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# Community Participation in Development

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ABSTRACT

*A remarkable series of legal reforms and private innovations has given municipalities, indigenous peoples, and other local groups vital opportunities to influence development projects and secure economic benefits. This Article demonstrates the existence of this global trend and offers a model for explaining how and why it has manifested, as well as why—despite impressive gains—many communities still lack what they would consider sufficient influence or benefits. First, the Article argues that all of the formal rights and powers that local interests have secured in recent years result from pressure by communities and their supporters and are designed to address specific deficiencies in higher-level decision making. Second, while higher authorities have made a number of concessions, they have consistently tailored any new community rights and powers to avoid giving local interests outright control over development, for reasons both self-interested and grounded in legitimate public policy concerns. Third, communities are increasingly turning to private mechanisms to supplement their formal rights and powers. These mechanisms offer a number of advantages, but their viability ultimately depends on communities possessing—and effectively leveraging—robust public sources of influence.*

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## I. INTRODUCTION

Once marginalized in the decision making over business activities with high environmental and social impacts, local communities around the world are increasingly playing a more assertive role.[1] It is now common in many countries for municipalities, citizen coalitions, indigenous peoples, and other local groups to wield significant influence over the development process. Local interests may exercise this influence by enacting zoning ordinances,[2] offering comments during environmental impact assessments (EIAs),[3] or filing citizen suits,[4] among other possibilities. It is also increasingly common for local interests to receive compensation for project impacts or even to collaborate with developers as business partners.[5] In short, communities are participating in development in ever more diverse and meaningful ways: as regulators, as law enforcers, as commentators, and as economic actors.

Regulatory powers of local governments are one important source of community influence. Many local governments have acquired more expansive powers through a global trend toward "decentralization,"[6] or have sought to use preexisting powers in novel ways. Such regulatory assertiveness can be seen, for example, in efforts by local governments in the United States and Spain to ban hydraulic fracturing—or "fracking"—within their territories.[7] Meanwhile, many local

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1. *See* George S. Akpan, *Host State Legal and Policy Responses to Resource Control Claims by Host Communities: Implications for Investment in the Natural Resources Sector, in* INTERNATIONAL AND COMPARATIVE MINERAL LAW AND POLICY: TRENDS AND PROSPECTS 283, 290 (Elizabeth Bastida, Thomas Wälde & Janeth Warden-Fernandez eds., 2005) (asserting that historically the state in some countries has "appropriate[d] to itself the right for control and management of the resources without recourse to the host populations," but, in recent years, many states have adopted reforms that give local populations a greater role).

2. *See infra* Part II.A.1.

3. *See infra* Part II.B.1.a.

4. *See infra* Part II.B.1.b.

5. *See infra* Part III.B.

6. *See* Jean-Paul Faguet & Caroline Pöschl, *Is Decentralization Good for Development?, in* IS DECENTRALIZATION GOOD FOR DEVELOPMENT?: PERSPECTIVES FROM ACADEMICS AND POLICY MAKERS 1, 1 (Jean-Paul Faguet & Caroline Pöschl eds., 2015) (observing that in recent years "new or deepening [decentralization] reforms have been announced in countries as disparate as Japan, Cambodia, France, Turkey, and Kenya, amongst many others."); Andrés Rodríguez-Pose & Nicholas Gill, *The Global Trend Towards Devolution and Its Implications*, 21 ENV'T & PLAN. C: GOV. & POL'Y 333, 337 (2003) (describing a "global trend in the transference of powers, authority, and resources to subnational levels of government").

7. *See* Albert C. Lin, *Fracking and Federalism: A Comparative Approach to Reconciling National and Subnational Interests in the United States and Spain*, 44 ENVTL. L. 1039, 1048 (2014) (discussing fracking bans enacted by several communities in Spain); David B. Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351,

governments have secured mandated shares of revenue collected by higher authorities from development activities, such as severance taxes from mining and oil and gas extraction.[8]

Local interests have also acquired more influence through a global proliferation of requirements for higher authorities and project developers to conduct EIAs before undertaking development projects.[9] EIA regimes typically require decision makers to take into account potential impacts on communities and give members of the public the right to receive information and offer input during the process.[10] Stakeholders have also gained access-to-justice rights in many countries, allowing them to participate in the enforcement of environmental laws implicated by development projects.[11] Stakeholders availing themselves of these opportunities have delayed, blocked, or secured modifications to numerous projects—two prominent recent examples being the Keystone XL Pipeline in the United States[12] and the Whites Point Quarry and Marine Terminal in Canada.[13]

At the same time, indigenous communities are increasingly accorded special safeguards to address their unique vulnerability to the impacts of development and barriers to participation in decision making.[14] These safeguards have enabled indigenous groups to halt several major development projects to which they were opposed, from a proposed coal terminal near Seattle[15] to a gold mine in Chile.[16]

Moreover, when indigenous or other local communities are amenable to development proposals, they are increasingly able to

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370 (2014) ("[L]ocal governments [in the United States] are enacting de facto or de jure fracking bans in rapidly increasing numbers.").

8. *See* Rodríguez-Pose & Gill, *supra* note 6, at 338; *see also infra* Part II.A.

9. *See infra* Part II.B.

10. NEIL CRAIK, THE INTERNATIONAL LAW ON ENVIRONMENTAL IMPACT ASSESSMENT: PROCESS, SUBSTANCE AND INTEGRATION 3–4 (2008) (describing EIA regimes around the world).

11. *See generally* Domenico Amirante, *Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India*, 29 PACE ENVTL. L. REV. 441, 445 (2012); Bende Toth, *Public Participation and Democracy in Practice—Aarhus Convention Principles as Democratic Institution Building in the Developing World*, 30 J. LAND RESOURCES & ENVTL. L. 295, 311–35 (2010) (discussing access-to-justice mechanisms in the United States, Europe, and the developing world).

12. *See infra* Part II.B.1.b.

13. *See infra* Part II.B.2.

14. *See infra* Part II.C.

15. *See, e.g.*, Kirk Johnson, *Tribe's Fishing Rights Halt Proposed Coal Terminal*, N.Y. TIMES, May 10, 2016, at A11 (describing the defeat of a proposal to build a coal terminal near Seattle following objections by the Lummi Nation).

16. Fabiana Li, *The Defeat of Pascua Lama: How Local Resistance Halted Construction of a Destructive Mining Project on the Chilean Border*, NORTH AM. CONG. ON LATIN AM. (Mar. 9, 2016), http://nacla.org/news/2016/03/09/defeat-pascua-lama [https://perma.cc/48FA-QZ6V] (archived Oct. 20, 2017) (discussing the closure of a gold mine in Chile following a successful lawsuit by the Diaguita indigenous community).

negotiate private agreements with project developers that provide for impact mitigation and benefit sharing.[17] Benefits provided under these agreements may include shares of profits or production, infrastructure improvements, employment or contracting preferences, and even equity stakes in projects.[18]

Scholars have engaged aspects of these developments, but the literature is fragmentary. Separate lines of scholarship address discrete components of what this Article dubs collectively "community participation in development." These separate lines explore, for example, local fracking bans and moratoria,[19] decentralization processes in foreign countries,[20] public participation in environmental matters,[21] rights of indigenous communities,[22] and particular types of community–developer agreements.[23] Yet the time is ripe for examining these phenomena collectively—for considering to what extent they relate to one another and their significance as a whole. When such an examination is undertaken, it becomes clear that all of these phenomena are interrelated and mutually reinforcing. It becomes clear, moreover, that together they constitute a global wave of reform and innovation that is transforming relations between local communities, higher authorities, and project developers around the world.

And yet—as remarkable as these gains by local interests are—many communities have not yet secured what they consider a sufficient voice in decision making or an adequate share of benefits. In some cases, higher authorities refuse to transfer powers or benefits sought

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17. *See infra* Part III.B.

18. *See* Danielle Campbell & Janet Eileen Hunt, *Achieving Broader Benefits from Indigenous Land Use Agreements: Community Development in Central Australia*, 48 COMMUNITY DEV. J. 197, 203–06 (2013) (describing agreements between mining companies and Aboriginal groups in Australia and the benefits provided thereunder); Ginger Gibson & Ciaran O'Faircheallaigh, *IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements*, GORDON FOUND. 96–97 (Summer 2015), http://gordonfoundation.ca/publication/669 [https://perma.cc/NV3Q-4JR7] (archived Oct. 20, 2017) (describing provisions in agreements between developers and Canadian Aboriginal groups that address impact mitigation); *Newmont Ghana Signs Revised Social Responsibility Agreements with Ahafo Communities*, NEWMONT MINING CORP. (July 1, 2014), http://ourvoice.newmont.com/2014/07/01/newmont-ghana-signs-revised-social-responsibility-agreements-with-ahafo-communities/ [https://perma.cc/37F9-2E58] (archived Nov. 14, 2017) (describing community benefits provided under agreements between a mining company and communities in Ghana).

19. *See, e.g.*, Spence, *supra* note 7, at 370.

20. *See, e.g.*, Faguet & Pöschl, *supra* note 6, at 7–8.

21. *See, e.g.*, Toth, *supra* note 11, at 306–309.

22. *See generally, e.g.*, S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 39–70 (2d ed. 2000).

23. *See, e.g.*, Gibson & O'Faircheallaigh, *supra* note 18, at 96.

by local communities[24] or move forward with projects despite strong local opposition.[25]

Higher authorities' motivations vary, but principled arguments can sometimes be made for declining to give further influence or benefits to local communities. Notably, entrusting local governments with greater regulatory powers may risk a weakening of environmental standards or enforcement, due to limited local capacity or accountability.[26] Benefits accorded to local interests may be siphoned off by corrupt local elites.[27] Transferring more revenues to the local level may exacerbate economic disparities within a country or region[28] or even fuel separatist movements.[29] Higher authorities may also be concerned that communities in the vicinity of a project cannot objectively assess its risks and benefits, and would hold the broader public interest hostage to unfounded local fears.[30] For all of these

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24. *See, e.g.*, Akpan, *supra* note 1, at 300 (asserting that, in Nigeria, "[m]embers of the host populations are still not given a say or any influence in the processes leading to the granting of legal authorizations to exploit natural resources or any say on how the proceeds are disbursed."); *see also* David W. Case, *The Role of Information in Environmental Justice*, 81 MISS. L. J. 701, 718 (2012) (discussing barriers to participation by low-income and minority communities in environmental decision making in the United States).

25. An example is President Trump's decision to revive the permitting processes for the Keystone XL and Dakota Access Pipelines, despite significant community opposition and prior decisions by the Obama administration halting both projects. *See* Steven Mufson & Juliet Eilperin, *Trump Seeks to Spark Action on Oil Pipelines*, WASH. POST, Jan. 25, 2017, at A1.

26. *See* Jesse C. Ribot, *Democratic Decentralisation of Natural Resources: Institutional Choice and Discretionary Power Transfers in Sub-Saharan Africa*, 23 PUB. ADMIN. DEV. 53, 54 (2003) ("Decentralisations in Burkina Faso, Cameroon, Guinea, Malawi, Niger, the Gambia and Zimbabwe . . . are transferring decision-making powers to various unaccountable local bodies, threatening local equity and the environment."); Ryan Stoa, *Subsidiarity in Principle: Decentralization of Water Resources Management*, 10 UTRECHT L. REV. 31, 34 (2014) ("Local communities are less likely to have access to environmental science, data, and the modeling tools necessary to create dynamic management systems.").

27. *See* WORLD BANK INDEPENDENT EVALUATION GROUP, DECENTRALIZATION IN CLIENT COUNTRIES: AN EVALUATION OF WORLD BANK SUPPORT, 1990–2007, at 4 (2008) ("[C]apture by political and other local elites can readily emerge as power is transferred to the local level, where entrenched inequities may help elites orient service delivery toward themselves and away from the poor.").

28. *See* Eric A. Coleman & Forrest D. Fleischman, *Comparing Forest Decentralization and Local Institutional Change in Bolivia, Kenya, Mexico, and Uganda*, 40 WORLD DEV. 836, 841 (2012) ("Many authors have argued that decentralization exacerbates wealth differences at the local level.").

29. *See* Thomas W. Wälde, *International Standards: A Professional Challenge for Natural Resources and Energy Lawyers*, *in* INTERNATIONAL AND COMPARATIVE MINERAL LAW AND POLICY: TRENDS AND PROSPECTS, *supra* note 1, at 219, 232 (local control over mineral rent can "generate[] financial resources for building up power of insurgent groups" and "weaken[] the government's often fragile grip over the area").

30. *See* CHARLES H. ECCLESTON, ENVIRONMENTAL IMPACT ASSESSMENT: A GUIDE TO BEST PROFESSIONAL PRACTICES 177 (2011) (discussing the potential for local

reasons, communities have often fallen short of their aspirations in the political arena.

This Article will demonstrate that all of these events—the gains secured by communities as well as their limitations—result from a recurring set of causes and countervailing forces. It will show in particular that the global wave of community participation in development can be explained by the following three-part model. First, the diverse formal rights and powers that local interests have secured are all attributable to pressures on higher authorities, which result from perceived deficiencies in higher authorities' ability or willingness to protect local communities and the environment, or to share benefits equitably.[31] Second, although higher authorities have ceded various forms of influence and benefits, they have carefully tailored each category of community rights and powers in a specific way: to avoid outright local control over major development activities.[32] Third, private mechanisms have emerged that increasingly supplement communities' formal rights and powers.[33] These mechanisms offer flexibility and can produce further gains without the need for more extensive political change. Yet private mechanisms have limitations of their own and their viability ultimately depends on communities possessing—and effectively leveraging—robust public sources of influence.[34]

The discussion in this Article will proceed as follows. Part II will explore several formal sources of influence and benefits that communities around the world have secured in recent years, or have begun to use more aggressively. Part III will examine private mechanisms that have emerged as further sources of community leverage. Part IV will explain why the global wave of community participation has manifested and why its public and private aspects have assumed their particular forms. Part V will conclude.

