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**Responsible Land Governance:
Towards an Evidence Based Approach**
ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017



**MECHANISMS FOR CONSULTATION AND FREE, PRIOR AND INFORMED
CONSENT IN THE NEGOTIATION OF INVESTMENT CONTRACTS**

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Abstract

Investor-state contracts are regularly used in low- and middle-income countries to grant concessions for land-based investments, such as agricultural or forestry projects. These contracts are rarely negotiated in the presence of, or with meaningful input from, the people who risk being adversely affected by the project. This has serious implications for requirements for meaningful consultation, and, where applicable, free, prior, and informed consent (FPIC), and is particularly important in situations in which investor-state contracts grant the investor rights to lands or resources over which the community has legitimate claims.

The paper explores how consultation and FPIC processes can be integrated into investor-state contract negotiations, taking into account the practicalities of contract negotiations, to better safeguard the land rights and human rights of members of project-affected communities. Based on a review of relevant international law standards and guidance documents, as well as a close analysis of typical investor-state negotiations and of consultation and consent processes in other contexts, the paper provides various options that may be appropriate, depending on the local context and the community's resources and decision-making structures.

Key words:

Consent, Consultation, Contracts, Investment, Negotiations

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Introduction

In many places, natural resource investments that involve concessions or leases for large swathes of land can pose significant threats to the land rights and human rights of local communities and their members. International law and guidance documents require meaningful consultation with, and in some cases the free, prior, and informed consent (FPIC) of, project-affected communities, and much work has been done to articulate how this can be implemented in practice. Yet one area that is less explored is whether, and if so how, FPIC and consultation processes can be built into negotiations of the investor-state contracts that grant concessions or lease land to investors.¹

Investor-state contracts are regularly used in low- and middle-income countries to grant concessions or provide leases for natural resource investments, including agricultural, forestry, and extractive industry projects. These contracts, which are negotiated between host governments and investors, typically allocate rights to access and develop land and/or resources for the investment project, in exchange for revenue (through land rents, taxes, and other fees) and other potential benefits to the host government. They are rarely negotiated in the presence of, or with meaningful input from, the people who risk being adversely affected by the project, including those with legitimate claims to the lands or resources underlying the project. In such scenarios, requirements for meaningful consultation and, where applicable, FPIC—whether under international law, domestic law, or industry or finance-related standards—will often not be satisfied.

In other cases, domestic laws may require investors seeking access to land or resources to negotiate directly with community representatives or local authorities, rather than with the host government. This is more common for agricultural and forestry concessions than for extractive projects, as governments usually retain rights to sub-surface minerals under domestic law. Scenarios where investors must negotiate directly with community representatives or local authorities are outside the scope of this paper. That said, it should not be taken for granted that government obligations to ensure that community members have been consulted or, where relevant, have provided their FPIC to any transaction merely because a chief or other community representative or local authority was a party. On the contrary, such negotiations can concentrate power into the hands of local leaders who may not always be incentivized to act in the interests of the community, or to ensure the community remains abreast of developments and has

¹ This paper also uses the term ‘companies’ to refer to investors who seek to establish, or actually carry out, a natural resource project in a host country.

provided its consent to proceed. In such cases there should therefore be a concerted effort to ensure that community members are adequately consulted and, where relevant, have provided their consent.

Of course, respect for FPIC goes far beyond simply inserting consent processes into an anticipated or ongoing negotiation between a host government and investor. FPIC, distilled to its essence, is about the right of indigenous people, and at times other communities, to decide for themselves how their lands and resources are used. To the extent that FPIC is required, communities must have far greater say in such decisions, including before the government decides on, or grants any authorizations for, a proposed investment project. Similarly, for consultation to be meaningful, communities must have the opportunity to shape decision-making on projects that will affect them. This, too, requires more than simply meeting with communities to discuss a proposed project in general terms, and should allow sufficient time for community perspectives to be incorporated into any decision-making regarding the proposed project. This paper thus considers consultation and FPIC processes tied to contract negotiations as mechanisms for continuing to ensure respect for rights to meaningful consultation and to FPIC, which require iterative and evolving processes; it does not advocate for such processes being the first or only opportunity for community input into decision-making.

After a spike in the negotiation of land deals for agricultural projects in the last decade, the “global rush for land” appears to be slowing—with a decrease in the reported number of investment contracts concluded between investors and host governments each year—though not stopping.² Development of new projects in the extractive industries also slowed in response to the dramatic drops in commodities prices that began midway through 2014, following the “commodity supercycle”.³ This creates a window of opportunity for developing better consultation and FPIC practices in relation to investment contract negotiations between investors and governments, by ensuring that communities whose lands or resources risk being affected are informed, and have the opportunity to participate in and influence decision-making regarding such negotiations. This paper does not endorse investment contracts as an optimal means of regulating resource investments; rather, it acknowledges the prevalence of such contracts in

² Kerstin Nolte et al, *International Land Deals for Agriculture: Fresh insights from the Land Matrix: Analytical Report II* (2016), 12.

³ Lisa Sachs and Nicolas Maennling, “Resource Resilience: How to Break the Commodities Cycle,” *World Politics Review* (2015), <http://www.worldpoliticsreview.com/articles/15848/resource-resilience-how-to-break-the-commodities-cycle>; Thomas Lassourd and David Manley, “Guest post: 10 consequences of the commodity crash,” *beyondbrics* (2015).

current practices, and the need to ensure that governments comply with their consultation and FPIC obligations at the contract negotiation stage for as long as such contracts regulate such investments.

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

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

Consultation and FPIC – in standards and in practice

Rights underpinning the need for consultation

Human rights principles set out various entitlements to information and participation for communities who may potentially be affected by a natural resource investment. These and other rights can be interpreted as requiring governments to meaningfully consult with such communities. Key elements of consultation for communities in the context of a natural resource

project that risks affecting them include: having access to all relevant information regarding the project in a understandable format; having the opportunity to deliberate internally and communicate community priorities to the government and investor; and being able to participate in and influence relevant decisions regarding the project to the extent that such decisions will affect the community's rights or lands or resources.

All community members have a right to information; this is found in the protection of freedom of expression, which includes the freedom to seek and receive information.⁴ The Inter-American Court of Human Rights has held that this right establishes a positive obligation on states to provide information of public interest upon request,⁵ which can include information regarding foreign investment contracts.⁶ In the context of a natural resource investment, the right to information may cover information regarding the project's impacts on the environment,⁷ the fulfillment of mandates by public bodies concerned with investment,⁸ and the project's health impacts.⁹

Potentially affected communities also have a right to take part in public affairs,¹⁰ which under the International Covenant on the Elimination of All Forms of Racial Discrimination extends beyond voting and standing for election to include participation of ethnic minorities in “the conduct of public affairs at any level.”¹¹ The UN High Commissioner for Human Rights, while not a source of binding jurisprudence, has interpreted the right to take part in public affairs as including entitlements “to be fully involved in and to effectively influence public decision-making processes that affect them,”¹² and “to be consulted and to be provided with equal and effective

⁴ ICCPR, art 19.2.

⁵ *Case of Claude Reyes v. Chile*, 2006 Inter-American Court of Human Rights (ser. C) No. 151, 19, September 2006, 41 (applying Art 9(1) of the American Convention on Human Rights, which uses identical language, namely that “Every individual shall have the right to receive information”).

⁶ *Case of Claude Reyes v. Chile*, *supra*, para. 73.

⁷ *Case of Claude Reyes v. Chile*, *supra*, para. 73; Mrs Fatma Zohra Ksentini, Special Rapporteur to the Commission on Human Rights, *Human Rights and The Environment*, 6 July 1994, UN Doc. E/CN.4/Sub.2/1994/9, paras. 180, 203-216.

⁸ *Case of Claude Reyes v. Chile*, *supra*, para. 73.

⁹ Committee on Economic, Social and Cultural Rights, *General Comment 14 on the Right to Health*, U.N. Doc. E/C.12/2000/4 (2000), paras. 8, 11, 44.

