIONAL NORMS	PRIMARY SLO-RELATED PROVISIONS
	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 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 colonization 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) 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, utilization or exploitation of mineral, water or other resources.

INTERNATIONAL & REGIONAL NORMS	PRIMARY SLO-RELATED PROVISIONS
	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)
ECOWAS Directive on the Harmonization 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)

INTERNATIONAL & REGIONAL NORMS	PRIMARY SLO-RELATED PROVISIONS
	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 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)