## II. COMMUNITIES' GROWING FORMAL RIGHTS AND POWERS

In recent decades, local governments and stakeholders around the world have acquired diverse rights and powers under domestic and international law, which they can use to influence development and secure benefits. The subparts that follow explore several such formal

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communities to have an exaggerated perception of risks associated with development projects).

31. *See infra* Part IV.A.
32. *See infra* Part IV.B.
33. *See infra* Part IV.C.
34. *See infra* Part IV.C.3.

sources of leverage: (i) local governments' regulatory powers and revenue-sharing mandates, (ii) EIA requirements and public participation in environmental decision making and enforcement, and (iii) safeguards specific to indigenous and traditional communities.[35]

### A. *Local Regulatory Powers and Revenue-Sharing Mandates*

#### 1. Developments in the United States

In the United States, local regulatory powers derive from the state's inherent "police power" to protect health, safety, welfare, and morals.[36] Although the police power resides in the state government, all states have delegated certain aspects of that power to local governments, including the authority to enact land-use regulations in the public interest.[37] The nature and scope of that delegation vary, but local governments generally have the authority to enact a wide range of regulations governing the use of land within or near municipal boundaries.[38] Mechanisms for regulating land use include the adoption of comprehensive land-use plans (which establish general goals and policies for local development);[39] zoning ordinances (which implement the comprehensive plan by dividing the land into zones or districts of land and specifying the permissible uses for each);[40] and subdivision and site plan regulations (which provide more detailed requirements for particular locations).[41]

Many local governments have applied these powers in new and more intensive ways in recent years in response to stakeholder concerns about development activities. Notably, many local governments have created special zoning districts or ordinances to

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35. Communities in some countries may possess other formal sources of leverage as well. For example, in a paper written for a recent symposium organized by the Author, Albert Lin identifies various other sources available in the United States, including the law of nuisance and other common law torts, the public trust doctrine, and other environmental laws. *See* Albert C. Lin, *Community Levers for Benefit Sharing*, 21 LEWIS & CLARK L. REV. 357, 364–75 (2017).

36. *See* FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 10.01(4)(a) (2017).

37. *See id.*; *see also* Shelby D. Green, *Development Agreements: Bargained-for Zoning that Is Neither Illegal Contract nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 386 (2004).

38. *See* RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79C.10(2)(a) (Michael Allan Wolf ed., 2017).

39. *See generally* Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1 (1998) (describing comprehensive plans).

40. *See* PATRICK J. ROHAN & ERIC DAMIAN KELLY, ZONING AND LAND USE CONTROLS § 37.03 (2017) (describing zoning ordinances).

41. *See* Arnold, *supra* note 39, at 94; John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 373–74 (2002) (providing examples of subdivision and site plan regulations).

protect natural resources from development, or to control sources of pollution not covered by state or federal law.[42] Many are also regulating development activities that are already regulated extensively by state or federal law. The oil and gas industry, for example, has recently experienced an explosion in local-level regulation in response to pressure from citizens concerned about the spread of fracking into populated areas.[43]

Fracking is an unconventional method of production used to access oil and gas deposits in shale formations.[44] The operator drills into the shale layer before injecting chemicals and water into the ground at high pressure, causing the shale to fracture and allowing oil or gas to escape and flow into production wells.[45] Fracking operations can cause numerous adverse impacts, including groundwater contamination, air pollution, truck traffic, seismic activity, and noise, among others.[46] Local fracking ordinances seek to limit these impacts by restricting where drilling can occur, limiting hours of operation, and requiring various mitigations and safeguards.[47] Some local ordinances have even attempted to ban fracking or other forms of drilling altogether within city or county borders.[48] Local governments are also increasingly imposing "impact fees" or bond requirements on operators to cover extra road maintenance and other governmental expenses caused by fracking.[49] Mining, quarrying, and logging have likewise

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42. *See* Nolon, *supra* note 41, at 410–11 (summarizing local environmental measures, and observing that they often address the loss of natural resources to suburbanization or water and air pollution not adequately addressed by state and federal law).

43. *See* Alex Ritchie, *On Local Fracking Bans: Policy and Preemption in New Mexico*, 54 NAT. RESOURCES J. 255, 258–59 (2014) (increased local regulation of fracking seeks to address local negative externalities in the face of a "community outcry from voters"); Spence, *supra* note 7, at 351 ("[W]ithin the last few years more than 400 local governments, from California to Texas to New York, have enacted ordinances restricting or banning within their borders the use of" fracking).

44. *See* David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 U. PA. L. REV. 431, 438–39 (2013).

45. *Id.*

46. *See* Spence, *supra* note 7, at 358–68 (summarizing potential environmental and social impacts of fracking).

47. *See* Sorrell E. Negro, *Fracking Wars: Federal, State and Local Conflicts over the Regulation of Natural Gas Activities*, 35 ZONING & PLANNING L. REP. 1, 7–9 (2012) (describing municipal ordinances that regulate fracking).

48. Spence, *supra* note 7, at 356–57.

49. *See* Joel Minor, *Local Government Fracking Regulations: A Colorado Case Study*, 33 STAN. ENVTL. L. J. 59, 114 (2013); Ritchie, *supra* note 43, at 283 ("[S]ome counties across the country have begun to assess impact fees on a per well basis to offset the cost of maintaining, repairing, and even improving county roads."); *see also* ANNEMARGARET CONNOLLY, ENVIRONMENTAL LAW IN REAL EST. & BUS. TRANSACTIONS § 25.04(2)(e)(vii) (2017) ("In addition to impact fees, some municipalities may require applicants for gas drilling permits to post bonds for fees, penalties, violations, or damage to roads.").

been targeted by local ordinances, as municipalities and counties have reacted to citizen concerns about these activities' environmental and social impacts.[50]

In an effort to compensate for impacts of extractive activities, some states have adopted laws providing for local governments in affected areas to receive a specified portion of tax revenues collected by the state from project developers, which they can spend on schools or other community benefits.[51]

Yet higher authorities have resisted some efforts by local governments to regulate extractive activities. In particular, some states have enacted legislation that expressly limits local regulation of specific sectors.[52] In addition, state and federal courts have repeatedly struck down local ordinances regulating fracking or other extractive activities even in the absence of express preemption, if these courts perceived the ordinances as conflicting with or impeding the state regulatory framework.[53]

One exception to this pattern is a 2013 decision by the Supreme Court of Pennsylvania, which declined to invalidate a local fracking ordinance that was expressly preempted by state law and struck down the state regulatory framework instead.[54] Specifically, in *Robinson*

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50. *See, e.g.*, Hoffman Mining Co. v. Zoning Hearing Bd., 612 Pa. 598, 604 (2011) (lawsuit challenging ordinance enacted by Adams Township in Pennsylvania that restricted mining and imposed setbacks); Colo. Mining Ass'n v. Bd. of County Comm'rs, 199 P.3d 718, 721 (Colo. 2009) (lawsuit challenging ban by Summit County, Colorado on the use of cyanide in gold mining); MIKE JACOBSON, ELIF KAYNAK & COREEN RIPP, DEALING WITH LOCAL TIMBER HARVESTING ORDINANCES 3 (2004), http://conservationtools.org/library_items/235-Dealing-with-Local-Timber-Harvesting-Ordinances (last visited Oct. 21, 2017) [https://perma.cc/E8DU-97NZ] (archived Oct. 21, 2017).

51. *See* Minor, *supra* note 49, at 86 ("[T]he primary government revenues from fracking—mineral leasing revenues and severance taxes—go to federal and state governments, not to local governments. A few states, including Colorado, transfer some of those funds to local governments."); *cf.* Chris Groeschen, *Coal Severance Tax: The Move Towards Educational Advancement in Kentucky Coal-Producing Counties*, 44 J. L. & EDUC. 145, 152 (2015) ("In 2009, Tennessee passed a bill allocating 100% of their coal severance tax funds back to coal-producing counties, with fifty percent of the funds specifically marked for education.").

52. *See, e.g.*, In re Wallach v. Town of Dryden et al., 16 N.E.3d 1188, 1196–97, 1199 (N.Y. 2014); JACOBSON, KAYNAK & RIPP, supra note 50, at 4–5 (summarizing Pennsylvania state legislation restricting local regulation of timber harvesting).

53. *See, e.g.*, Swepi, LP v. Mora County, 81 F. Supp. 3d 1075, 1198–1203 (D. N.M. 2015); City of Longmont Colo. v. Colo. Oil & Gas Ass'n, 369 P.3d 573, 585 (Colo. 2016); State ex rel. Morrison v. Beck Energy Corp., 37 N.E.3d 128, 135–37 (Ohio 2015); Colo. Mining Ass'n, 199 P.3d at 721–22 (Summit County's ban on the use of cyanide in gold mining was preempted because it excluded what the Colorado state mining law authorized); Northeast Natural Energy, LLC v. City of Morgantown, No. 11-C-411, 2011 WL 3584376, at *9 (W. Va. Cir. Ct. Aug. 12, 2011) (striking down a municipal ordinance that prohibited oil and gas drilling in areas where the West Virginia state government had authorized wells).

54. Robinson Twp. v. Commonwealth, 623 Pa. 564 (2013).

*Township v. Commonwealth*, a plurality of the court invalidated portions of a state oil and gas statute, Act 13, which required local governments to treat oil and gas operations as permitted in all zoning districts within their territories.[55] The plurality acknowledged that local governments' regulatory powers had been delegated by the state, and that the state could limit those powers.[56] Nevertheless, these justices found Act 13 inconsistent with a provision of the Pennsylvania Constitution—known as the Environmental Rights Amendment—which guarantees the right of all people in the state to clean air and pure water.[57] According to the plurality, the state could not require municipalities to permit fracking *everywhere* within their territories, without taking reasonable precautions against well contamination, air pollution, and other impacts.[58] Nevertheless, the decision in *Robinson Township* did not suggest that local governments in Pennsylvania have unfettered discretion to regulate fracking. Notably, local governments still cannot ban fracking altogether within their territory.[59]

In that sense, *Robinson Township* did not deviate from a broader trend in the case law. Courts around the country have consistently struck down local ordinances that purported to ban fracking or other extractive activities completely, provided the bans were contrary to state policy.[60] Although New York's highest court upheld a local government's ban on fracking, New York had a statewide moratorium on fracking at the time, and the state has since banned the practice altogether.[61]

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55. *Id.* at 679, 725–26

56. *Id.* at 688.

57. *Id.* at 584–85, 689–90.

58. *Id.* at 689–90.

59. *See* Katie Colaneri, *Pennsylvania towns with no zoning rules unlikely to limit gas drilling*, STATE IMPACT, https://stateimpact.npr.org/pennsylvania/2014/02/11/pa-towns-with-no-zoning-rules-unlikely-to-limit-gas-drilling-2/ [https://perma.cc/X387-W2PW] (archived Oct. 21, 2017); Alex Wolf, *Pennsylvania Cases Could Pave Clearer Path For Local Fracking Laws*, LAW360, https://www.law360.com/articles/848756/pa-cases-could-pave-clearer-path-for-local-fracking-laws [https://perma.cc/MV34-VZ6A] (archived Oct. 21, 2017) ("But while the rulings in the so-called *Robinson Township* case may have given municipalities the right to determine where drilling activities can take place, they did not give local governments the power to ban fracking-related operations altogether[.]").

60. *See, e.g.*, Swepi, 81 F. Supp. 3d at 1093–94 (ban by New Mexico county); City of Longmont Colo., 369 P.3d at 577 (ban by Colorado municipality); State ex rel. Morrison, 37 N.E.2d at 133 (ban by Ohio municipality).

61. In *In re Wallach*, the Court held that state law merely preempts local governments from regulating the manner in which oil and gas activity occurs, leaving them free to determine the location, 16 N.E.3d at 1199, or even to disallow the activity. *Id.* at 1202. The Court acknowledged that the state could take away that power at any time, *id.* at 1202–03, but, as a practical matter, there was no need for the state to do so. The state had already issued a moratorium on fracking, and decided soon after this opinion was issued to ban fracking altogether. *See* Nicholas St. Fleur, *The Alarming*

Another way in which local governments can influence development is by imposing "exactions" on developers as a condition for granting land-use approvals. A municipality might, for example, ask a developer to set aside part of its land for a public park or street, or to pay fees to cover the cost of providing public services to the development.[62] Yet local governments must be careful when imposing exactions, because developers may challenge them as uncompensated takings in violation of the Takings Clause of the US Constitution.[63] The US Supreme Court has developed a strict framework for evaluating exactions under the Takings Clause, known as the *Nollan-Dolan* test. Under that framework, the municipality must demonstrate a rational nexus between the exaction and the project's anticipated negative impacts, as well as a "rough proportionality" between the burden on the developer and the impacts.[64] In essence, the exactions must be narrowly tailored to address project impacts; the government cannot impose conditions simply to enhance community welfare.[65]

As this discussion has shown, local governments in the United States have several means at their disposal to influence development and secure benefits but are also held in check in important ways by higher authorities.

### 2. Developments Around the World

As in the United States, local governments abroad are increasingly exercising regulatory powers and benefiting from revenue-sharing mandates. Many local governments have acquired

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*Research Behind New York's Fracking Ban*, ATLANTIC (Dec. 19, 2014) (discussing the 2008 moratorium and 2014 ban).

62. *See* JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § G17.03(1)(a) (3d ed. 2016) (an exaction occurs when "the local government has required that a developer actually transfer something of value to the government as a condition of development approval" such as "the dedication of land or easements or the payment of fees"); PETER S. SALSICH, JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION: A LEGAL ANALYSIS AND PRACTICAL APPLICATION OF LAND USE LAW (3d ed. 2015) (summarizing types of exactions).

63. *See, e.g.*, B.A.M. Dev., L.L.C. v. Salt Lake County, 128 P.3d 1161, 1163 (Utah 2006) (takings challenge to county decision to condition approval of residential subdivision on dedication of property to widen traffic artery); Stephen L. Kling, Jr. et al., *Zoning as a Tool of Land Use Control: An Analysis of the Use of Zoning as a Land Use Control*, 64 J. MO. B. 230, 234 (2008) (discussing takings challenges to zoning regulations and explaining that the Takings Clause of the Fifth Amendment is applicable to local zoning regulations through the Fourteenth Amendment).

64. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 838 (1987); SALSICH & TRYNIECKI, *supra* note 62, at 418–22 (summarizing the *Nollan-Dolan* framework and case law applying the same).

65. *See* Lin, *supra* note 35, at 363 ("Takings doctrine limits the exactions a local government may demand . . . Thus, exactions typically focus on ameliorating negative externalities rather than providing affirmative incentives to local communities.").

these rights and powers only recently, through "decentralization" processes in vogue internationally.[66]

a. The Decentralization Trend

In countries all over the world, higher authorities have transferred powers and revenues to lower authorities in an effort to improve governance and achieve a more equitable sharing of benefits.[67] Many have done so at the urging of international donors, United Nations bodies, and theorists, who have lauded decentralization as a means to promote sustainable development by bringing decision making closer to those affected by decisions.[68] This embrace of decentralization is notably reflected in Agenda 21,[69] the action plan for implementing the Rio Declaration, a soft-law instrument adopted by more than 170 countries in 1992.[70] Notably, Agenda 21 called on states to promote sustainable development through "increased local control of

66. *See* Allen L. Clark, *Government Decentralisation and Resource Revenue Sharing, in* INTERNATIONAL AND COMPARATIVE MINERAL LAW AND POLICY: TRENDS AND PROSPECTS, *supra* note 1, at 549 ("The process of government decentralisation and resource revenue sharing, as part of fiscal decentralisation, is developing rapidly internationally[.]").

67. *See* WORLD BANK INDEPENDENT EVALUATION GROUP, *supra* note 27, at xiii ("The main reasons for [decentralization] reforms are often political, but governments also adopt them as a way to improve service delivery and local governance."); Laura A. German et al., *Forest Governance and Decentralization in Africa: Linking Local, Regional, and Global Dialogues, in* GOVERNING AFRICA'S FORESTS IN A GLOBALIZED WORLD 1 (Laura Anne German, Alain Karsenty & Anne Marie Tiani eds., 2009) ("Many countries embarked on decentralization in response to demands for better management of natural resources, including forests, and for more equitable sharing of benefits derived from them.").

68. *See Introduction, in* LOCAL FOREST MANAGEMENT: THE IMPACTS OF DEVOLUTION POLICIES 1 (David Edmunds & Eva Wollenberg eds., 2003) ("Environmentalists painted images of sustainable resource management based on an intimate economic and cultural connection between local people and natural resources, as well as images of more effective resource protection by those living in close proximity to natural resources."); Peter Oosterveer & Bas Van Vliet, *Environmental Systems and Local Actors: Decentralizing Environmental Policy in Uganda*, 45 ENVTL. MGMT. 284, 287 (2010) (in Uganda, international donors "made decentralization a condition for the release of grants or loans."); Jesse C. Ribot, Arun Agrawal & Anne M. Larson, *Recentralizing While Decentralizing: How National Governments Reappropriate Forest Resources*, 34 WORLD DEV. 1864, 1865 (2006) ("Governments, donors, NGOs, and theorists typically defend decentralization reforms on grounds of improved efficiency, equity, and responsiveness of bureaucracies to citizen demands.").

69. U.N. Conference on Environment and Development, Agenda 21, U.N. Doc. A/CONF.151/26 (June 1992) [hereinafter Agenda 21].

70. U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (Aug. 12, 1992) [hereinafter Rio Declaration]; Stathis N. Palassis, *Beyond the Global Summits: Reflecting on the Environmental Principles of Sustainable Development*, 22 COLO. J. INT'L ENVTL. L. & POL'Y 41, 47–48 (2011) (discussing the adoption of these instruments).

resources, local institution-strengthening and capacity-building."[71] Agenda 21 also contemplated "a community-driven approach to sustainability," which should include "[g]iving communities a large measure of participation in the sustainable management and protection of the local natural resources[.]"[72] International instruments building on the Rio Declaration since then have continued to recognize an important role for local authorities in sustainable development.[73]

At the same time, some decentralization processes have been driven in part by pressures from below, as communities have demanded more input into decision making or a greater share of benefits.[74]

Some such demands have been fueled by environmental or social impacts of development activity. In the Philippines, for example, large-scale development projects under the highly centralized Marcos regime in the 1970s and 1980s caused widespread environmental degradation and contributed to the rise of community resistance movements.[75] After Marcos fell from power, local interests pressured the Corazon Aquino administration to give them more say in decision making over development and a greater share of benefits.[76] The resulting Local

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71. Agenda 21, *supra* note 69, ¶ 3.4.

72. *Id.* ¶ 3.7

73. *See, e.g.*, Rio+20: United Nations Conference on Sustainable Development, Rio de Janeiro, Braz., June 20–22, 2012, *The Future We Want*, ¶ 42, U.N. Doc. A/RES/66/288 (July 27, 2012) ("We ... recognize the important role that [local] authorities and communities can play in implementing sustainable development."); *id.* ¶ 193 ("[W]e commit to improving the livelihoods of people and communities by creating the conditions needed for them to sustainably manage forests, ... particularly decision-making and benefit sharing, in accordance with national legislation and priorities.").

74. *See* Clark, *supra* note 66, at 558 (in the Philippines and Indonesia decentralization occurred in response to "massive public demonstrations for a greater role in government decision-making through decentralisation and for resource revenue sharing, the latter led particularly by the resource-rich provinces of each nation"); *Introduction*, *in* LOCAL FOREST MANAGEMENT: THE IMPACTS OF DEVOLUTION POLICIES, *supra* note 68, at 2 ("Popular protest at the shortcomings of centralized policies ... also forced government officials in some countries to re-evaluate their position on who should be responsible for forest management.").

75. *See* Francisco A. Magno, *Environmental Movements in the Philippines*, *in* ASIA'S ENVIRONMENTAL MOVEMENTS: COMPARATIVE PERSPECTIVES 143, 149 (Yok-shiu F. Lee & Alvin Y. So eds., 1999) (explaining that during the Marcos era "Philippine environmental activism was fueled by threats to local people and nature generated by environmentally high-impact projects," and providing examples); Alma Ocampo-Salvador, *Environmental Governance in the Philippines*, PHILIPPINE GOVERNANCE REPORT 11 (2002), http://www.ombudsman.gov.ph/UNDP4/philippine-governance-report/index.html [https://perma.cc/UX24-PYYN] (archived Oct. 21, 2017).

76. *See* Ledivina V. Cariño, *Devolution toward Democracy: Lessons for Theory and Practice from the Philippines*, *in* DECENTRALIZING GOVERNANCE: EMERGING CONCEPTS AND PRACTICES 92, 103 (G. Shabbir Cheema & Dennis A. Rondinelli eds., 2007); Ocampo-Salvador, *supra* note 75, at 15–16 (describing the impact of local activism on Aquino administration policy, including community-based natural resource

Government Code (LGC) expanded local governments' taxing powers, gave them a specified share of revenues from natural resource development, and increased their share of national taxes.[77] The LGC also required national agencies to consult with and obtain consent of local governments before undertaking any project that poses substantial environmental risk.[78] In addition, the LGC gave local governments new regulatory powers in areas such as forestry management, mining, and environmental protection.[79] Nevertheless, it was not until an environmental disaster in 1996 at a mine regulated by the central government that local governments began to use their new powers fully. Galvanized by growing community fears about the risks of mining, several local governments opted to withhold their consent to mining proposals or passed ordinances prohibiting mining within their territory.[80]

In other cases, local demands for decentralization have been spurred by a desire to secure a greater share of benefits. In Bolivia, for example, the central government devolved significant powers and revenues to local authorities in the mid-1990s in response to pressures from local interests seeking greater access to, and benefits from, natural resources.[81] Subsequently, after the discovery of extensive new

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management); Joseph Siegle & Patrick O'Mahony, *Assessing the Merits of Decentralization as a Conflict Mitigation Strategy*, USAID OFF. DEMOCRACY AND GOVERNANCE 39–40 (2006) (in light of community resistance movements, "decentralization was seen as a principal means to improve security by bringing government closer to the people").

77. *See* Siegle & O'Mahony, *supra* note 76, at 40.

78. *See* William N. Holden & R. Daniel Jacobson, *Mining Amid Decentralization. Local Governments and Mining in the Philippines*, 30 NAT. RESOURCES F. 188, 192–93 (summarizing LGC provisions); Varsha Venugopal, *Thinking Locally: Community Consultation in the Philippines*, NAT. RESOURCE GOVERNANCE INST. 2 (April 2016), http://www.resourcegovernance.org/sites/default/files/documents/thinking-locally-community-consultation-in-the-philippines.pdf (last visited Oct. 21, 2017) [https://perma.cc/L4MZ-D3D2] (archived Oct. 21, 2017).

79. *See* Boris Verbrugge, *Decentralization, Institutional Ambiguity, and Mineral Resource Conflict in Mindanao, Philippines*, 67 WORLD DEV. 449, 453 (2015) (summarizing the new powers that the LGC provided).

80. *See* Venugopal, *supra* note 78, at 2 ("Events reached a turning point in March 1996 following the tailings spill at the Marcopper Mining Corporation mine which filled the 26-kilometer Boac River on the island of Marinduque with 3–4 million tons of metal-enriched and acid-generating tailings. . . . [S]ince the disaster local governments have used the code provisions more frequently to oppose mining activities[.]").

81. *See* Ribot, Agrawal & Larson, *supra* note 68, at 1874 (asserting that the devolution of powers and revenues to local authorities in Bolivia was a "response to regional movements demanding local access to forests and timber royalties since the 1970s."); Gonzalo Sánchez de Lozada & Jean-Paul Faguet, *Why I Decentralized Bolivia*, *in* IS DECENTRALIZATION GOOD FOR DEVELOPMENT?: PERSPECTIVES FROM ACADEMICS AND POLICY MAKERS, *supra* note 6, at 31, 41–44 (explaining that demands in Santa Cruz and other departments for "a bigger and bigger piece of the pie" drove the decentralization that occurred in Bolivia in the early 1990s).

natural gas deposits in that country,[82] movements developed in the resource-rich regions seeking exclusive control over local resources.[83] In response, the central government agreed to devolve further powers to subnational authorities but insisted on retaining ultimate control over resource development.[84]

Decentralization has also sometimes been fueled in part by ethnic, religious, or linguistic divisions, as minority groups have sought greater autonomy from central regimes dominated by majority groups.[85] In Spain, for example, the central government sought to defuse separatist demands in Catalonia and the Basque Region by dividing the country into seventeen autonomous communities and two autonomous cities.[86] These autonomous bodies acquired new regulatory powers in areas such as land use planning and environmental protection, as well as mandated shares of governmental revenues.[87]

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82. *See* Thomas Perreault, *Extracting Justice: Natural Gas, Indigenous Mobilization, and the Bolivian State*, *in* THE POLITICS OF RESOURCE EXTRACTION: INDIGENOUS PEOPLES, MULTINATIONAL CORPORATIONS AND THE STATE 75, 76 (Suzana Sawyer & Edmund Terence Gomez eds., 2012) (asserting that new discoveries increased Bolivia's proven gas reserves thirty-fold between 1996 and 2002).

83. *See* Franz Chávez, *Bolivia: The Complex Process of Designing a New State*, INTER PRESS SERVICE (Mar. 21, 2007) (observing that Bolivia's natural gas reserves are concentrated in the eastern and southern regions and that "civic leaders in the eastern provinces want greater local control over the administration of natural resources and the taxes levied on them."); Mohit Joshi, *In Political Unrest, Looters Target Bolivian Telecoms, TV Offices*, TOP NEWS, Sept. 11, 2008 (describing protests against the state's taxation of local natural gas, and noting that "citizens in four provinces have approved referenda, by large margins, for greater autonomy from the national government, which would grant them control over key natural resources").

84. *See La Paz Opts For New Constitution, Cements Control Over Resources*, BMI AMERICAS OIL & GAS INSIGHTS (Jan. 27, 2009) (describing Bolivia's new constitution, which grants "more autonomy to the country's nine regions," but also enshrines "state control over Bolivia's natural resources."); *Multiple Challenges To Stability, With Or Without Morales*, BUS. MONITOR ONLINE (Oct. 2015) ("Morales initially refused the autonomy demands of the eastern regions . . . however, following international mediation, Morales agreed to grant the eastern regions more autonomy in the 2009 constitution.").

85. *See* Rodríguez-Pose & Gill, *supra* note 6, at 338 ("Regions and states with their own ethnic, historical, cultural, or linguistic identity have paved the way for decentralization.").

86. *See* DAVID STOREY, TERRITORIES: THE CLAIMING OF SPACE 89 (2d ed. 2012) (asserting that the creation of autonomous communities was a response to separatist pressures and was "designed to stave off the disintegration of the Spanish state").

87. *See* Núria Bosch & José M. Durán, *The Financing System of Spanish Regions: Main Features, Weak Points and Possible Reforms*, *in* FISCAL FEDERALISM AND POLITICAL DECENTRALIZATION: LESSONS FROM SPAIN, GERMANY AND CANADA 3–6 (Núria Bosch & José M. Durán eds., 2008) (summarizing the powers and revenues devolved to the autonomous bodies); Covadonga Del Pozo & María Soto, *Spain*, *in* INTERNATIONAL COMPARATIVE LEGAL GUIDES: ENVIRONMENT & CLIMATE CHANGE LAW 2017 § 1.1, http://www.iclg.co.uk/practice-areas/environment-and-climate-change-law/environment-and-climate-change-law-2016/spain [https://perma.cc/GZV4-BGCT] (archived Oct. 21, 2017) (summarizing the autonomous bodies' regulatory powers).