¹⁰ ICCPR, art. 25. For a more detailed discussion of this right as it applies to transparency in land investments see Jesse Coleman and Kaitlin Cordes, *Articulating a Rights-Based Argument for Land Contract Transparency* (forthcoming), <http://csi.columbia.edu/work/projects/transparency-in-land-based-investment/>.

¹¹ International Covenant on the Elimination of All Forms of Racial Discrimination, art. 5(c).

¹² Office of the UN High Commissioner for Human Rights, *Report on the Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them* (2015) UN Doc. A/HRC/30/26, para. 9.

opportunities to be involved in decision-making processes on all matters of public concern.”¹³

The Inter-American Court has also upheld rights of communities with a “special relationship” to the land, such as those who draw spiritual or cultural importance from the land, to effectively participate in decisions affecting their lands and resources.¹⁴

FPIC requirements

The FPIC requirement features many of the elements discussed under consultation, above, while also places additional control in the hands of relevant communities by focusing on the provision of the community’s consent. This element can change power dynamics with governments or investors, increasing the community’s bargaining power. Requiring governments to obtain a community’s consent also encourages consultations to be conducted with a view to reaching consensus, which can help to ensure consultations are meaningful, and that community perspectives are actually incorporated into proposals regarding project design.

Governments’ legal obligations regarding FPIC often extend far beyond what is commonly acknowledged by governments themselves. Obligations to obtain the FPIC of indigenous and tribal communities in the context of projects that stand to affect their access to lands, territories and resources are contained in various treaties and guidelines. The consent requirement for governments contemplating relocation of an indigenous people in the ILO’s Convention concerning Indigenous and Tribal Peoples in Independent Countries¹⁵ is the only legally binding international treaty provision that explicitly discusses consent as it may apply in the context of natural resource-based investments. However, most states have ratified at least one, and often many more, treaties that have been authoritatively interpreted to require FPIC. These include the International Covenant on Civil and Political Rights,¹⁶ the American Convention on Human Rights,¹⁷ and the African Charter on Human and Peoples Rights,¹⁸ among other treaties. Rights

¹³ Office of the UN High Commissioner for Human Rights, *Report on Factors that impede equal political participation and steps to overcome those challenges* (2014) UN Doc. A/HRC/27/29, para. 89.

¹⁴ Inter-American Court of Human Rights, *Case of the Moiwana Community v. Suriname*, Judgment of June 15, 2005, paras. 131-134; Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, Judgment of November 28, 2007, paras. 82-86.

¹⁵ International Labour Organization, *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (“ILO C169”), June 27, 1989, 1650 U.N.T.S 383, Art 16(2). The article goes on to set out alternative requirements for when such consent cannot be obtained.

¹⁶ *Ángela Poma Poma v. Peru*, Human Rights Committee, Communication No. 1457/2006, 27 March 2009, U.N. Doc. CCPR/C/95/D/1457/2006, para. 7.6.

¹⁷ Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, (Ser. C) No. 172, Judgment of November 28, 2007, para. 129.

that have been regarded as forming a basis for FPIC include minority rights to enjoy culture,¹⁹ freedom of religion,²⁰ and rights to self-determination,²¹ property and resources,²² and development,²³ among others. The United Nations' Committee on Economic, Social and Cultural Rights and Committee on the Elimination of Racial Discrimination have also recommended that consent processes apply in the context of non-indigenous communities, including "local communities,"²⁴ "ethnic groups,"²⁵ "afro-Colombian people,"²⁶ and "vulnerable communities, including pastoralist and hunter-gatherer communities."²⁷ FPIC requirements for any project affecting an indigenous people's lands, territories or other resources are also contained in the United Nations Declaration on the Rights of Indigenous Peoples, which is not technically binding, but is regarded as synthesizing various customary international law principles; similar FPIC requirements are echoed by the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests ("Voluntary Guidelines"),²⁸ another soft law document.

How FPIC is implemented in practice will vary from case to case, but some core components are required. The government is obligated to engage directly with the community through the community's own representative decision-making structures, and to make good faith efforts to reach agreement on just terms.²⁹ The government must also find ways to mitigate power

¹⁸ African Commission on Human and Peoples' Rights, 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, para. 291 (May 2009).

¹⁹ *Ángela Poma Poma v. Peru*, *supra*, para. 7.7; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, *supra*, para. 251.

²⁰ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, *supra*, para. 173.

²¹ International Law Association, *Resolution No. 5/2012: Rights of Indigenous Peoples*, section I, para. 5 (concluding that states are obliged by "customary and applicable convention international law" to ensure FPIC and the rights to participation and consultation as a prerogative of the obligation to recognize and promote the right of indigenous peoples to autonomy or self-government); Cathal Doyle and Jill Cariño, *Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector* (2013), <http://www.ecojesuit.com/wp-content/uploads/2014/09/Making-FPIC-a-Reality-Report.pdf>; Emily Greenspan, *Free, Prior, and Informed Consent in Africa: An emerging standard for extractive industry projects* (2014), 5.

²² *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, *supra*, paras. 162, 238, 268, 291.

²³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, *supra*, paras. 291, 298.

²⁴ Committee on Economic, Social and Cultural Rights, *Concluding Observations - Mexico*, UN Doc. E/C.12/MEX/CO/4, June 9, 2006, para. 28.

²⁵ UN Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations - Lao People's Democratic Republic*, UN Doc. CERD/C/LAO/CO/15, April 18, 2005, para. 18.

²⁶ Committee on Economic, Social and Cultural Rights, *Concluding Observations - Colombia*, UN Doc. E/C.12/COL/CO/, June 7, 2010, para. 9.

²⁷ Committee on Economic, Social and Cultural Rights, *Concluding Observations on the initial to 3rd reports of the United Republic of Tanzania*, UN Doc. E/C.12/TZA/CO/1-3, December 13, 2012, para. 22.

²⁸ U.N.G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (2007) ("UNDRIP"), Art 32(2).

²⁹ *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent*, UN Doc. E/C.19/2005/3, endorsed by the UN Permanent Forum on Indigenous Issues (2005), para. 47; James Anaya and Sergio Puig,

imbalances between the community and other actors, such as investors, to ensure that any consent obtained is “free” from coercion or manipulation.³⁰ Consultation and consent processes must be conducted sufficiently “prior” to the granting of authorizations and the commencement of the project, with relevant information regarding the project provided in an accessible format so that the community is “informed.”³¹ For the FPIC standard to be met, the government must also obtain the community’s “consent.” The Inter-American Court of Human Rights, regional human rights commissions, and United Nations experts have found that proceeding with a project where consent was not provided³² breached the FPIC standard.³³

While governments are the primary duty-bearers of obligations under international human rights law, businesses have responsibilities to respect human rights, which includes respect for FPIC rights. More generally, soft law instruments like the UN Guiding Principles on Business and Human Rights (UNGPs) set out the need for strong human rights due diligence and consultation processes.³⁴ The Principles for Responsible Contracts, annexed to the UNGPs, also emphasize the need for an “effective community engagement plan through [the project’s] life cycle.”³⁵ Outside of explicit human rights frameworks, businesses have increasingly embraced commitments to FPIC, both through certifications schemes and through specific company policies. These FPIC commitments often apply to all local communities. For example, the Forest Stewardship Council’s International Standard³⁶ and the Roundtable on Sustainable Palm Oil’s

Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples | *Arizona Legal Studies Discussion Paper No. 16-42* (2016), 23-24.

³⁰ *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent*, *supra*, para. 46(i); Anaya and Puig, *supra*, 23-24.

³¹ *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent*, *supra*, para. 46(i); Anaya and Puig, *supra*, 24.

³² For a contrary view regarding the requirement to obtain consent, see Anaya and Puig, *supra*, 2 and 18 (focusing on FPIC as a duty for meaningful consultation, which acts as a balancing function to mitigate adverse impacts on the human rights of indigenous peoples) and Former Special Rapporteur on the rights of indigenous peoples, James Anaya, *Extractive industries and indigenous peoples*, UN Doc. A/HRC/24/41 (1 July 2013), paras. 31-36 (discussing exceptions to the general FPIC requirement).

³³ Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*, (Ser. C) No. 172, para. 134; *Centre for Minority Rights and Development & Others v Kenya* (2009) AHRLR 75, para. 291; Inter-American Commission on Human Rights, *Indigenous peoples, Afro-descendent communities, and natural resources: Human rights protection in the context of extraction, exploitation, and development activities* (2016), 93; Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. E/CN.4/2003/90, (2003), para. 66; Emily Greenspan, *The right to say “No”: Indigenous rights experts weigh in on community consent* (2015) (quoting Inter-American Commission on Human Rights chair Rose-Marie Belle Antoine and United Nations special rapporteur on the rights of indigenous peoples Victoria Tauli-Corpuz).

³⁴ U.N. Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc. A/HRC/17/31 (Mar. 21, 2011), para. 18(b).

³⁵ U.N. Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, UN Doc. A/HRC/17/31/Add.3 (2011), p. 24.

³⁶ Forest Stewardship Council, FSC® International Standard, FSC Principles and Criteria for Forest Stewardship, FSC-STD-01-001 V5-1 EN, Art. 4.8.

Principles and Criteria for Sustainable Palm Oil Production³⁷ set out FPIC requirements for all relevant local communities for different aspects of forestry and palm oil concessions, respectively. Individual food and beverage companies have also made overarching commitments to FPIC.³⁸

Consultation and FPIC standards relating to contract negotiations

This paper seeks to develop ideas around the potential means of operationalizing consultation and FPIC in the negotiation of investment contracts for natural resource projects. This is needed: although several guidance highlight the need for consultation with, or informed participation of, affected communities in the negotiation of investment contracts, none provide detailed guidance on how this could be undertaken in practice. Moreover, while guidance documents exhort that legitimate tenure right holders be included in project design or negotiations, they too do not explain the mechanisms for how this would occur or the link to investor-state negotiations.

For example, one set of principles that provides some guidance specific to investment contracts is the Principles for Responsible Contracts, which set out that “consultation with the affected communities and individuals should take place before the contract is finalized.”³⁹ These Principles also emphasize the need for community engagement plans, but do not explore in great detail the specific consultation and FPIC processes that could be employed for contract negotiations. Similarly, the African Union’s Guiding Principles on Large Scale Land Based Investments in Africa also assert that communities affected by large-scale land-based investment should be “provided sufficient information, consulted on their views prior to finalizing [large-scale land-based investment] agreements and [have] these views taken into consideration.”⁴⁰ The Voluntary Guidelines also note that “[a]ll forms of transactions in tenure rights as a result of investments in land, fisheries and forests should be done transparently” and that “[c]ontracting parties should provide comprehensive information to ensure that all relevant persons are engaged and informed in the negotiations, and should seek that the agreements are documented and

³⁷ Roundtable for Sustainable Palm Oil, *Principles and Criteria for Sustainable Palm Oil Production* (2007), Criteria 2.3, 7.5 and 7.6.

³⁸ See, e.g., Coca-Cola Company, *The Coca-Cola Company Commitment - Land Rights and Sugar* (stating that “[t]he Coca-Cola Company will adhere to the principle of Free, Prior and Informed Consent across our operations (including bottling partners) and will require our suppliers to adhere to this principle.”), <http://assets.coca-colacompany.com/6b/65/7f0d386040fcb4872fa136f05c5c/proposal-to-oxfam-on-land-tenure-and-sugar.pdf>.

³⁹ *Principles for Responsible Contracts*, *supra*, Principle 7, at 24.

⁴⁰ African Union, African Development Bank and United Nations Economic Commission for Africa, *Guiding Principles on Large Scale Land Based Investments in Africa* (2014), Principle 9, at 15. See also p. 13: “In order that decisions on LSLBI respond to local and national development priorities, devolution of decision-making authority to appropriate levels, meaningful participation by those affected by the investments in decision-making are required along with transparency throughout the negotiation, approval, contracting and implementation process.”

understood by all who are affected.”⁴¹ In addition, in 2009 the then-UN Special Rapporteur on the right to food highlighted that it is “vital that the negotiations leading to [large-scale land acquisitions and leases] comply with a number of procedural requirements ensuring informed participation of the local communities.”⁴²

Many other operational guidance documents also usefully stress the importance of including affected communities and legitimate tenure right holders in negotiations for land-based investments. The *Guide to due diligence of agribusiness projects that affect land and property rights*, prepared by the Technical Committee on “Land Tenure and Development,” discusses pertinent considerations in this regard, including whether local people were consulted and involved in negotiations, whether the contract were made public, and whether local authorities or representatives of local people were co-signatories to the contract, and whether local people were invited to participate in the process of negotiating the contract and commenting on draft versions of the contract.⁴³ Other documents underline the importance of consultation and participation but are vague regarding whether and how this should interact with investor-state negotiations regarding such investments. For example, the USAID *Operational Guidelines for Responsible Land-Based Investment* urge investors to “include in negotiations those who use or claim the land [...], even if their rights are not formally recognized.”⁴⁴ Similarly, the New Alliance for Food Security and Nutrition’s *Analytical Framework for Land-Based Investments in African Agriculture* notes that investors should “[i]dentify those who legally own the land, as well as those who have other legitimate rights over the land,” “[i]nclude both groups in negotiation, even if only legal owner signs the contract,” and “[e]nsure that the entity or person signing the contract has legal authority to do so.”⁴⁵ These suggestions raise interesting questions regarding how to incorporate legitimate right holders in negotiations, whether negotiating separate side agreements would suffice, and what type of influence legitimate right holders might have in such processes if they are not allowed to sign the contract.

⁴¹ FAO, *Voluntary Guidelines On The Responsible Governance Of Tenure Of Land, Fisheries And Forests In The Context Of National Food Security* (2012), paras. 12.3, 12.11.

⁴² Prof. Oliver de Schutter, UN Special Rapporteur on the Right to Food, *Largescale land acquisitions and leases: a set of minimum principles and measures to address the human rights challenge* (2009), 13.

⁴³ Technical Committee on “Land Tenure and Development,” *Guide to due diligence of agribusiness projects that affect land and property rights* (2014), 25-27, 61-63, <http://www.foncier-developpement.fr/wp-content/uploads/Guide-to-due-diligence.pdf>.

⁴⁴ Karol Boudreaux and Yuliya Neyman, USAID, *Operational Guidelines for Responsible Land-Based Investment* (2015), 37

⁴⁵ New Alliance for Food Security and Nutrition, *Analytical Framework for Land-Based Investments in African Agriculture: Due Diligence and Risk Management for Land-Based Investments in Agriculture* (2015), 12.

A proviso: consultation and FPIC processes must take place before authorization, and should be iterative

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

First, only seeking to consult or obtain consent when an investment contract is being negotiated would be too late in the process to comply with legal standards and best practices. Rather, consultation and FPIC processes should commence prior to any authorization,⁴⁶ and not only when the need arises to obtain the community's approval.⁴⁷ In practice, a meaningfully consultative and participatory process will entail informing and consulting with affected communities, and when relevant obtaining their FPIC, before any permits are granted as well as well before the negotiation of any investment contract. There are also practical reasons for why this is important. As time passes, and investors spend more money on preparations for a project, governments will face increasing pressure to approve the project, and may find it difficult to require alterations or cessation of the project where local and public interests may be at risk. In addition, communities who are only brought in at the stage of contract negotiations may struggle to acquaint themselves with the project's implications and to access funding, information, and capacity support to meaningfully participate in negotiations. Thus, not engaging with the community from the beginning may cause delays and create barriers to building consensus, managing expectations, and obtaining the community's social license to operate.⁴⁸

Second, obtaining consent and consulting communities is not an obligation that can be fully and finally satisfied at any one point in time; instead, consent and consultation processes should take place regularly as part of "a continuous, iterative process of communication and negotiation spanning the entire planning and project cycles."⁴⁹ Given the iterative nature of the consultation and FPIC standards, a government's obligations do not expire as soon as consent is obtained.⁵⁰

⁴⁶ *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent*, *supra*, para. 46(i).