In some countries, a combination of these factors has played a role in the decentralization process. Indonesia provides a case in point. In that country, the central government adopted a sweeping series of decentralization measures in 1999 in the face of separatist movements in minority-group regions. These movements were fueled not only by ethnic or religious divisions, but also by resentment over environmental degradation and limited sharing by the central government of revenues derived from natural resource development.[88] As the central government struggled to deal with these pressures, international donors supported decentralization as a potential solution.[89] The decentralization measures that the central government ultimately adopted gave local governments substantial new powers and revenues.[90] Among other things, local governments secured control over the issuing of permits for natural resource development and environmental enforcement,[91] as well as specified shares of tax revenues collected from resource development.[92]

b. Results of Decentralization

The results of decentralization processes to date have been mixed. On the one hand, local authorities have used their newfound powers to

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88. *See* CHRISTOPHER M. BARR ET AL., DECENTRALIZATION OF FOREST ADMINISTRATION IN INDONESIA: IMPLICATIONS FOR FOREST SUSTAINABILITY, ECONOMIC DEVELOPMENT, AND COMMUNITY LIVELIHOODS 18–28 (2006) (describing the historical background to decentralization in Indonesia, and noting that "policies and practices employed by the [central] government to secure timber rents for elites at the national level generated deep resentment among stakeholders in forested regions[,]" which had experienced "unprecedented rates of deforestation and forestry degradation"); *id.* at 68 ("Demands from regional stakeholders for a more equitable share of natural resource revenues have been a significant driving factor behind Indonesia's decentralization process. In the years leading up to the 1999 regional autonomy law, some of the most vociferous demands came from stakeholders in the resource-rich provinces ... [each of which] had a long-standing separatist insurgency[.]"); Akpan, *supra* note 1 at 291–93 (discussing the impact of separatist movements in Aceh, Irian Jaya, and Riau on the central government's decision to decentralize).

89. *See* MICHELLE ANN MILLER, REBELLION AND REFORM IN INDONESIA: JAKARTA'S SECURITY AND AUTONOMY POLICIES IN ACEH 45 (2008) ("[T]he Indonesian government consulted the World Bank and the International Monetary Fund (IMF) throughout the drafting of Indonesia's autonomy laws, which both institutions supported as a way of strengthening local institutional capacity and building good governance.").

90. *See* Akpan, *supra* note 1, at 291–96 (summarizing new powers granted to local authorities by the Indonesian state in response to local struggles for resource control).

91. *See* John McCarthy & Zahari Zen, *Regulating the Oil Palm Boom: Assessing the Effectiveness of Environmental Governance Approaches to Agro-industrial Pollution in Indonesia*, 32 L. & POL'Y 153, 163 (2010) ("In effect, the districts and municipal governments now have most of the responsibilities for environmental management and monitoring.").

92. *See* Akpan, *supra* note 1, at 295–96.

extract benefits from developers in the form of taxes, fees, or infrastructure improvements,[93] and have sometimes shared those benefits broadly across communities.[94] Some local governments have also used their powers to enhance regulatory frameworks or secure project modifications to mitigate environmental and social risks.[95] On the other hand, scholars have reported a deterioration in environmental standards and a rush to develop resources in some countries following decentralization.[96] Capture of community benefits by corrupt local elites has also occurred in some countries.[97] Decentralization has also sometimes created or exacerbated economic inequalities among communities within a region or between parts of the country—with resource-rich areas faring better than resource-poor ones.[98] In addition, social conflict has sometimes erupted among local groups competing for benefits.[99]

Whether in response to these issues or simply to protect their own interests, some central governments have taken steps to reverse or undermine decentralization processes.[100] In particular, some have delayed transferring powers or revenues that they committed to

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93. *See* Venugopal, *supra* note 78, at 3 (discussing taxes and fees imposed by local governments on mining companies in the Philippines pursuant to the LGC).

94. *See, e.g.*, Phil René Oyono, *The Social and Organisational Roots of Ecological Uncertainties in Cameroon's Forest Management Decentralisation Model*, *in* DEMOCRATIC DECENTRALISATION THROUGH A NATURAL RESOURCE LENS 174, 183 (Jesse C. Ribot & Anne M. Larson eds., 2005); Charles Palmer & Stefanie Engel, *For Better or for Worse? Local Impacts of the Decentralization of Indonesia's Forest Sector*, 35 WORLD DEV. 2131, 2138 (2007) (asserting that in parts of Indonesia "[t]he percentage of households per community that received financial benefits [from timber harvesting] significantly increased from an average of one percent before decentralization to over 90% afterward").

95. *See* Ribot, Agrawal & Larson, *supra* note 68, at 1876; Venugopal, *supra* note 78, at 3 (asserting that, post-decentralization, local governments in the Philippines have established new safeguards against environmental degradation).

96. *See, e.g.*, Coleman & Fleischman, *supra* note 28, at 839–40 (asserting that decentralization has sometimes led to "localized benefits which are out of harmony with the broader policy goals (*e.g.*, short term economic benefits from timber extraction which improves local livelihoods, but at the expense of the broader goals of sustainability)").

97. *See* Oyono, *supra* note 94, at 184; Palmer & Engel, *supra* note 94, at 2136 (describing local rent-seeking, corruption and elite capture following decentralization in Indonesia).

98. *See* Clark, *supra* note 66, at 564 (asserting that Indonesia's revenue-sharing framework has exacerbated economic disparities among different regions and municipalities); Priscilla Schwartz, *Corporate Activities and Environmental Justice: Perspectives on Sierra Leone's Mining*, *in* ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 429, 438 (Jonas Ebbesson & Phoebe Okowa eds., 2009) (explaining that benefits have been distributed unevenly among inhabitants of some mining communities in Sierra Leone, resulting in social discord).

99. *See* Verbrugge, *supra* note 79, at 457 (describing conflicts between local groups in the Philippines over resource royalties).

100. *See* Ribot, Agrawal & Larson, *supra* note 68, at 1865 (describing such measures and asserting that they are sometimes taken by central authorities "to preserve their own interests and powers").

transfer,[101] enacted new laws or decrees that contradict prior devolutions of authority,[102] or questioned the validity of actions taken by lower governments pursuant to devolved powers.

For example, despite language in the LGC requiring consent from local governments for mining projects, the central government in the Philippines has disputed local governments' authority to withhold consent. In 2012, after several local governments attempted to do so, President Benigno S. Aquino III issued Executive Order No. 79, declaring that local governments must restrict themselves to "the imposition of reasonable limitations on mining activities . . . that are consistent with national laws and regulations."[103] The same year, his Department of Justice issued an opinion asserting that local governments do not have the legal authority to ban mining.[104] One scholar has described these actions as seeking to "confirm the primacy of national government laws over local ordinances . . . as part of a broader attempt on the part of the current administration to recentralize control over mineral wealth."[105]

### B. *EIA Requirements and Public Participation in Environmental Decision Making and Enforcement*

As local governments have expanded their regulatory roles and revenues—subject, in some cases, to pushback from higher authorities—communities and stakeholders have secured further

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101. *See id.* at 1876 (asserting that—despite laws purporting to allow local governments in Nicaragua to "control the rational use of the environment and natural resources" and giving them a right to 25% of the tax income from natural resource contracts—the central government often awards such contracts unilaterally and fails to transfer the required funds).

102. *See* Akpan, *supra* note 1, at 293–95 (explaining that after the Indonesian state passed a law giving local governments the power to issue permits for particular investment activities, the state enacted regulations empowering the state to grant the main licenses for certain projects); Palmer & Engel, *supra* note 94, at 2133 (asserting that, after legislation granted local governments in Indonesia the authority to issue logging permits, the Ministry of Forestry suspended that authority).

103. Institutionalizing and Implementing Reforms in the Philippine Mining Sector, Providing Policies and Guidelines to Ensure Environmental Protection and Responsible Mining in the Utilization of Mineral Resources, Exec. Ord. No. 79, § 12 (Phil.).

104. *See* Dep't of Justice, Opinion No. 87 s. 2012 (Phil), http://www.intexresources.com.ph/mindoronickel/index_html_files/DOJ%20Opinion%2087-2012.pdf [https://perma.cc/FEN8-G75F] (archived Oct. 21, 2017); Edu Punay, *LGUs Prohibiting Open Pit Mining May Face Sanctions*, PHIL. STAR, Nov. 26, 2012 (the Department of Justice "supported the plan of the Department of the Interior and Local Government (DILG) to impose administrative sanctions on local government units (LGUs) that continue to prohibit open pit mining").

105. Verbrugge, *supra* note 79, at 454.

influence through the rise of EIAs and opportunities for public participation in environmental matters.[106]

1. Developments in the United States

Innovations in the United States gave rise to both the EIA phenomenon and multilayered participation rights for affected communities and individuals: access to information, participation in decision making, and access to justice.

a. The US EIA Regime

In 1969, Congress passed the National Environmental Policy Act (NEPA), which established a requirement for federal agencies to evaluate the environmental impacts of development projects or other actions that implicate significant federal responsibility.[107] The statute was a response to public demands for reform in the wake of the 1969 Santa Barbara oil spill and other events that raised awareness of the potential environmental and social costs of development.[108] Legislative history suggests that Congress enacted NEPA to address perceived deficiencies in agency decision making and "restore public confidence in the Federal Government's capacity to achieve important public purposes and objectives and at the same time to maintain and enhance the quality of the environment."[109]

Under NEPA, unless a proposed action falls within a statutory or regulatory exclusion, the responsible agency must undertake an environmental assessment (EA) before approving the action.[110] An EA

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106. *See* George (Rock) Pring & Susan Y. Noé, *The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development, in* HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT 11, 38 (Donald N. Zillman et al. eds., 2002) (discussing the rise of EIAs and associated participation requirements).

107. National Environmental Policy Act of 1969, Pub. L. No. 91–190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347 (2012)); *see also* Todd S. Aagaard, *A Functional Approach to Risks and Uncertainties Under NEPA*, 1 MICH. J. ENVTL. & ADMIN. L. 87, 91–92 (2012) (summarizing NEPA's requirements).

108. Bradley C. Karkkainen, *NEPA and the Curious Evolution of Environmental Impact Assessment in the United States, in* TAKING STOCK OF ENVIRONMENTAL ASSESSMENT: LAW, POLICY AND PRACTICE 45, 51–52 (Jane Holder & Donald McGillivray eds., 2007) (summarizing circumstances leading to NEPA's adoption); 115 Cong. Rec. 40,422 (1969) (statement of Sen. Allott) ("[B]y enactment of this measure, the Congress is not giving the American people something, rather the Congress is responding to the demands of the American people.").

109. Daniel J. White, *When There Are No Adverse Effects: Protecting the Environment from the Misapplication of NEPA*, 71 A.F. L. REV. 107, 139 (2014) (quoting S. Rep No. 91-296, at 8).

110. *See* John Travis Marshall, *Weathering NEPA Review: Superstorms and Super Slow Urban Recovery*, 41 ECOLOGY L. Q. 81, 91–92 (2014) (summarizing categorical exclusions and circumstances under which an EA must be performed).

is a relatively cursory investigation into whether or not the action has the potential to cause significant adverse environmental effects.[111] If the agency determines that the effects of a proposed action will *not* be significant, then it issues a "finding of no significant impact" (FONSI) and ends the review.[112] If, however, the agency concludes that the effects *will* be significant, then it must undertake a much more comprehensive investigation and prepare an environmental impact statement (EIS).[113] An EIS is a formal written statement that discusses the purpose and need for the proposed action, describes the environment that will be affected, analyzes the environmental impacts, and considers alternatives to the proposed action.[114]

NEPA does not mandate any particular outcome, leaving agencies free to approve or reject actions notwithstanding impacts identified in an EIS. The statute does, however, require agencies to take a "hard look" at the environmental consequences of their decisions.[115] Moreover, when preparing an EIS the responsible agency must consider not only potential impacts on the physical environment but also social and economic impacts.[116] This gives local communities a form of indirect influence: the responsible agency must disclose and analyze how communities could be affected by the proposed action.

b. Access to Information and Participation in Environmental Decision Making

NEPA implementing regulations also provide more direct avenues of community influence by establishing opportunities for members of

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111. *See id.* at 92 ("[an EA] serves an exploratory purpose"); *see also* White, supra note 109, at 114–15 (describing EAs).

112. *See* Whether to Prepare Environmental Impact Statement, 40 C.F.R. § 1501.4(e) (1978) (criteria for issuance of a FONSI); *see also* Kevin T. Haroff, *On Thin Air: Standing, Climate Change, and the National Environmental Policy Act*, 46 VAL. U. L. REV. 411, 417 (2012) (explaining when FONSIs may be issued).

113. *See* Haroff, *supra* note 112, at 417 ("If no categorical exclusion applies, and issuance of a FONSI cannot be justified, the agency ordinarily must prepare an EIS."); White, *supra* note 109, at 114–15 (comparing the difference between an EA and an EIS).

114. 42 U.S.C. § 4332 (statutory basis for the EIS requirement); Haroff, *supra* note 112, at 417 (summarizing issues typically addressed in an EIS).

115. Aagaard, *supra* note 107, at 92 ("NEPA 'require[s] that agencies take a 'hard look' at environmental consequences.' But NEPA's requirements are procedural, not substantive. So long as 'the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.'").

116. GRAD, *supra* note 36, § 9.02 ("NEPA itself clearly requires that the environmental impact statement includes social, economic, and other non-physical impacts."); 5-120 DAVID J. MUCHOW & WILLIAM A. MOGEL, ENERGY LAW AND TRANSACTIONS § 120.02 (2016) ("If an EIS is prepared and economic or social effects are 'interrelated' with natural and physical effects, the EIS must discuss 'all of these effects on the human environment.'") (quoting 40 C.F.R. § 1508.14).

the public to participate in the review process.[117] In particular, regulations promulgated by the Council on Environmental Quality (CEQ)—an executive body established by NEPA—require agencies to encourage public participation in the EIS process from the earliest possible time; take prescribed steps to notify interested parties and make relevant materials available to the public; and hold public hearings whenever appropriate.[118] These requirements are designed to improve agency decision making by giving officials input from interested parties, as well as to increase the legitimacy of decisions.[119]

Notably, however, some opportunities for public participation do not arise unless the responsible agency decides to undertake an EIS.[120] Yet the agency does not have to prepare an EIS if it finds—in the threshold EA—that the action will have no significant impacts. And agencies have a distinct incentive to make such a finding, because preparing an EIS is extremely expensive and time-consuming.[121]

Another limiting factor is that decision makers do not have to credit whatever comments are offered by members of the public. Although agencies must consider comments received and respond to them,[122] the comments do not necessarily impact the ultimate outcome. Even if a majority of an affected community opposes a proposal, the responsible agency can still approve it; affected communities do not have a veto.[123]

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117. PANEL ON PUB. PARTICIPATION IN ENVTL. ASSESSMENT & DECISION MAKING & THE NAT'L RESEARCH COUNCIL, PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING 37 (Thomas Dietz & Paul C. Stern eds., 2008) [hereinafter Dietz & Stern] (describing public participation opportunities).