⁴⁷ FAO, *supra* (2016), 15.

⁴⁸ Anaya and Puig, *supra*, 12.

⁴⁹ World Commission on Dams, *Dams and Development: A new framework for decisionmaking* (2000), 281, https://www.internationalrivers.org/sites/default/files/attached-files/world_commission_on_dams_final_report.pdf.

⁵⁰ Anaya and Puig, *supra*, 15.

Continuous consent and consultation ensure a greater degree of participation and control for communities, and improve communication between them and government and company representatives; this helps to safeguard the human rights that underlie consent and consultation requirements,⁵¹ potentially including rights to self-determination, water, health, and food, among others.

This paper's consideration of consultation and FPIC at the contract negotiation stage will thus only be relevant where: (i) the community has initially provided its FPIC to the project or to being relocated sufficiently prior to contract negotiations; or (ii) where the government permissibly determines that consent is not required, and discharges the burden of demonstrating that no rights are being limited or affected or, if they are, that the limitation is permissible under established international human rights law and "compl[ies] with certain standards of necessity and proportionality with regard to a valid public purpose."⁵² The instances in which a government can make such a determination is a matter of unsettled debate and is not considered further in this paper. Where such a determination is permissibly made, best practices still require robust consultation processes prior to any authorization or commencement of activities; as such, the options explored in this paper will still be relevant to such situations.

Consultation and FPIC in practice

Many communities have organized to articulate demands and advocate to governments and companies regarding the shape that FPIC (and consultation) processes can take. Key to these enactments has been a focus on FPIC as a means of community-driven decision-making and a vehicle for self-determination;⁵³ this emphasizes self-determination's "internal aspect," which

⁵¹ Anaya and Puig, *supra*, 14.

⁵² Former Special Rapporteur on the rights of indigenous peoples, James Anaya, *Extractive industries and indigenous peoples*, UN Doc. A/HRC/24/41 (1 July 2013), paras. 31-36; Anaya and Puig, *supra*, 27. Such a determination may also need to be subject to independent judicial review: UN Doc. A/HRC/24/41, paras 39 and 87; FAO, *Voluntary Guidelines On The Responsible Governance Of Tenure Of Land, Fisheries And Forests In The Context Of National Food Security* (2012), para. 16.1. For examples of such limitations on consent and consultation requirements, see ILO C169, art. 16(2) ("Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned"); and UNDRIP, art. 46(2) ("The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.").

⁵³ Doyle and Cariño, *supra*, 15 and International Law Association, Resolution No. 5/2012: Rights of Indigenous Peoples, section I, para. 5 (concluding that states are obliged by "customary and applicable convention international

includes the “rights of all peoples to pursue freely their economic, social and cultural development without outside interference.”⁵⁴

One approach that communities have used to enact the right to self-determination has been the development of community protocols, which set out culturally appropriate ways for external actors to interact with a community, and processes for seeking to obtain its consent.⁵⁵ Many community protocols have been developed in anticipation of potential projects or events, allowing the community to proactively set the agenda for how decisions regarding their lands and resources will be made. Communities within the Indigenous reserve of Cañamono Lomapretia in Colombia, for instance, developed a protocol that sets out detailed consultation procedures and requirements that must take place prior to any administrative act, including the granting of concessions and permissions for investment projects within the reserve.⁵⁶ The protocol, while not intended to only apply to extractive projects, goes so far as stating that the communities have made a pre-determined decision to withhold consent for large-scale mining or mining that uses cyanide or mercury.⁵⁷ Other communities have developed protocols as a response to existing impacts by extractives projects, setting rules and processes for ongoing or future projects.⁵⁸ Such protocols will be most effective when developed in advance of a project. They can also be initiated at other stages of the investment project—to help communities build capacity and organize, and to assist external actors to engage appropriately with the community—though they won’t be able to ensure that the FPIC standard is complied with at the earliest stages of decision-making in such circumstances.⁵⁹

In organizing to engage in FPIC and consultation processes, some communities have also sought to democratize their representation. This has included developing processes for community members to elect community liaison committees and any representatives participating in negotiations with the host government and the investor.⁶⁰ In other instances, communities have

law” to ensure FPIC and the rights to participation and consultation as a prerogative of the obligation to recognize and promote the right of indigenous peoples to autonomy or self-government).

⁵⁴ Committee on the Elimination of Racial Discrimination, *General Recommendation 21, The right to self-determination* (Forty-eighth session, 1996), UN Doc. A/51/18, annex VIII (1996) at 125.

⁵⁵ See, e.g., Doyle and Cariño, *supra*, 29-40; Jael Makagon et al, *Balancing the Scales: Community Protocols and the Extractive Industries – Lessons from Argentina, India, Kenya and Zimbabwe* (2016), https://za.boell.org/sites/default/files/balancing_the_scales.pdf; and Viviane Weitzner, “Dealing Full Force”: *Lutsel K’e Dene First Nation’s Experience Negotiating with Mining Companies* (2006), 33-34.

⁵⁶ Doyle and Cariño, *supra*, 28.

⁵⁷ Doyle and Cariño, *supra*, 28.

⁵⁸ Makagon et al, *supra*, 5-6.

⁵⁹ Makagon et al, *supra*, 10.

⁶⁰ Weitzner, *supra*, 7.

used national and local legal frameworks to hold referenda regarding whether or not a proposed project should be allowed to proceed.⁶¹

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

Negotiating investment contracts

The negotiation process

Investors and host states enter into various types of contracts for natural resource projects; most are negotiated before project operations begin. In addition to concluding contracts, an investor will typically conduct feasibility studies, carry out scoping of the project's potential environmental or social impacts, and seek to obtain finance and the necessary permits needed for the project under domestic law. Whether the investment contract is negotiated before or after these steps will depend in large part on the domestic law and the purpose of the contract.

Investment contract negotiations differ in terms of length, and the number of negotiation sessions and persons involved. In some cases, there can be multiple contracts between the same parties for the one project: for example, the investor and the government might decide to negotiate an investment incentives contract, a concession or lease agreement, and various side agreements. (They also will often negotiate additional contracts with other actors—for example, lenders that provide financing to the project, suppliers of goods and services necessary for operations, and purchasers of crops produced/resources exploited.) In addition, parties may subsequently renegotiate or amend relevant contracts based on changes in circumstances. The time that a negotiation for any particular contract or set of contracts takes will depend on the complexity of the project, and the extent to which those negotiating in the room have the authority to sign off on commitments proposed, among other factors. In some cases—including

⁶¹ Brant McGee, "The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development," *Berkeley Journal of International Law*, Vol 27:2 (2009), 573.

for some investment contracts regulating complex extractive projects⁶²—negotiations can take years; in other cases, negotiated agreements barely differ from investment contracts previously negotiated in the country with other investors, potentially indicating that they were the result of a much shorter negotiation period.

Negotiations themselves are unpredictable, as a government and investor might have widely varying expectations for the contract. The style of negotiations can also vary depending on the priorities of those participating and their ability to control the negotiation process. For instance, negotiations can be “rents-based,” focusing on the “economic equilibrium of the contract,” including the maximization of profits and the minimization of costs; alternatively, parties can work towards an “interests-based” negotiation, where the negotiations seek to incorporate the interests (financial and non-financial) of each party or stakeholder.⁶³

Status quo: Inadequate consultation and FPIC processes

Governments and investors typically negotiate investment contracts without the knowledge, consent, or participation of communities that stand to be affected by the investment. This will usually fail to satisfy requirements for meaningful consultation and, when relevant, FPIC, given the need for consultation and FPIC processes to be conducted iteratively, as discussed above. Mere advance notification that there will be negotiations, and the provision of general information about the proposed investment will also often be inadequate, unless opportunities also exist for the community to communicate its perspective and influence the substance of negotiations. Such an approach also fails to provide opportunity for communities to react to unforeseen changes in negotiations.