118. 40 C.F.R. § 1506.6 (2017) (requirements for public involvement); GRAD, *supra* note 36, § 9.03 (summarizing the public participation requirements set forth in the CEQ regulations); Peter Eddie Aldinger, *Addressing Environmental Justice Concerns in Developing Countries: Mining in Nigeria, Uganda and Ghana*, 26 GEO. INT'L ENVTL. L. REV. 345, 362 (2014) (same).

119. Dietz & Stern, *supra* note 117, at 49–50 (citing evidence that public participation and local knowledge can improve the quality of decision making); *id.* at 50 (federal agencies see public participation "as a means of making their decisions more broadly acceptable to the public"); Amy L. Major, *Foxes Guarding the Henhouse: How to Protect Environmental Standing From a Conservative Supreme Court*, 36 ENVTL. L. REP. 10698, 10708 (2006) ("[T]hrough NEPA's informational and procedural requirements, Congress sought to utilize public participation as a way of achieving environmental protection and demonstrated its commitment to public involvement in oversight of agency actions under the Act.").

120. *See* Elizabeth Burleson, *Cooperative Federalism and Hydraulic Fracturing: A Human Right to a Clean Environment*, 22 CORNELL J. L. & PUB. POL'Y 289, 298–99 (2012) (discussing the importance of an EIS for fulsome public participation).

121. Raefe Peterson, *Environmental Law Update*, 24 PROBATE & PROPERTY 54 (2010) ("[T]here is considerable benefit to reaching a finding of 'no significant impact' if for no other reason than the time and resources it takes to prepare an EIS.").

122. ROHAN & KELLY, *supra* note 40, § 24.03 (citing 40 C.F.R. § 1503.4 (2017)).

123. Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV. 1031, 1128–29 (2003) ("So long as the public is allowed to participate, the decision-maker

Studies have shown that decision makers are most likely to be swayed by highly technical comments that emanate from experts, usually involving scientific or economic issues.[124] This places members of the general public at a disadvantage in any attempt to influence decision making. That disadvantage can be particularly pronounced for members of low-income and minority communities, who are less likely to be able to hire experts and more likely to face linguistic and educational constraints.[125]

Despite these limitations, public input does sometimes influence agency decision making.[126] Such input was likely a factor, for example, in the Obama administration's denial of a permit required for the Keystone XL Pipeline—a project to bring crude oil from the Oil Sands of Canada to refineries in the United States.[127] During the review process, the State Department received millions of comments from citizens, community groups, Native American tribes, and local governments.[128] Many of these raised concerns about potential environmental or social impacts of the project, including the risk that oil spills would pollute the Ogallala Aquifer and threaten the health of local communities.[129] After this "unprecedented" outpouring of

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is free to decide where and how to locate a facility, without regard to the sentiments expressed in the public participation process.").

124. Nicholas A. Fromherz, *From Consultation to Consent: Community Approval as a Prerequisite to Environmentally Significant Projects*, 116 W. VA. L. REV. 109, 143 (2013) ("[T]he input that makes a difference—the input that agencies and courts credit—is largely the stuff of expertise.").

125. *See id.* at 142 ("To influence the process, non-governmental actors—be they citizen groups, NGOs, think tanks, industry representatives, etc.—must command resources to which many ordinary people do not have access."); Case, *supra* note 24, at 718 ("Problems such as literacy or language barriers, obscure or untimely official notices, and documents in technical and highly specialized language create serious accessibility obstacles to participation for environmental justice communities.").

126. *See* Marc B. Mihaly, *Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership with Experts and Agents*, 27 PACE ENVTL. L. REV. 151, 167 (2009) ("The quantity, unilateral nature, or vehemence of citizen testimony may sway a decision-maker in marginal or heavily politicized settings, especially where the ultimate decision-maker is comprised of elected officials.").

127. Cindy S. Woods, *The Great Sioux Nation v. The "Black Snake": Native American Rights and the Keystone XL Pipeline*, 22 BUFF. HUM. RTS. L. REV. 67, 68–73 (2016) (describing the Keystone XL project proposal and the application process, from inception to denial of the permit).

128. Department of State Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, L.P. Application for Presidential Permit at 4–5 (Nov. 3, 2015), http://keystonepipeline-xl.state.gov/documents/organization/249450.pdf [https://perma.cc/RZ2J-WH43] (archived Oct. 23, 2017) [hereinafter Department of State Record of Decision] (noting more than 1.5 million public comments in response to the Draft Supplemental EIS, and more than three million in response to the Final Supplemental EIS).

129. *Id.* at 13–17.

opposition, the State Department denied the permit—expressly acknowledging that community concerns were one basis for the decision.[130] Although the State Department indicated that a "key consideration" was a desire to send a message that the United States was taking steps to reduce dependence on fossil fuels,[131] the Obama administration approved a different cross-border pipeline carrying the same Oil Sands crude.[132] An important factor that distinguished the Keystone XL Pipeline was the widespread, grassroots opposition.[133] And while President Trump has since approved the Keystone XL Pipeline,[134] community concerns have already prompted one route modification after he did so, and the ultimate fate of the project remains to be seen.[135]

c. Access to Justice

Members of the public in the United States have also acquired opportunities to participate in the enforcement of environmental laws.

One such opportunity is the right to challenge an agency's perceived failure to comply with NEPA's procedural requirements. NEPA does not provide a private right of action, but members of the public may bring suit against the responsible agency under the Administrative Procedure Act (APA).[136] For example, citizens have filed suit under the APA to challenge agencies' FONSI

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130. *Id.* at 5 (describing the volume of comments as "unprecedented"); *id.* at 30 (listing, among the factors that contributed to the decision, "the concerns of some Indian tribes . . . regarding cultural sites and avoidance of adverse impacts to the environment, including to surface and groundwater resources").

131. *Id.* at 31.

132. David Shaffer, *State a Busy Hub for Crude Oil*, STAR TRIB. (Aug. 26, 2012), at 1A (observing that "[w]hen Enbridge built its 'Alberta Clipper' pipeline to carry Canadian crude into Minnesota, it won approval from the Obama administration in 2009 with no fanfare").

133. *Id.* (attributing the difference in outcomes for the two projects to the existence of grassroots opposition in the case of the Keystone XL Pipeline).

134. Brady Dennis & Steven Mufson, *As Trump administration grants approval for Keystone XL pipeline, an old fight is reignited*, WASH. POST (Mar. 24, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/03/24/trump-administration-grants-approval-for-keystone-xl-pipeline/?utm_term=.ca26bb246033 [https://perma.cc/A3MR-AXG3] (archived on Oct. 23, 2017).

135. *Id.; see also* Jillian Goodman, *Can Some Nebraska Farmers Kill the Keystone XL Pipeline?*, BLOOMBERG (Aug. 14, 2017), https://www.bloomberg.com/news/articles/2017-08-14/can-some-nebraska-farmers-kill-the-keystone-xl-pipeline [https://perma.cc/45AB-GQV9] (archived Oct. 23, 2017); Adam Wernick, *The Keystone XL Pipeline Gets a Victory, but with a Question Mark*, PRI (Dec. 12, 2017), https://www.pri.org/stories/2017-12-12/keystone-xl-pipeline-gets-victory-question-mark [https://perma.cc/GJN7-NBWE] (archived on. Jan. 5, 2018).

136. NICHOLAS A. ROBINSON, ENVIRONMENTAL REGULATION OF REAL PROPERTY § 4.07 (2017).

determinations[137] or the adequacy of EISs.[138] Courts generally give substantial deference to agency decisions,[139] but citizen plaintiffs can prevail when the decision plainly lacks an adequate basis. For example, one court overturned a FONSI issued by the Bureau of Land Management (BLM) in connection with a proposed fracking operation in the Monterey Shale Formation because the FONSI was based on an erroneous assumption.[140] Specifically, in determining that the operation would have no significant impacts, BLM assumed that the developer would not find oil and that no production would result.[141] BLM based this assumption on the fact that prior attempts to produce oil—using conventional methods—had failed.[142] As the Court pointed out, however, there were significant oil deposits in the local shale formation and fracking is much more effective at recovering oil and gas from shale.[143] Consequently, BLM should have at least considered what impacts would result if production commenced.[144]

Members of the public can also allege violations of substantive environmental laws, most of which authorize citizen suits.[145] Such suits can be an effective supplement to agency enforcement efforts, stopping pollution or other harms that would likely continue unchecked if agencies were left to their own devices.[146] In fact, Congress established these private rights of action because of limitations on agency resources and the concern that agencies

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137. *See* Wendy B. Davis, *The Fox is Guarding the Henhouse: Enhancing the Role of the EPA in FONSI Determinations Pursuant to NEPA*, 39 AKRON L. REV. 35, 44–52 (2006) (summarizing case law involving citizen suit challenges to FONSI determinations).

138. Haroff, *supra* note 112, at 417–18 (discussing citizen suits challenging the adequacy of an EIS or the manner in which it was prepared).

139. *See* Sierra Club v. Flowers, 526 F.3d 1353, 1361 (11th Cir. 2008) (internal citation omitted) ("A court can only find a federal agency's attempted NEPA compliance inadequate where it is arbitrary, capricious, or an abuse of discretion in violation of the APA. This standard requires substantial deference to the agency ... when reviewing decisions like what evidence to find credible and whether to issue a FONSI or EIS[.]").

140. Ctr. for Biological Diversity & Sierra Club v. Bureau of Land Mgmt., 937 F. Supp. 2d 1140, 1155–56 (N.D. Cal. 2013).

141. *Id.* at 1155.

142. *Id.*

143. *Id.* at 1144–45.

144. *Id.* at 1155–56.

145. Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 98–99 (2005) (asserting that "almost every major federal environmental statute passed since 1970" authorizes citizen suits).

146. For an example, see Ohio Valley Envtl. Coal. v. Fola Coal Co., 120 F. Supp. 3d 509, 511–12, 542–43, 547 (S.D. W. Va. 2015) (upholding environmental NGOs' claim that a mining company was violating federal statutes by discharging pollution into streams from mountaintop removal coal mines in West Virginia, and establishing a framework for permanent injunctive relief).

sometimes lack adequate motivation to enforce environmental statutes.[147]

2. Developments Around the World

EIA requirements and public participation opportunities that first developed in the United States have since spread worldwide.

More than one hundred countries have established some form of EIA regime modeled on NEPA,[148] and the international community has adopted several international instruments that incorporate EIA norms.[149] Some of these instruments are binding, requiring member states to conduct EIAs when considering activities that are likely to cause significant adverse transboundary impact[150] or to adversely affect the marine environment,[151] the environment in Antarctica,[152] or biological diversity.[153] NEPA and its progeny also inspired Principle 17 of the non-binding Rio Declaration, which called for EIAs whenever states are considering activities likely to have a significant adverse environmental impact.[154]

Most of these EIA frameworks contemplate some form of public participation.[155] In fact, an international convention adopted in 1998 and ratified by forty-seven countries—the Aarhus Convention—requires member states to meet minimum standards for all three forms of public participation in environmental matters: access to

147. Conservation Law Found. v. Browner, 840 F. Supp. 171, 174 (D. Mass. 1993) (internal citations omitted) ("Sponsors of the Clean Air Act [citizen suit provision] were wary of the untrustworthiness or lack of will of federal environmental agencies and the inevitable lack of resources for those agencies to address all statutory violations.").

148. CRAIK, *supra* note 10, at 23.

149. Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 ECOLOGY L. Q. 615, 629–30 (2009) (describing the spread of EIA norms from NEPA to international environmental agreements and domestic laws around the world).

150. Convention on Environmental Impact Assessment in a Transboundary Context art. 2(3), Feb. 25, 1991, 1989 U.N.T.S. 309.

151. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

152. Protocol on Environmental Protection to the Antarctic Treaty, art. 8, *opened for signature* Oct. 4, 1991, 30 I.L.M. 1455 (1991).

153. United Nations Conference on Environment and Development, Convention on Biological Diversity, art. 14, June 5, 1992, 31 I.L.M. 818 (1992) [hereinafter CBD].

154. Rio Declaration, *supra* note 70, Principle 17.

155. CRAIK, *supra* note 10, at 31 ("Almost every EIA system includes some form of public participation and consultation."); Jonas Ebbesson, *Principle 10: Public Participation*, *in* THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: A COMMENTARY 287, 293 (Jorge E. Viñuales ed., 2015) ("[M]ost global environmental agreements adopted since [the Rio Declaration] endorse public access to information and public participation by some means.").

information, participation in decision making, and access to justice.[156] While the parties to the Aarhus Convention are currently confined to Europe and Central Asia,[157] many other countries' laws incorporate these elements to some degree as well.[158]

To be sure, the mere fact that public participation opportunities are formally established in a country's law does not necessarily mean they are effective in practice. Scholars have reported a number of problems that can limit the effectiveness of public participation. For example, agencies may fail to give sufficient notice or information to the public[159] or may seek input too late in the process.[160] Officials may be corrupt or lack the capacity to use public input effectively.[161] There may also be strict standing requirements for citizen suits or limited remedies available when such suits are successful.[162]

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156. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 3(1), June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention]; Ebbesson, *supra* note 155, at 298–300 (describing the Aarhus Convention's minimum standards and implementation mechanism).

157. Aarhus Convention Status Table, U.N. Treaty Collection, https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVII/XXVII-13-a.en.pdf [https://perma.cc/4VAX-T7MY] (archived Oct. 22, 2017).

158. *See* José Juan González Márquez, *Key Regional Perspectives on Public Participation: Mexico and Central America*, *in* HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT: PUBLIC PARTICIPATION IN THE SUSTAINABLE DEVELOPMENT OF MINING AND ENERGY RESOURCES 629, 639–46 (Donald N. Zillman et al. eds., 2002) (summarizing access to justice mechanisms in Mexico and Central America); Jona Razzaque, *Participatory Rights in Natural Resource Management: The Role of Communities in South Asia*, *in* ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT, *supra* note 98, at 117–25 (describing procedures for public participation in India, Pakistan, and Bangladesh); Aldinger, *supra* note 118, at 364–71 (describing public participation features of EIA legislation in Ghana, Uganda, and Nigeria).

159. Razzaque, *supra* note 158, at 130 (describing barriers to effective participation in South Asian countries); Venugopal, *supra* note 78, at 6 (asserting that in the Philippines governmental authorities have sometimes refused to share documents relating to proposed mining operations); Aldinger, *supra* note 118, at 367 (explaining that in Nigeria notice is often given in writing and in English, which excludes stakeholders who are illiterate or speak only a local language).

160. Aldinger, *supra* note 118, at 366–68 (observing that EIA processes in Ghana, Uganda and Nigeria may be well-advanced before the public has had a chance to comment).

161. Razzaque, *supra* note 158, at 132 ("Public agencies [in India, Pakistan and Bangladesh] have limited power and resources to collect, update or disseminate environmental information."); Schwartz, *supra* note 98, at 437 (asserting that problems in Sierra Leone include "state-centric albeit uncoordinated bureaucratic processes, corruption, ill-defined responsibilities between departments and lack of technical capacity on the part of regulatory bodies").

162. *See* Lye Lin Heng, *Public Participation in the Environment: A South-East Asian Perspective*, *in* HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT: PUBLIC PARTICIPATION IN THE SUSTAINABLE DEVELOPMENT OF MINING AND ENERGY RESOURCES, *supra* note 158, at 651, 669 (discussing a citizen suit challenging the adequacy of an EIA for a dam dismissed on standing grounds); González Márquez, *supra* note 158, at 646

Nevertheless, as in the United States, stakeholders abroad availing themselves of participation opportunities are sometimes able to influence outcomes. For example, widespread community opposition seems to have prompted provincial and federal authorities to reject the proposed Whites Point Quarry and Marine Terminal in Nova Scotia.[163] During the EIA process for that project, many local citizens and groups voiced concerns about potential impacts, including contamination of groundwater and harm to local fisheries and marine mammals.[164] In its report, the review panel gave considerable weight to those comments, recommending that the project be denied because it would be inconsistent with "core values" of the community.[165] After provincial and federal authorities accepted the review panel's conclusion and denied the permit, the project proponents brought a claim against Canada under the North American Free Trade Agreement (NAFTA).[166] The claimants contended that the review panel deviated from the legal standard applicable to EIAs in Canada, which focuses on whether or not the project is likely to have significant adverse environmental effects after mitigation—not whether or not it is consistent with community values.[167] A majority of the tribunal agreed and determined that the permit denial was therefore arbitrary and violated NAFTA.[168] Whether or not the review panel properly grounded its decision in the "significant adverse effects" standard,[169]

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(explaining that, while a Mexican environmental law provides a private right of action affected communities, only administrative—rather than judicial—relief is available).

163. *See* Elise LeGros, *Bilcon of Delaware v. Canada: NAFTA's Impact on Environmental Assessments*, 21 LAW & BUS. REV. AM. 343, 343–45 (2015) (describing the project's review process and subsequent arbitration filed by the project proponents after the permit denial).

164. *See* Clayton v. Gov't of Canada, Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 37 (Perm. Ct. Arb. 2015), http://www.pcacases.com/web/sendAttach/1287 [https://perma.cc/45VQ-ACBS] (archived Oct. 23, 2017) [hereinafter Clayton Bilcon Award] (the project was "a long-term industrial scale marine terminal and quarry project in an environmentally sensitive area in which many members of the local community expressed strong concerns and objections"); Environmental Assessment of the Whites Point Quarry and Marine Terminal Project, Joint Review Panel Report 39, 54–55, 72 (Oct. 2007), https://www.novascotia.ca/nse/ea/whitespointquarry/WhitesPointQuarryFinalReport.pdf [https://perma.cc/P2L6-EJLE] (archived Oct. 23, 2017) [hereinafter JRP Report].

165. Clayton Bilcon Award, *supra* note 164, ¶ 503; JRP Report, *supra* note 164, at 4.

166. Clayton Bilcon Award, *supra* note 164, ¶¶ 5, 40; North American Free Trade Agreement, Dec. 8, 1993, 107 Stat. 2057, 32 I.L.M. 289 (1993).

167. Clayton Bilcon Award, *supra* note 164, ¶ 21.

168. *Id.* ¶¶ 590–91, 724, 742.

169. A dissenting arbitrator concluded that the references in the review panel's report to "core values" of the community concerned issues properly within the panel's mandate: potential impacts on the human environment. *See* Clayton v. Gov't of Canada, Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, ¶¶ 15–27 (Perm. Ct. Arb. 2015), http://www.pcacases.com/web/sendAttach/1288 [https://perma.cc/2XKG-BTGT] (archived Oct. 23, 2017).

this case highlights the pressure that decision makers can feel to respect the local popular will.

### C. *Development Safeguards for Indigenous and Traditional Communities*

As local interests around the world have secured new formal opportunities to influence development, there has been growing recognition that certain communities are uniquely vulnerable to impacts of development and face special barriers to participation—namely, indigenous peoples and other communities that practice traditional lifestyles.[170] In response to these concerns, special safeguards for these communities have developed at both the international and domestic levels.

#### 1. International Instruments and Human Rights Jurisprudence

As discussed in more detail below, the international community has adopted a number of instruments that reflect three core safeguards for indigenous and traditional communities vis-à-vis development. Specifically, these instruments provide that, before undertaking or approving development activities that may impact indigenous or traditional communities, state authorities should: (i) conduct comprehensive EIAs that take into account the unique circumstances of these communities; (ii) ensure that these communities are able to participate effectively in EIAs and other decision-making processes; and (iii) ensure that these communities receive appropriate benefits or compensation for any impacts that occur. This Article will refer to these measures as the "Indigenous Development Safeguards" or "IDSs."

The first IDS recognizes that conventional EIA regimes may not adequately serve indigenous and traditional communities. In particular, conventional EIA procedures may not be sufficient to identify and evaluate social and cultural harms, which can be particularly severe for such communities.[171] To address these

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170. *See, e.g.*, William M. Laurin & Joann P. Jamieson, *Aligning Energy Development with the Interests of Aboriginal Peoples in Canada*, 53 ALBERTA L. REV. 453, 462 (2015) ("When compared to other communities or ethnic groups, indigenous peoples are particularly prone to experience adverse impacts from energy development both because they typically have a special and fundamental relationship with their 'lands and territories,' and because they often suffer from discrimination and a systemic lack of representation from and within government and legal institutions.").

171. *See* DAVID SZABLOWSKI, TRANSNATIONAL LAW AND LOCAL STRUGGLES: MINING, COMMUNITIES AND THE WORLD BANK 49–51 (2007) (asserting that requirements for social and cultural impact assessment in Peruvian EIA legislation are not well-

concerns, international instruments call for states to undertake comprehensive EIAs before undertaking or approving any activities that may impact an indigenous or traditional community, and some instruments even prescribe special assessment protocols.

One such instrument was adopted in 1989 under the auspices of the International Labour Organization, known as Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (the ILO Convention).[172] The ILO Convention requires member states contemplating development activities to carry out studies to assess the "social, spiritual, cultural and environmental impact" on indigenous and traditional communities[173] and to treat the results as "fundamental criteria for the implementation of these activities."[174]

Subsequently, in 2004, the parties to the Convention on Biological Diversity (CBD)[175] adopted a set of guidelines to be used during EIAs when actions may impact indigenous or traditional communities.[176] Known as the Akwé:Kon Guidelines, they prescribe a cultural impact assessment to identify and evaluate impacts on sacred sites, traditional knowledge, and other features specific to indigenous and traditional cultures.[177] The Akwé:Kon Guidelines also call for a social impact assessment to identify impacts that may arise in this context, such as effects on traditional systems of production, social cohesion, and relations between different genders and generations.[178]

EIAs are also addressed in non-binding declarations on the rights of indigenous peoples adopted by the General Assemblies of the United

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defined and "responsibilities for social impacts are often regarded rather loosely by both mining enterprises and governments"); Naohiro Nakamura, *Towards a Culturally Sustainable Environmental Impact Assessment: The Protection of Ainu Cultural Heritage in the Saru River Cultural Impact Assessment, Japan*, 51 GEOGRAPHICAL RESEARCH 26, 28 (2013) (observing that conventional EIA procedures may not identify cultural impacts because of "[a] gap . . . in the understanding of the concept of 'cultural heritage' between Indigenous and non-Indigenous members," and the fact that "Indigenous cultural heritage often lacks physical material evidence").

172. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO Convention].

173. The ILO Convention uses the term "tribal peoples" to refer to peoples that practice a traditional lifestyle or are otherwise socially, culturally and economically distinct from the mainstream society, and are governed by special laws, customs or traditions. *See id.* art. 1(a).

174. *Id.* art. 7(3).

175. CBD, *supra* note 153.

176. Secretariat of the Convention on Biological Diversity, Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, ¶ 1 (2004) [hereinafter Akwé: Kon Guidelines].

177. *Id.* ¶¶ 21–34.

178. *Id.* ¶¶ 39–51.

Nations (UNDRIP)[179] and the Organization of American States (ADRIP),[180] in 2007 and 2016, respectively. These declarations not only call for comprehensive EIAs in connection with development projects,[181] but also articulate a number of rights specific to indigenous peoples that any EIA would need to take into account. These rights include, *inter alia*, the right to maintain, protect, and have access to archaeological and other cultural sites;[182] the right to enjoy their own means of subsistence and other traditional economic activities,[183] and the right to conservation and protection of the local environment and the productive capacity of their lands and resources.[184]

The international community has also endorsed the second IDS—effective participation in decision making—in a number of contexts. The Akwé:Kon Guidelines identify a number of steps to facilitate participation by indigenous or traditional communities during EIAs, including special forms of notification and communication to overcome geographic or linguistic barriers.[185] In addition, several instruments provide that states contemplating development projects must affirmatively consult with the peoples concerned, in good faith, through their own representative institutions.[186] Some provide even that states shall refrain from going forward under some circumstances unless the consultations result in the peoples' free, prior and informed consent (FPIC). Such an obligation to secure FPIC may exist, *inter alia*, where a project would require a community's relocation,[187] expose the community to hazardous materials,[188] or involve access to traditional knowledge or genetic resources.[189]

Finally, several international instruments contemplate some form of benefit sharing: the third IDS. The ILO Convention provides in

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179. United Nations Declaration on the Rights of Indigenous Peoples art. 25, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

180. Organization of American States, American Declaration on the Rights of Indigenous Peoples, AG/RES. 2888 (XLVI-O/16) (2016), http://www.narf.org/wordpress/wp-content/uploads/2015/09/2016oas-declaration-indigenous-people.pdf [https://perma.cc/J92C-94RE] (archived Oct 22, 2017) [hereinafter ADRIP].

181. UNDRIP, *supra* note 179, art. 32; ADRIP, *supra* note 180, art. 29(5).

182. UNDRIP, *supra* note 179, arts. 11, 12; ADRIP, *supra* note 180, art. 16(3).

183. UNDRIP, *supra* note 179, art. 20; ADRIP, *supra* note 180, art. 29(1).

184. UNDRIP, *supra* note 179, art. 29; ADRIP, *supra* note 180, art. 19(4).

185. Akwé: Kon Guidelines, *supra* note 176, ¶ 10.

186. *See* ILO Convention, *supra* note 172, arts. 6, 15; UNDRIP, *supra* note 179, art. 32(2); ADRIP, *supra* note 180, art. 29(4); Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity art 6(3), Oct. 29, 2010, UNEP/CBD/COP/DEC/X/1 of 29 [hereinafter Nagoya Protocol].

187. ILO Convention, *supra* note 172, art. 16; UNDRIP, *supra* note 179, art. 10.

188. UNDRIP, *supra* note 179, art. 29(2).

189. CBD, *supra* note 153, art. 15; Nagoya Protocol, *supra* note 186, arts. 6, 7.

particular that if the state approves the exploitation of indigenous or tribal peoples' resources, 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."[190] UNDRIP and ADRIP similarly call for compensation if a development project affects an indigenous people's lands or resources[191] or their means of subsistence.[192] In addition, a supplementary agreement to the CBD adopted in 2010—known as the Nagoya Protocol—requires benefit sharing as a condition for accessing traditional knowledge and genetic resources.[193]

Apart from the adoption of these instruments, international human rights bodies have found that adherence to the IDSs is vital for states to uphold their more general human rights obligations. This view is expressed, for example, in the Inter-American Court of Human Rights' ruling in *Saramaka People v. Suriname*.[194] In that case, a traditional Maroon community, the Saramakas, contended that Suriname violated their right to property under the American Convention on Human Rights by authorizing mining, logging, and other activities on their traditional lands without consent.[195] The Court upheld the Saramakas' claim, concluding that their right to property included the right "to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied."[196] The Court held further that Suriname could not restrict this right without complying with the IDSs.[197] Indeed, the Court found that "effective participation" in this context would have required Suriname to secure the Saramakas' consent before authorizing the development activities, which Suriname failed to do.[198] In the Court's view, although consultations may be sufficient in some contexts, a heightened standard—FPIC—is

190. ILO Convention, *supra* note 172, art. 15.

191. UNDRIP, *supra* note 179, art. 32; ADRIP, *supra* note 180, art. 29(5).

192. UNDRIP, *supra* note 179, art. 20; ADRIP, *supra* note 180, art. 29(5).

193. Nagoya Protocol, *supra* note 186, art. 5.

194. Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Comm'n H.R., (ser. C) No. 172 (2007) [hereinafter Saramaka Judgment].

195. *Id.* ¶¶ 12, 95–96.