A lack of community involvement in negotiations provokes additional concerns when the contract requires the investor to subsequently negotiate a community development agreement with the community, or to deliver social benefits: the community’s absence during the investment contract negotiations may undermine its bargaining power in any subsequent community-investor negotiations, as the parameters of the investment itself have already been set. In addition, the absence of community input increases the risk that any local development requirements in the

⁶² David Kienzler et al, *Natural Resource Contracts as a Tool for Managing the Mining Sector*, 4 (“The agreement for the Simandou iron ore project in Guinea took a number of years, in part due to negotiations over the 650km railway and deep-sea port the project required and their availability for third-party access.”)

⁶³ Carin Smaller et al, *The IISD Guide to Negotiating Investment Contracts for Farmland and Water* (2014), 12, http://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water_1.pdf.

investment contract will not be appropriately adjusted to the rights or priorities of the community, and will instead be determined, and will be subject to trade-offs and compromise made, by stakeholders less familiar with the community's needs and with different agendas and priorities than the community.

Will communities want to be involved?

In considering the potential for greater community participation and influence in investment contract negotiations, the question arises: will communities even want to be involved? Given that revenue sharing, local employment creation, and other benefits could be negotiated between the community and the company directly in a separate agreement, why would communities be interested in the negotiation of the overarching investment contract? While this will be for the community to decide in each case, there are at least three potential advantages for community members in participating in investment contract negotiations.

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

Investment contracts also often detail the specific business model that a project will take, which in turn can affect the amount of revenue that will be shared with the community or the number of local jobs created through a community development agreement, as well as more general impacts on local land use, sources of livelihood, and the environment. Take, for instance, a recent study of the oil palm and rubber operations of Sime Darby in Liberia. The report viewed the company's large-scale land concession model as "at a crossroads,"⁶⁴ and detailed three potential ways forward for the company to pursue: Scenario A involved developing the company's full

⁶⁴ Barbara Kuepper et al, *Sime Darby: Liberian Crossroads* (2016), <https://chainreactionresearch.files.wordpress.com/2014/02/sime-darby-161101-final.pdf>.

concession without obtaining FPIC of affected communities; Scenario B involved proceeding with the investment but respecting buffer zones, obtaining FPIC, and preserving forests; and Scenario C involved ceasing to expand the company's own plantations and instead transitioning to an outgrower model and relying on small-scale farmers.⁶⁵ The potential variations in the company's business model for the project would also have very different impacts on local communities. (Scenario A or B could also include additional outgrower commitments, in addition to the larger plantation operations, which would potentially be of interest to the communities that stand to be affected.) Given that a project's business model is often outlined in an investment contract, local communities might therefore wish to participate in investment contract negotiations, to advocate for specific models that best meet their needs, and to warn against models that may be particularly disruptive to the community.

Second, the community's being able to influence the negotiation of investment contracts can also create the opportunity to advocate for greater enforceability mechanisms for any related community development agreement. Depending on the mode of consultation or consent, communities could: advocate for the inclusion of a clause in the investment contract that deems relevant company breaches of the community development agreement to constitute breaches of the investment contract; advocate for clauses that make the community a third party beneficiary with enforceable rights; or, where the community is to be a party to the investment contract, potentially⁶⁶ fold the substance of a community development agreement into the investment agreement.

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

⁶⁵ Kuepper et al, 1 and 10-12.

⁶⁶ Further research would be needed to fully understand the potential benefits and drawbacks of having only one agreement that acts as both a tripartite investment contract and a community development agreement.

Modes of consultation and FPIC for investment contract negotiations

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

Ensuring that the community has a say

The decision as to which mode of consultation or consent is most appropriate will vary from case to case, and should correspond with the community's expressed preference. The government should thus consult with the community regarding how it should participate in investment contract negotiations, taking into account the community's internal organization and decision-making structures.⁶⁷ Such an approach is especially important for indigenous communities and ethnic minorities, whose right to self-determination extends to having the right to pursue freely their economic, social and cultural development without outside interference.⁶⁸ Consultation on the question of participation should also include opportunities for representatives of marginalized subgroups to contribute their perspective.

Key to any mode of community participation will be the allocation of sufficient resources and time for the community to prepare itself to be able to decide on its preferred mode of participation, to adequately prepare and decide on key priorities within the community, and then to meaningfully participate. This may require capacity building—potentially on topics including contract negotiations, human rights, the type of project proposed, internal decision-making, representation and consultation with different subgroups, and so on—as well as access to legal

⁶⁷ Ute Dieckmann and Ben Begbie-Clench, "Chapter 19: Consultation, Participation and Representation," in Ute Dieckmann et al, *"Scraping the Pot": San in Namibia two decades after independence* (2014), 597-598 (noting the discussion by the ILO's Senior Specialist on Indigenous and Tribal Peoples' Issues, Dr Albert Barume, of the need for "Designing with the participation of indigenous peoples the consultation and participation framework and mechanism [...] (consultation on consultation)").

⁶⁸ UNDRIP, arts. 3-4; Committee on the Elimination of Racial Discrimination, *General Recommendation 21, The right to self-determination* (Forty-eighth session, 1996), UN Doc. A/51/18, annex VIII (1996) at 125, para. 4 (referring to the right to self-determination's "internal aspect").

and other support, and access to sufficient information regarding the proposed project in a form that it can understand.⁶⁹

Factors affecting increased community involvement in investment contract negotiations

This subsection considers different factors that may affect how, or the degree to which, a community can be more closely involved in the negotiation of an investment contract. The government should be strongly influenced by the community's stated preference for the mode of their inclusion in the investment contracting stage. In practice, however, the government's obligations to comply with human rights law requirements for consultation and FPIC may be in tension with its investment promotion objectives, which often create pressures to attract investors, including by streamlining the processes needed for investors to be granted concessions and authorizations. While noting that such factors do not provide a legal grounds for failing to comply with requirements for consultation and FPIC, including at the investment contract negotiation stage, it is useful to consider how the perspectives of both the government and the investor can affect the applicability or likelihood of different modes of community consultation and FPIC in practice.

The **political and economic context** may encourage greater community involvement in negotiations. For instance, state-level authorities from Southern Sudan reportedly faced some political pressure to meaningfully involve the Tindilo community in investment contract negotiations with Tree Farms Sudan Ltd., given that a recent peace agreement included a statement—which also happened to be the Sudan People's Liberation Movement's slogan—that the “land belongs to the community.”⁷⁰ Similarly, where the government is willing to increase community involvement but the investor is reluctant, the government may be able to leverage existing conditions, such as favorable economic conditions for the project, tight timelines, or the fact that certain permits have not yet been granted.⁷¹ In addition, piloting efforts to increase

⁶⁹ See Weintz, *supra*, 1, for an example of peer-to-peer sharing: the document was prepared by the Lutsel K'e Dene First Nation as “a direct response to a request from the Association of Indigenous Village Leaders of Suriname (VIDS) for Canadian Indigenous People to provide capacity-building support to communities in West Suriname who will be affected by proposed open-pit, large-scale bauxite mining by BHP Billiton and Suralco, large-scale hydro-electric development by Suralco, and a nature reserve proposed by the Government of Suriname and the World Wildlife Fund.”

⁷⁰ Center for Human Rights and Global Justice (CHRGJ), *Foreign Land Deals and Human Rights: Case Studies on Agricultural and Biofuel Investment* (2010), 48 (at footnote 349) and 51.

⁷¹ See, e.g., Natasha Affolder, “Rethinking Environmental Contracting,” *Journal of Environmental Law and Practice*, Vol. 21 (2010), 164 (discussing the Canadian government's strategy for including Aboriginal communities in some contractual negotiations for the Ekati Diamond Mine). Although O'Faircheallaigh also notes that the national and territorial government parties were “determined that development of Ekati should not be prevented or substantially delayed”: Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World* (2015), Chapter 8.

community participation in negotiations may lead to expectations for improved community consultation in future negotiations. For instance, community participation in environmental contract negotiations for the Ekati Diamond Mine “crystallized expectations about the degree of Aboriginal participation in environmental agreements for major Canadian projects,” making it “virtually impossible to return to a process of closed negotiations between governments and project proponents in this region.”⁷² On the other hand, in country contexts where corruption is prevalent, corrupt actors may view community participation as a threat to their illicit dealings and may seek to ensure they are excluded from the negotiation table.

Investors seeking to obtain **social license** to operate in the area may also be receptive to enabling the community to more meaningfully participate in decision-making and contract negotiations. For instance, in the abovementioned Tree Farms Sudan example, a company representative stressed that the long-term nature of the project meant that the company needed “a local community who looks upon the project as their property, so they can guard and protect the plantation themselves.”⁷³ Additionally or alternatively, the investor may face pressures from its headquarters office or parent company to engage in international best practices. One example of this concerned the participation by Aboriginal representatives in negotiations between the Government of the Northwest Territories of Canada and a diamond mining company regarding both an Environmental Agreement and a Socio-Economic Agreement for the Ekati Diamond Mine. A representative from the company noted that by engaging in such a process, the company sought to maintain its parent company’s interest in the project which was at risk of waning because of a slow and costly permitting phase: “We had to keep it sexy and interesting for [the parent company. ...] We used words like ‘sustainable development.’ They liked that stuff.”⁷⁴ Other actors—such as financiers or development organizations seeking to partner with investors on a project—could also theoretically influence an investor’s willingness to support community participation in negotiations by requiring greater community inclusion as a condition of their support or cooperation.

Another factor that may also add to pressures for community inclusion is the **domestic legal framework** in place, including laws, court decisions, and any treaties or other instruments of settlement between the government and communities regarding claims to indigenous or customary lands and resources. For instance, a tripartite investment contract for a Pooling and

⁷² Affolder, *supra*, 169.

⁷³ CHRJ, *supra*, 52

⁷⁴ Affolder, *supra*, 164.

Sharing Joint Venture between the South African government, the government-owned Alexkor diamond mining company, and a corporate vehicle established and controlled by members of the Richtersveld community⁷⁵ was entered into pursuant to a deed of settlement between the government and the community following the community's successful court claims to ancestral lands and resources.⁷⁶ The Tindilo community's reported participation in negotiations regarding the Tree Farms investment contract, discussed above, also may have been slightly bolstered by recently enacted land legislation which set out, albeit in undetailed terms, that administration of the country's land shall be based on principles including participation and transparency.⁷⁷

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

Option one: Periodic consultations during negotiations

A basic option for increasing meaningful consultation with potentially affected communities in the context of negotiations, and for providing further iterative consent processes, is to ensure that any relevant investor-state negotiation process includes sufficient opportunities to undertake multiple consultations and obtain consent as necessary, which are based on an informed understanding of negotiations to date and that in turn influence continued negotiations. Under this option, a government and investor that plan to conduct negotiations in the absence of community representatives and civil society organizations would conduct negotiations in “rounds,” with corresponding community consultations and consent processes taking place between each round, based on the latest draft version of the contract. Negotiating rounds could be set at the outset; in addition, rules could be determined to enable (or require) either party to halt contract negotiations to report back to, and gather input from, the community, if negotiations touch on key issues identified by the community beforehand.

⁷⁵ See Lorenzo Cotula, *Investment Contracts and Sustainable Development: How to Make Contractors for Fairer and More Sustainable Natural Resource Investments* (2010), 28 (Box 3); James Gathii and Ibironke T Odumosu-Ayanu, “The Turn to Contractual Responsibility in the Global Extractive Industry,” *Business and Human Rights Journal*, Vol. 1 (2015), 91; Research Unit of the Parliament of the Republic of South Africa, *Alexkor: Richtersveld Community and the Pooling and Sharing Joint Venture (PSJV)*, (2016) <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/161012alexkorr.pdf>.

⁷⁶ *Alexkor Ltd and the Republic of South Africa v the Richtersveld Community & Others* (CCT19/03) [2003] ZACC 18 (South African Constitutional Court), para. 62; *Richtersveld Community & Others v Alexkor Ltd & Another* 2003 6 BCLR 583 (South African Supreme Court of Appeal), para. 18.

⁷⁷ CHRJ, *supra*, 51.

To maximize the degree to which communities are able to participate, such processes could involve local public meetings that would allow for consultation with members of the community, as well as their representatives, and local civil society groups. As for any consultation process, specific strategies may be needed to facilitate the meaningful participation of marginalized subgroups of the community, such as ensuring meetings are convened at accessible times, convening separate meetings for different subgroups, and providing for appropriate translation into local languages. Radio, SMS, and other communications technology could be used to share information and publicize meetings. Where appropriate, online contract repositories could also be used to publish draft versions of contracts, along with resources that make it easier for affected persons and their advisers to understand the implications of the draft contract and to formulate their subsequent submissions to the negotiating parties.⁷⁸

Where there are credible concerns regarding the sensitivity of information contained within the contract, consultations could be conducted with a lightly redacted version of the draft agreement. Alternatively, consultations could take place solely with community representatives and local civil society groups on a confidential basis, on the understanding that information of a general nature would then be the subject of more widespread consultations with community members. Another alternative in such circumstances would be to adopt a process similar to the U.S. government’s consultation process around trade treaties, which involves providing information to, and seeking comment from, multi-stakeholder advisory committees before and during the negotiation of such treaties.⁷⁹ In a local community context, consultative committees could include representatives from any traditional community decision-making structures as well as members of subgroups such as women, religious minorities, youth, workers, and so on, as well as representatives from civil society organizations that support them.

The likelihood of governments and investors agreeing to community demands for this option may be bolstered by the fact that this option shares some features with existing consultation processes, and provides avenues to protect sensitive information. Negotiators may, however, be reluctant to halt negotiations when they have gained momentum; mechanisms would be needed to ensure that the breaks between negotiation rounds are sufficiently long, and can be periodically

⁷⁸ For example, OpenLandContracts.org hosts investment contracts between investors and host governments relating to agriculture and forestry investments; each contract is accompanied by plain language summaries of the contract’s key social, environmental, fiscal, and operational provisions: <http://OpenLandContracts.org>. ResourceContracts.org provides a similar platform for oil, gas and mining contracts: <http://ResourceContracts.org>.

⁷⁹ “A Note on Stakeholder Consultation,” *Tradewinds: The official blog of the United States Trade Representative* (2014), <https://ustr.gov/about-us/policy-offices/press-office/blog/2014/February/a-note-on-stakeholder-consultation>

triggered, to ensure the community has ample opportunity to follow developments and offer its perspective.

Opportunities and challenges

This option deepens consultations with communities beyond mere one-off *ex ante* consultations,⁸⁰ by providing the community with regular updates on negotiations and, if carried out meaningfully, providing opportunities for community members to influence and shape negotiations. The lack of community or civil society presence at negotiations, however, renders community members reliant on other actors to stay updated on the progress of negotiations. Absence from the negotiating table also limits the community's ability to shape the agenda of contract negotiations and to ensure that their concerns are adequately reflected in the structure and substance of the investment contract. Any restrictions on a community's access to the draft agreement would also significantly undermine its ability to participate meaningfully, given the importance of the wording of contract clauses.

Another challenge with this approach would be ensuring that breaks between negotiation rounds allowed a sufficient amount of time to enable the consultation to take place meaningfully. This may be hard to achieve when negotiations move quickly unless clear criteria for triggering a break in negotiations are set out. Yet negotiating timetables may not allow for adequate consultation with communities. Even when a community has a representative in the room, the involvement of different segments of the community may be limited because of time pressures faced by the investor or company, as community elders found in the Ekati Diamond Mine negotiations.⁸¹ This highlights the even greater difficulties that non-represented communities may face.