196. *Id.* ¶ 95.

197. *Id.* ¶ 146 ("[T]he State should not have granted logging concessions within Saramaka territory unless and until the three safeguards of effective participation, benefit-sharing, and prior environmental and social impact assessments were complied with."); *id.* ¶¶ 147–48 (determining that Suriname failed to fulfill the IDSs).

198. *Id.* ¶¶ 134–37.

appropriate for large-scale projects that could affect the integrity of a traditional people's lands and resources.[199]

The African Commission on Human and Peoples' Rights has taken a similar approach. For example, in *SERAC v. Nigeria*,[200] the claimants contended that Nigeria violated rights of the traditional Ogoni people under the African Charter on Human and Peoples' Rights by authorizing oil companies to carry out operations on Ogoni lands without conducting EIAs, consulting the Ogoni, or providing adequate benefits.[201] Although the African Charter did not expressly articulate the IDSs, the Commission found that Nigeria could not uphold certain rights the African Charter *did* articulate—including rights to health, to a satisfactory environment, and to freely dispose of wealth and natural resources—without adhering to those safeguards.[202]

2. Domestic Legal Frameworks

As the IDSs have coalesced at the international level, many countries have adopted parallel protections for indigenous and traditional communities in their domestic legal frameworks.

a. Developments in the United States

In the United States, each IDS has been incorporated to some extent in federal law or policy in recent decades.

The EIA safeguard is reflected in part in a 1994 Executive Order.[203] That Order directs federal agencies to "make achieving environmental justice part of its mission" by identifying and addressing "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations," including Native

199. *Id.*; *see also* Saramaka People v. Suriname, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Comm'n H.R., (ser. C) No. 185, ¶ 17 (2008) ("The Tribunal has emphasized that when large-scale development or investment projects could affect the integrity of the Saramaka people's lands and natural resources, the State has a duty not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent in accordance with their customs and traditions.").

200. Social & Economic Rights Action Center & Another v. Nigeria, African Commission on Human and Peoples' Rights, (2001) AHRLR 60 (ACHPR 2001), Comm. No. 155/96 (May 27, 2002).

201. *Id.* ¶¶ 1–10, 55; *see also* Laura Westra, *The Conflict Between Development and the Right of the Child to Health*, 42 DENV. J. INT'L L. & POL'Y 1, 4 (2013) ("[T]he Ogoni people had a comfortable traditional lifestyle, cultivating their land and fishing" before adverse impacts of oil and gas development).

202. Social & Economic Rights Action Center & Another v. Nigeria, *supra* note 200, ¶¶ 50–58.

203. Exec. Order No. 12,898, 3 C.F.R. 859 (1994).

American communities.[204] In addition, CEQ guidance identifies a number of ways in which NEPA procedures should be tailored to identify impacts on these communities.[205] Moreover, federal statutes and regulations require consideration of impacts specific to Native American communities in several contexts, including effects on the subsistence needs of Alaska natives[206] and effects on traditional cultural properties.[207]

The effective participation safeguard is also developing in the United States. CEQ guidance calls on agencies to take measures to overcome linguistic, cultural, and other barriers to participation by Native American communities in the NEPA process.[208] Further, an Executive Order and a separate Presidential Memorandum direct federal agencies to engage in "regular and meaningful consultation" with tribal governments on matters that significantly affect their communities.[209] Federal statutes and regulations identify several specific contexts in which such consultations are required, including when actions may affect native human remains or funerary objects, properties of cultural significance, or the subsistence takes of Alaska natives, or when actions will have environmental effects on a reservation.[210]

While the federal government's "meaningful consultation" policy has generated dialogue in many cases, it notably does not require

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204. *Id.*; *see also* U.S. Council on Envtl. Quality, Environmental Justice: Guidance Under the National Environmental Policy Act 1 (Dec. 10, 1997), https://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-EJGuidance.pdf [https://perma.cc/S3QB-SQNS] (archived Oct. 23, 2017) [hereinafter CEQ Environmental Justice Guidance] ("The Executive Order makes clear that its provisions apply fully to programs involving Native Americans.").

205. CEQ Environmental Justice Guidance, *supra* note 204, at 8.

206. 16 U.S.C. § 3120(a) (2012).

207. Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 299–300 (2012) ("[F]ederal agencies considering a federal 'undertaking' must first identify tribes with potentially impacted TCPs [traditional cultural properties], consult with such affected Indian tribes, and develop alternatives aimed at minimizing potential adverse effects on TCPs.").

208. CEQ Environmental Justice Guidance, *supra* note 204, at 9.

209. Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 56 (2015), (citing Exec. Order No. 12,875, 58 Fed. Reg. 58,093 (1993)); *see also* Memorandum for the Heads of Executive Departments and Agencies: Tribal Constitution, 74 Fed. Reg. 57,881 (Nov. 5, 2009).

210. 40 C.F.R. § 1503.1(a) (2017) (requiring federal agencies to consult with Indian tribes during the EIS process "when the effects may be on a reservation"); Stuart R. Butzier & Sarah M. Stevenson, *Indigenous Peoples Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent*, 32 J. ENERGY & NAT. RESOURCES L. 297, 314–16 (2014) (summarizing consultation requirements under federal statutes); Greta Swanson, Kathryn Mengerink & Jordan Diamond, *Understanding the Government-to-Government Consultation Framework for Agency Activities That Affect Marine Natural Resources in the U.S. Arctic*, 43 ENVTL. L. REPORTER 10872, 10880–81 (2013) (summarizing the requirement to consult with Alaska natives before regulating subsistence takes).

agencies to secure Indian tribes' consent for development projects.[211] As a practical matter, tribes may be able to control whether or not development activity takes place on lands over which they have beneficial ownership.[212] Yet they lack such control when the activity would take place off tribal lands, even if it could affect them.[213] This might be the case, for example, if an off-reservation project would harm tribes' treaty rights to hunt or fish or would harm sites of cultural significance.[214]

Even though federal agencies are not bound to secure tribal consent in such situations, agencies are sometimes influenced by input from tribes. For example, the Obama administration repeatedly halted construction of the Dakota Access Pipeline—intended to transport oil from the Bakken Formation in Montana to an existing pipeline in Illinois—following protests and lawsuits by local tribes.[215] Similarly, the Army cited the opposition of the Lummi Nation as the reason for

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211. Miller, *supra* note 209, at 64 ("Tribal governments have been inundated with consultation requests in recent decades. The presidential executive orders and memoranda have created a cottage industry in tribal consultations."); *id.* ("The lack of a consent requirement—actual consent by a tribe before federal agencies can proceed—is one of the main sticking points.").

212. FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 17.03 (Nell Jessup Newton ed., 2012) ("When lands are reserved or otherwise set aside for Indian tribes, the tribes hold the beneficial ownership of both the soil and the mineral interests."); *id.* § 17.04 ("Indian tribes have full beneficial ownership of timber located on their reservations.").

213. *See* Akilah Jenga Kinnison, Note, *Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the U.N. Declaration on the Rights of Indigenous Peoples*, 53 ARIZ. L. REV. 1301, 1305 (2011) ("Although indigenous peoples' consent is required for extractive projects on lands to which they hold title, special conflicts arise when such activities are conducted on their traditional lands that are now classified as 'public' and managed by the federal government.").

214. *See, e.g.*, Emily Bregel, *Tribe's Protest of Mine Plan Near Superior is in Third Week*, ARIZ. DAILY STAR (Feb. 20, 2015), http://tucson.com/news/state-and-regional/tribe-s-protest-of-mine-plan-near-superior-is-in/article_f551fab1-853b-5826-9037-9ddb3739e5fc.html [https://perma.cc/AHL7-SX38 ] (archived Oct. 23, 2017) (discussing protests by tribal members against a proposed copper mine on federal land held sacred to the tribe); Phuong Le, *Major Battle Over Oil Terminal Unfolds in Pacific Northwest*, ASSOC. PRESS (June 25, 2016) (discussing concern that an oil-by-rail terminal along the Columbia River could interfere with "treaty-reserved fishing rights and that a potential oil spill could have devastating consequences to salmon and other natural resources on which the tribe depends.").

215. *See* Press Release, Joint Statement from Dep't of Justice, Dep't of the Army & Dep't of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Sept. 9, 2016), https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing [https://perma.cc/5JJE-RX8D] (archived Oct. 23, 2017) (calling for construction halt in light of "important issues raised by the Standing Rock Sioux Tribe and other tribal nations and their members regarding the Dakota Access pipeline").

its recent denial of a proposal to build a coal export terminal north of Seattle.[216]

The effective participation safeguard is also promoted by statutes that authorize the Environmental Protection Agency to delegate pollution control authority to Indian tribes.[217] When tribes qualify, they can establish their own pollution control regulations, which can exceed federal standards.[218] This is a particularly robust form of participation, allowing tribes to act as decision makers rather than merely providing input.

Finally, the benefit-sharing safeguard is fulfilled at least in part through a variety of federal laws and policies. Although at one time Indian tribes had little control over development activity on tribal lands, federal statutes now authorize tribes to negotiate agreements with private companies to develop tribal resources, subject to federal agency approvals and controls.[219] Moreover, some tribes have treaty rights to hunt or fish off-reservation, including commercial harvesting.[220] Federal agencies have also authorized some Indian tribes to commercially exploit forest resources on non-tribal federal lands where these tribes have treaty rights.[221] In addition, a federal

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216. Johnson, *supra* note 15 ("[T]he corps agreed [with the Lummi], saying that the developer's plan to extend docks across 144 acres over the water could have restricted access to the water by the tribe. That concern was enough to stop the terminal, corps officials said, even without considering potential environmental harm.").

217. Michael C. Blumm, *Retracting the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 770 (2004) ("All the major federal environmental statutes, except the Resource Conservation and Recovery Act (RCRA), enable the Environmental Protection Agency (EPA) to approve tribal programs to function as states for the purpose of implementing pollution control programs.").

218. *Id.* at 772.

219. Maura Grogan, Rebecca Morse & April Youpee-Roll, *Native American Lands and Natural Resource Development*, REV. WATCH INST. 13–16 (2011), http://www.resourcegovernance.org/sites/default/files/RWI_Native_American_Lands_2011.pdf [https://perma.cc/QRJ6-E7R7] (archived Oct. 23, 2017) (summarizing the development of Indian tribes' rights vis-à-vis mineral extraction); Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J. L. REFORM 417, 434 (2013) ("[T]ribes usually decide whether to lease their land, mineral, and timber resources. . . . Yet federal law provides that these leases are void until approved by the federal government in its role as trustee over tribal resources.").

220. Blumm, *supra* note 217, at 765–66 (treaty fishing rights in the Pacific Northwest and Great Lakes region have been found to "include implied water rights, the right to harvest commercially, and the right to harvest hatchery as well as spawning fish").

221. *See* Brett Kenney, *Tribes as Managers of Federal Natural Resources*, 27 NAT. RESOURCES & ENV'T. (2012) (discussing an agreement between the Confederated Tribes of the Warm Springs and two federal agencies, which authorizes the tribes to harvest biomass from federal forests for use in generating power for the tribe's forest products company), http://www.americanbar.org/content/dam/aba/publications/natural_resources_environment/summer2012/nre_sum12_kenney.authcheckdam.pdf [https://perma.cc/7LT2-8UGR] (archived Nov. 19, 2017).

statute directs the State of Alaska to share with Alaska natives specified percentages of revenues derived from the exploitation of mineral resources on federal lands in Alaska to which native claims have been extinguished.[222]

b. Developments Around the World

Numerous other countries have similarly adopted protections for indigenous or traditional communities in recent years.

In Canada, for example, the EIA safeguard has been incorporated into the Canadian Environmental Assessment Act, which requires decision makers to consider "any change that the project may cause in . . . the current use of lands and resources for traditional purposes by Aboriginal persons."[223] In addition, review panels must consider traditional knowledge as part of an EIA.[224] In the same vein, the National Energy Board has identified potential impacts on Aboriginal groups that must be considered during EIAs for energy projects, including effects on vegetation, water bodies, fish, or wildlife "of specific concern to an Aboriginal group."[225]

Canada has also taken a number of steps consistent with the effective participation safeguard. Notably, the federal government has negotiated land claims agreements (LCAs) with several Aboriginal groups, which grant those groups land and governance rights over defined territories.[226] LCAs require the government to consult with the groups prior to authorizing any natural resource development and establish bodies with Aboriginal representation for planning and implementing development projects.[227]

Further, the Supreme Court of Canada has recognized that the Crown has a duty to consult with Aboriginal groups that may be adversely impacted by governmental actions even outside the context

222. Dwight Newman, Michelle Biddulph & Loreell Binnion, *Arctic Energy Development and Best Practices on Consultation with Indigenous Peoples*, 32 B.U. INT'L L. J. 449, 457–58 (2014) (summarizing the statute's royalty payment framework).

223. Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 2(1).

224. Lynda M. Collins & Meghan Murtha, *Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap*, 47 ALBERTA L. REV. 959, 963 n.25 (2010) (summarizing the Canadian federal government's efforts to enhance aboriginal participation in EIAs).

225. National Energy Board, Filing Manual, https://www.neb-one.gc.ca/bts/ctrg/gnnb/flngmnl/fmgda2-eng.html [https://perma.cc/8PSG-QJPK] (archived Oct. 23, 2017).

226. Newman, Biddulph & Binnion, *supra* note 222, at 464.

227. *See id.* at 117–20 (summarizing LCAs negotiated with various indigenous groups in the Northwest Territories).

of LCAs.[228] The nature of the consultation required follows a spectrum that depends on the strength of the asserted rights and the seriousness of the potential impact on those rights.[229] However, the Crown is under no obligation to secure the consent of the impacted indigenous communities before approving a development project.[230] The Crown may still approve a project if it has a "compelling and substantial" public purpose and is "not inconsistent with the Crown's fiduciary duties to the Aboriginal group."[231]

Nevertheless, if an Aboriginal group challenges the adequacy of consultations it can result in delays or reputational harm to the developer, which gives the developer an incentive to secure Aboriginal consent before undertaking a project.[232]

Canada has also implemented the benefit-sharing IDS to some extent. Specifically, LCAs require some form of economic participation by the impacted Aboriginal group when development projects are carried out on lands subject to the LCA, with the details to be negotiated.[233] Moreover, the duty to consult has encouraged benefit sharing, as an affected Aboriginal group is less likely to challenge the adequacy of consultations if the project proponent has offered a benefit-sharing arrangement that the group considers acceptable.[234]

Other countries have likewise adopted protections for indigenous or traditional communities, either to implement the ILO Convention[235]

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228. Laurin & Jamieson, *supra* note 170, at 456; Newman, Biddulph & Binnion, *supra* note 222, at 116.