Overall, this option holds some potential for improving consultation processes at the negotiation stage, by ensuring that communities are aware of developments and, potentially, can voice concerns and shape negotiations while they take place (though this will depend on the degree to which either party to the negotiations accurately reports back to the community and allows for

⁸⁰ For an example of the shortcomings of solely conducting *ex ante* consultations in the extractive industries context, see Kienzler, *supra*, 45 (“A civil society representative noted that the government engaged with them in advance of negotiations for a mining agreement. However, despite the CSO’s efforts to have local communities included in the actual negotiations, they were not consulted in any way during talks, nor did the government or the company come back after the deal was completed to inform the people what was agreed to.”)

⁸¹ Weitzner, *supra*, 13 (“‘When the negotiation was happening, the Elders weren’t informed until it was too late,’ one Elder said. ‘But even though when the negotiators came back to the Elders to give them information, it was already processed. They were informed, but then it was too late. And the government was already ahead with the mines.’”).

community perspectives to influence negotiations). The option is less attractive as a means of ensuring FPIC: while communities may be more “informed,” and while such processes would take place “prior” to the contract being finalized, the degree to which any consent is “free” may be undermined by the lack of opportunity, to consider alternative options unless the option of withholding consent and effectively vetoing the project remains on the table.

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

A second option for improved consultation and FPIC at the contract negotiation stage involves community representatives being present at, and directly participating in, investment contract negotiations, but not actually signing the agreement as a contractual party. Contracting parties would determine the exact boundaries of the community representatives’ participation in negotiations. The degree to which the community’s representatives were able to participate would also be influenced by their ability and willingness to follow and participate in discussions, and may also be affected by the attitudes of the government and company negotiators. Under such an arrangement, community representatives may need time and resources for capacity building and preparation, as well as ongoing support, for example, from an adequately trained interpreter and, potentially, from legal advisors or civil society allies. Community representatives would also benefit from reserving the right to put negotiations on hold if more time is needed to consult with their community members to obtain input on unexpected proposals or developments.

Representatives of communities and civil society organizations have already participated in negotiations with host governments and investors in ways similar to the approach outlined in this option. Examples include: the aforementioned reported inclusion of the Tindilo community in negotiations for an investment contract for the Tree Farms Sudan tree plantation and forestry conservation project in Southern Sudan (which had an annexed Community Support Program agreement between the community and the government);⁸² the participation by Aboriginal representatives in contractual negotiations for the Ekati Diamond Mine, also discussed above;⁸³ and Afghanistan EITI’s presence as an observer of investment contract negotiations for an extractive project.⁸⁴

The exact mechanism for determining who will represent the community at negotiations will vary. While traditional councils or decision-making structures may be appropriate, these should be

⁸² CHRJ, *supra*, 16.

⁸³ Weitzner, *supra*, 6; Affolder, *supra*, 156; O’Faircheallaigh, *supra*, Chapter 8.

⁸⁴ Kienzler, *supra*, 45.

supplemented by representatives from relevant subgroups as needed to ensure all perspectives are represented.⁸⁵ Also, as noted under option one, above, it will still be vital for community representatives to regularly report back to, and consult with, community members regarding the negotiations to ensure community members remain informed and can offer their opinions on new developments.

Despite not being a formal party to any investment contract negotiated under this option, communities can use their participation in negotiations to bolster the enforceability of related community-investor or community-government agreements, which can be referenced in, or annexed to, the investment contract between the investor and the state. For instance, the Community Support Program agreement for the Tindilo community is referenced in the investment contract for that project.⁸⁶ Communities can also seek to include third party beneficiary clauses in the investment contract,⁸⁷ though it is not yet common for such clauses to be created to the benefit of affected communities in investment contracts. Such clauses could identify the community as having enforceable rights under the investment contract—for instance, regarding investor obligations to protect the environment or avoid human rights impacts.⁸⁸

Opportunities and challenges

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

⁸⁵ For instance, during the negotiations for the Ekati Diamond Mine, the Lutsel K'e Dene's council represented that community in negotiations, resulting in youth groups and Elders feeling that their views were not sufficiently represented: Weitzner, *supra*, 12-3.

⁸⁶ Land Title Agreement between Ministry of Agriculture & Forestry, Central Equatoria State and Tree Farms Sudan Ltd., 2008, Art 4.6, available at Open Land Contracts, <http://www.openlandcontracts.org/contract/ocds-591adf-2526678534/view#/pdf/page/2/annotation/24035>.

⁸⁷ In the agricultural context, see, e.g., Memorandum of Understanding between the Sierra Leone Ministry of Agriculture, Forestry and Food Security, Ministry of Finance and Economic Development, Ministry of Trade and Industry, and Sierra Land Development Ltd., 2013, Art. 6, Appendix, Arts. 10-11 (Granting third party beneficiary rights to the investor's shareholders, contractors and subcontractors with regard to a stabilization clause and a clause prohibiting nationalization and expropriation).

<http://www.openlandcontracts.org/contract/ocds-591adf-2317427356/view#>. In the extractive industries context, see, e.g., Mineral development agreement between the government of the republic of Liberia, Western Cluster Limited, Sesa Goa Limited, Bloom Fountain Limited, and Elenilto Minerals & Mining LLC, 2011, Art. 27.9 (Granting third party beneficiary rights to the investors' shareholders to invoke mediation and arbitration rights), <http://resourcecontracts.org/contract/ocds-591adf-6207349867/view#/pdf>.

⁸⁸ International Senior Lawyers Project and Columbia Center on Sustainable Investment, *Guide to Land Contracts: Forestry Projects* (2017), 8, <http://ccsi.columbia.edu/files/2017/01/GuidetoLandContracts-ForestryProjects.pdf>.

The principal challenge of this option is that the community's ability to influence negotiations might be undermined by the fact that it is not a formal party to the agreement. Not being a party means that there is no guarantee that the community will be able to shape what is agreed upon.

This approach creates the potential for improved consultation, given that community representatives will be more informed regarding the direction negotiations take, and will be well-placed to seek to influence negotiations as they take place. It also can contribute to ensuring communities are informed, as required by FPIC requirements. However, to the extent that communities risk having their views ignored during negotiations this option may struggle to be an adequate instantiation of meaningful consultation or FPIC.

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

A third option for improved consultation and FPIC at the contract negotiation stage would involve the community being a party to the investment contract, making the contract a tripartite⁸⁹ or “multi-actor”⁹⁰ investment contract, with the host government, the investor, and the local community (or communities) as parties. The contract would set out the government's and investor's obligations with regard to the investment as it normally would in an investor contract. Depending on how the contract is structured, the community could obtain enforceable rights to hold either actor to account if they were in breach of the contract.

Examples of other types of tripartite contracts between governments, investors, and affected communities exist, but only provide a limited insight into what a tripartite investment contract would include and how it would operate in practice. Mozambique requires mining companies to enter into tripartite memoranda of understanding with the government and certain families or communities who may face resettlement, with such memoranda detailing the amount of compensation the company will pay to those families or communities.⁹¹ Tripartite agreements have been negotiated in Canada, also in the context of extractive industries. For instance, a socio-economic agreement for the Diavik Diamonds Project was entered into between the investor (Diavik Diamond Mines Inc., owned by Rio Tinto), the government of the Northwest Territories

⁸⁹ Boudreaux and Neyman, *supra*, pp. 37-38;

⁹⁰ Ibiroinke T. Odumosu-Ayanu, Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework, *Melbourne Journal of International Law*, Vol 15(2) (2014) (hereafter “Odumosu-Ayanu, MJIL”); Ibiroinke T. Odumosu-Ayanu, “Multi Actor Contracts, Competing Goals and Regulation of Foreign Investment,” *University of New Brunswick Law Journal*, Vol 65 (2014) (hereafter “Odumosu-Ayanu, UNBLJ”).

⁹¹ Mining Law No. 20/2014 (Mozambique), Art. 30.

of Canada, and five aboriginal signatories,⁹² some of whom were involved in the Ekati Diamond Mine negotiations. The agreement focuses on benefit sharing, including employment creation, and environmental monitoring, and was used as the basis for five subsequent individual participation agreements with each aboriginal signatory.⁹³ A second example comes from the same Canadian territory; the Snap Lake environmental agreement has as its parties the Government of Canada, the Government of the Northwest Territories, the investor (De Beers Canada Mining Inc.), and four aboriginal signatories.⁹⁴ The agreement focused on environmental management. While both agreements detail important processes and mechanisms ancillary to the project—the Diavik agreement sets up an advisory board and details the company’s benefit sharing commitments, while the Snap Lake agreement establishes an environmental monitoring agency to be established by the aboriginal signatories—neither cover the full range of issues usually included in investment contracts. Finally, the Pooling and Sharing Joint Venture between the South African government, Alexkor (a government-owned company), and a corporate vehicle for the Richtersveld community is an example of a tripartite investment contract, albeit of a very unique character. The agreement reportedly sees the two corporate parties pooling their marine and land mining rights and having equal representation on the Joint Board, with Alexkor entitled to a 51% share in the joint venture, and the community’s company entitled to the remaining 49%.⁹⁵ This agreement has been noted to arise from unique factors, including a landmark court ruling in favor of the community, the community’s legal ownership of mining rights, and significant government assistance and cooperation.⁹⁶

Communities with prior experience with formal negotiations—such as indigenous communities that may have negotiated treaties with governments or community development agreements with companies—will be especially well placed to embark upon this mode of participation.⁹⁷ It has also

⁹² Socio-Economic Monitoring Agreement between Diavik Diamond Mines Inc., The Government of the Northwest Territories, Dogrib Treaty 11 Council, Lutsel K’e Dene Band, North Slave Métis Alliance, Yellowknives Dene First Nation, and Kitikmeot Inuit Association (1999), <http://ccsi.columbia.edu/files/2015/01/Canada-Northwest-Territories-and-Aboriginal-Peoples-Diavik-Diamond-Mines-1999-Agreement.pdf>.

⁹³ Richard Missens et al, “Aboriginal partnerships in Canada: focus on the Diavik Diamond Mine,” *Journal of Enterprising Communities: People and Places in the Global Economy*, Vol. 1 No. 1 (2007), 56-57.

⁹⁴ Environmental agreement between the Government of Canada, the Government of the Northwest Territories, De Beers Canada Mining Inc., Dogrib Treaty 11 Council, Lutsel K’e Dene Band, Yellowknives Dene First Nation, and North Slave Métis Alliance (2007), <http://www.slema.ca/wp-content/uploads/2011/02/De-Beers-Final-Environmental-Agreement-PDF1.pdf>.

⁹⁵ Cotula, *supra*, 28 (Box 3).

⁹⁶ Cotula, *supra*, 28 (Box 3).

⁹⁷ See Affolder, *supra*, 164 (“Why did this agreement happen at Ekati? Local Aboriginal groups were effective negotiators, with the legal and technical capacity to negotiate the agreements. One company official described the Aboriginal negotiators involved as ‘the best negotiators in the world’ given their decades-long experience with land claims negotiations.”)

been suggested that tripartite contracts may be more likely to work where there is a “special need for cooperation,” a manageable number of contractual parties, and an expectation of cooperation—and not strategic stalling or opposition—towards reaching an agreement.⁹⁸

Opportunities and challenges

Provided the project-affected community would have adequate time and access to sufficient resources, capacity building, and technical support, this option would strengthen the community’s opportunity to be meaningfully consulted on, and to influence and potentially consent to, the exact parameters of the investment contract eventually agreed upon. Opportunities for communities to set the agenda of negotiations and exercise leverage over decision-making regarding the project’s design are generally rare.⁹⁹ This option provides a genuine opportunity to do so, and may lead to investment contracts that minimize the adverse impacts of, and potentially leverage the benefits of, the investment projects.¹⁰⁰ Close participation in negotiations can also help to set expectations regarding the degree to which the community may wish to have a regular line of communication with the company and to be involved in future decision-making regarding the project when community members’ rights may be affected—potentially including in the design of any resettlement plans and water management plans.

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

⁹⁸ Meinhard Doelle, “Regulating the Environment by Mediation and Contract Negotiation: A Case Study of the Dona Lake Agreement,” *Journal of Environmental Law and Practice* Vol. 2 (1992), 212; referred to in Odumosu-Ayanu, UNBLJ, *supra*, 304.

⁹⁹ Affolder, *supra*, 173-4.

¹⁰⁰ The presence of organized community members could also assist governments with low capacity who may not have the expertise or the political motivation to ensure that each aspect of the contract is sufficiently considered and adapted to the needs of the country and the local community.

proposals during negotiations, thereby bolstering the degree to which the community can participate and drive decision-making.

In common law jurisdictions, the community, by being a party to the contract, may also be able to invoke a rich body of contract law protections that are aimed at addressing inequality of bargaining power between the parties, including protections against unconscionable conduct, misrepresentation, undue influence, or duress.¹⁰¹ These protections echo FPIC requirements that consent and consultation be “free,” and may thus provide an additional means of enforcing FPIC and consultation rights. The availability of these protections could also create an additional incentive to the government and company to ensure that the principles of FPIC are complied with during the investment contract negotiation stage.

Challenges remain with this option. In many instances, the community will face power imbalances, which can only be partially mitigated, rather than alleviated, by capacity building, advice, sufficient time and resources to prepare, and the promise of contractual law protections. Companies may seek to “buy off” the community’s resistance.¹⁰² This option would also require a degree of cooperation and inclusiveness afforded by the government that has so far proven very rare. Further, questions remain as to how low-capacity governments, which may already struggle to negotiate advantageous investment contracts, would manage with a third party in the room.

In addition, community members participating in negotiations have reported many adverse impacts in doing so, including stress and consultation fatigue, as well as disputes within the community and with other communities regarding the amount and allocation of financial benefits.¹⁰³ There also is no guarantee that communities empowered to participate in negotiations will be able to successfully negotiate agreements that meet community concerns.¹⁰⁴ Despite these challenges, the prospect of tripartite investment contracts creates real possibilities for effectively building FPIC and consultation into investment contract negotiations.

¹⁰¹ Odumosu-Ayanu, MJIL, *supra*, 27; Gathii and Odumosu-Ayanu, *supra*, 71.

¹⁰² Affolder, *supra*, 173-174; Weitzner, *supra*, 11.

¹⁰³ Weitzner, *supra*, 16-18.

¹⁰⁴ Researchers studying the Tindilo community’s involvement in negotiations noted that the resulting agreements were lopsided and written in “remarkably vague terms”: CHRGI, *supra*, 56 and 54. Similarly, community members from Lutsel K’e Dene noted that the agreement negotiated “had some serious flaws”: Weitzner, *supra*, 29.

Conclusion

Government obligations with regard to consultation and FPIC are designed to enable communities to exercise a greater degree of influence over decision-making regarding the use of their lands and resources, and can also ensure greater protection of other human rights of affected communities in the context of natural resource investments. Yet in practice, these standards are rarely carried out adequately, despite important innovations by communities and civil society allies. Investment contract negotiations are one stage of the investment process that is relatively unexplored, and where current consultation or FPIC processes conducted by governments and investors are almost always inadequate. This paper has sought to highlight this deficiency and propose different options for how these standards could be met at the investment contract negotiation stage. In doing so it has considered the dynamic nature of contract negotiations and the various challenges that communities seeking to be more closely involved in such a technical process may encounter. The options in this paper remain relatively untested, and many questions deserve further attention. They will also not usually be relevant or of interest to communities who oppose a proposed investment, and may be met with resistance from public or corporate actors. In other cases, however, the options discussed can provide stakeholders involved in natural resource investments with ideas for strategies to improve practices with regard to investment contract negotiations; such options are intended to lead to improved communication and information sharing between stakeholders, greater influence and empowerment for communities, and ultimately to decision-making around investments that is compliant with human rights law and responsive to community needs and concerns.