229. DWIGHT G. NEWMAN, REVISITING THE DUTY TO CONSULT ABORIGINAL PEOPLES 17 (2014) (describing the spectrum analysis required by Canadian Supreme Court jurisprudence).

230. Laurin & Jamieson, *supra* note 170, at 459 ("Even in the case of serious impact, the right to be consulted does not necessarily amount to a right to informed consent or a 'veto' over what can be done on the land as the duty to consult does not require reaching agreement.").

231. Tsilhqot'in Nation v. British Columbia, [2014] 2 S.C.R. 256, 269 (Can.).

232. *See* Laurin & Jamieson, *supra* note 170, at 458 (discussing the risks of "delays, expense and possible reputational damage," which developers can manage by entering into agreements with affected communities).

233. *See* Newman, Biddulph & Binnion, *supra* note 222, at 116 ("[w]henever resource extraction is contemplated on traditional indigenous Arctic lands, the affected Indigenous groups may influence decision that will affect those lands.").

234. *What Are Impact and Benefit Agreements?*, FRASIER INST., http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-(IBAs)/ (last visited Oct. 21, 2017) [http://perma.cc/CCZ5-VLKM] (archived Oct. 21, 2017) [hereinafter FRASIER INSTITUTE].

235. *See* Laura M. Seelau & Ryan Seelau, *When I Want Your Opinion, I'll Give It To You: How Governments Support the Indigenous Right to Consultation in Theory, But Not in Practice*, 23 CARDOZO J. INT'L & COMP. L. 547, 562–66 (2015) (describing Chile's adoption of a consultation policy to implement the ILO Convention); John P. Williams, *Global Trends and Tribulations in Mining Regulation*, 30 J. ENERGY & NAT. RESOURCES L. 391, 417 (2012) (same regarding Peru).

or on their own initiative.[236] Again, however, these frameworks generally stop short of requiring the state to secure affected communities' consent before approving development activities.[237]

One notable exception is a statute in the Philippines known as the Indigenous Peoples Rights Act (IPRA).[238] Adopted in 1997, IPRA requires FPIC from indigenous communities as a condition for various actions, including the exploration, development, and use of natural resources claimed by indigenous groups.[239] Nevertheless, several indigenous communities have contended—following the adoption of IPRA—that the central government has authorized projects on their lands without FPIC.[240] In addition, indigenous rights advocates have reported attempts to manipulate consultation processes, including bribery of indigenous peoples' representatives,[241] and the appointment of alternative representatives when consent was not forthcoming from the traditional leaders.[242] Similar problems are sometimes reported with the implementation of indigenous rights frameworks in other countries.[243]

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236. *See* Marcia Langton & Odette Mazel, *Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom*, 26 J. ENERGY & NAT. RESOURCES L. 31, 39–41 (2008) (describing Australia's adoption of a legislative framework for recognizing Aboriginal land rights and requiring consultations, in order to implement a decision of the Australian Supreme Court that recognized the concept of "native title").

237. *See* Butzier & Stevenson, *supra* note 210, at 317–19 (summarizing legal frameworks regarding indigenous consultation in Peru, Bolivia, Mexico, Papua New Guinea, the Philippines, Colombia, and Australia); Newman, Biddulph & Binnion, *supra* note 222, at 124–32 (describing legal frameworks for indigenous consultation in Russia, Greenland, and Norway); Seelau & Seelau, *supra* note 235, at 555–67 (outlining the indigenous rights framework in Chile); Williams, *supra* note 235, at 417 (asserting that Peruvian law requires consultation with indigenous peoples but "does not grant the affected peoples a veto over local development").

238. The Indigenous Peoples Rights Act of 1997, Rep. Act No. 8371 (1997) (Phil.).

239. *Id.* §§ 7(c), 33(a), 35, 46(a), 58.

240. *See* RODOLFO STAVENHAGEN, PEASANTS, CULTURE AND INDIGENOUS PEOPLES 130 (2012) (asserting that the government went forward with a dam project despite a refusal by an indigenous group to consent); Reda M. Hicks, Nereus O. Acosta & Sedfrey M. Candelaria, *Crafting a Sustainable Mining Policy in the Philippines*, 27 NAT. RESOURCES & ENV'T. 43, 44 (2013) (discussing lawsuits alleging a failure to secure FPIC for mining projects).

241. *See* George K. Foster, *Combating Bribery of Indigenous Leaders in International Business*, 54 COLUM. J. TRANSNAT'L L. 59, 71 (2015) (summarizing reports of alleged bribery of indigenous leaders in the Philippines).

242. *See* Joji Cariño, *Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice*, 22 ARIZ. J. INT'L & COMP. L. 19, 34–35 (2005) (asserting that the "imposition or cultivation of rival leaderships is common," and citing an example in which a mining company purported to negotiate an agreement with a non-traditional body).

243. *See, e.g.*, Butzier & Stevenson, *supra* note 210, at 330–31 (summarizing court cases brought by indigenous groups in New Zealand, Chile, Belize, and Kenya challenging violation of their legal rights); Seelau & Seelau, *supra* note 235, at 567–80

As these examples demonstrate, indigenous and traditional communities have secured formal recognition of important rights in many countries, although those rights are limited in scope and not always implemented effectively in practice.

## III. EMERGING PRIVATE SOURCES OF COMMUNITY INFLUENCE AND BENEFITS

In addition to formal legal protections for communities, private mechanisms have emerged that can provide a further source of influence and benefits. The subparts that follow examine two such mechanisms: (i) financial institution standards and non-binding guidelines applicable to the private sector, and (ii) agreements between communities and project developers.

### A. *Financial Institution Standards and Non-Binding Guidelines*

In recent years, a number of intergovernmental organizations, private institutions, and industry bodies have adopted policies or guidelines that require or encourage project developers to comply with environmental and social standards, many of which are designed to protect the interests of local communities.[244] These policies and guidelines are "private" in the sense that they apply to the private sector, are not formalized in any law or regulation, and are enforceable only when incorporated into private agreements.[245]

Many financial institutions, for example, have adopted policies that condition any financing on the borrower's adherence to specified environmental and social standards.[246] Prominent examples are the

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(describing a lawsuit brought by the Atacameno indigenous people of Chile contending that the government failed to consult with the Atacameno before granting geothermal concessions on their ancestral territory).

244. Elisa Morgera, *From Corporate Social Responsibility to Accountability Mechanisms*, *in* HARNESSING FOREIGN INVESTMENT TO PROMOTE ENVIRONMENTAL PROTECTION INCENTIVES AND SAFEGUARDS 321, 325 (Pierre-Marie Depuy & Jorge E. Viñuales eds., 2013) (summarizing standards and guidelines and concluding that they generally call for "the ongoing assessment, beyond legal requirements at the national level, of the possible environmental impacts of private companies' activities before and during their operations, on the basis of scientific evidence, as well as communication with likely-to-be-affected communities").

245. *See* Elisa Morgera, *Significant Trends in Corporate Environmental Accountability: The New Performance Standards of the International Finance Corporation*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 151, 183 (2007) (explaining how environmental and social standards can become binding when incorporated into contracts).

246. *See* Natasha Affolder, *The Market for Treaties*, 11 CHI. J. INT'L L. 159, 189 (2010) (discussing the nature of financial institution standards).

IFC Performance Standards[247] and the Equator Principles, the latter being a version of the former adopted by many private financial institutions.[248]

The IFC Performance Standards and the Equator Principles both require borrowers to take specified steps to evaluate potential environmental and social risks before commencing a project and to consult with local stakeholders likely to be impacted.[249] Although neither require benefit sharing with all affected communities, they may facilitate it by promoting dialogue and strengthening communities' bargaining power.[250]

Both sets of standards have special rules for projects that may impact indigenous or traditional communities. Notably, whereas these standards require only "informed *consultation*"[251] for projects impacting mainstream communities, they require "free, prior and informed *consent*" for those impacting indigenous or traditional groups.[252] The IFC Performance Standards add that indigenous or traditional communities must receive compensation for any impacts, which must be culturally appropriate, sustainable, and commensurate with the nature and scale of the impacts.[253]

Finally, these standards establish remedial frameworks for concerned individuals, groups, or communities to challenge any perceived non-compliance, without reliance on judicial systems.[254]

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247. INT'L FIN. CORP., PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY (Jan. 1, 2012), http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES (last visited Oct. 21, 2017) [https://perma.cc/U7YC-3NAP] (archived Oct. 21, 2017) [hereinafter IFC Performance Standards].

248. EQUATOR PRINCIPLES (June 2013), http://www.equator-principles.com/resources/equator_principles_III.pdf (last visited Oct. 21, 2017) [https://perma.cc/9G44-5LPM] (archived Oct. 21, 2017) [hereinafter Equator Principles]; *see also* Affolder, *supra* note 246, at 189 (describing the Equator Principles).

249. *See* Morgera, *supra* note 245, at 160–63 (describing the IFC Performance Standards); Equator Principles, *supra* note 248, at 6–8.

250. *See* IFC Performance Standards, *supra* note 247, Performance Standard 1, ¶ 31 (requiring the borrower to discuss the possibility of benefit-sharing with affected communities and record the communities' views on the subject).

251. *Id.* (emphasis added); Equator Principles, *supra* note 248, at 7.

252. IFC Performance Standards, *supra* note 247, Performance Standard 7, ¶ 11 (requiring FPIC if the project will have adverse effects on indigenous peoples' lands or natural resources, will require their relocation, or will have significant project impacts on critical cultural heritage); Equator Principles, *supra* note 248, at 7–8 (incorporating the IFC Performance Standard's FPIC requirement).

253. IFC Performance Standards, *supra* note 247, Performance Standard 7, ¶ 9.

254. *See* Morgera, *supra* note 245, at 165–66 (describing the IFC's grievance mechanism); Equator Principles, *supra* note 248, at 8 (describing required grievance mechanism).

While these standards may not always offer sufficient protection,[255] it is widely acknowledged that they have generally improved the assessment and management of environmental and social risks in projects to which they apply and have helped address community concerns in a number of cases.[256]

Apart from these initiatives by financial institutions, several international organizations and industry groups have promulgated voluntary guidelines that encourage companies to employ similar environmental and social standards.

An example is the OECD Guidelines for Multinational Enterprises, adopted by the member states of the Organization for Economic Cooperation and Development.[257] The OECD Guidelines call on enterprises to assess the environmental, health, and safety impacts of their activities, create targets for improved environmental performance, and engage in regular monitoring and verification.[258] They also encourage enterprises to "[e]ngage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities."[259] Finally, the OECD Guidelines encourage enterprises to promote economic participation by local stakeholders, calling for "active co-operation with stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises."[260]

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255. *See, e.g.*, Shalanda H. Baker, *Why the IFC's Free, Prior, and Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities Affected by Development Projects*, 30 WIS. INT'L L. J. 668, 675 (2012) (asserting that the Equator Principles are "fairly vague, "and "it is unclear whether a project's deviation from the principles would invite any real penalty"); Evaristus Oshionebo, *World Bank and Sustainable Development of Natural Resources in Developing Countries*, 27 J. ENERGY & NAT. RESOURCES L. 193, 203 (2009) (asserting that project developers sometimes violate financial institution standards without consequence).

256. *See, e.g.*, Daniel D. Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L. 403, 410 (2005) (asserting that financial institution remedial frameworks "have turned out to be effective forums in which adversely affected persons can raise claims that relate to their rights as indigenous people or as involuntarily resettled people"); Laurin & Jamieson, *supra* note 170, at 467–68 (observing that the Equator Principles "have greatly increased the attention and focus on environmental, social, and governance issues, including setting standards for relations with locally affected indigenous communities."); Schwartz, *supra* note 98, at 444 (describing a project in Sierra Leone for which remedial action by a financial institution "triggered official attention and consideration of concerns of the local community which until then had largely been ignored").

257. ORG. FOR ECON. CO-OPERATION & DEV. (OECD), OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf (last visited Oct. 21, 2017) [https://perma.cc/52HE-EH7W ] (archived Oct. 21, 2017) [hereinafter OECD Guidelines].

258. *Id.* at 42.

259. *Id.* at 20.

260. *Id.* at 22.

Another set of voluntary guidelines is the United Nations Guiding Principles on Business and Human Rights (the UN Guiding Principles), adopted by the UN General Assembly in 2011.[261] The UN Guiding Principles assert that businesses have an obligation to respect the human rights of individuals and groups, which is independent of state obligations or domestic legal requirements.[262] They also call on businesses to carry out "human rights due diligence" to uphold that obligation, and suggest that such due diligence should include an assessment of the environmental and social impacts of the business's operations, as well as stakeholder engagement.[263]

International organizations and industry groups have also adopted guidelines for particular sectors, such as mining[264] and forestry.[265] These similarly call for EIAs, stakeholder consultation, and—in some cases—benefit sharing, but they are tailored for the circumstances of the relevant sector.[266]

While all of these various guidelines are non-binding, developers may feel some pressure to comply with them, lest they appear out of step with international norms and incur reputational damage.[267] Moreover, developers that fail to assess and manage impacts, engage with communities, and share benefits are more likely to encounter

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261. John Ruggie (Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UN Guiding Principles].

262. *Id.* at 13.

263. *Id.* at 17–18.

264. INT'L COUNCIL ON MINING & METALS (ICCM), ICCM PRINCIPLES, https://www.icmm.com/en-gb/about-us/member-commitments/icmm-10-principles/the-principles [https://perma.cc/3SQM-P9WG] (archived Oct. 21, 2017).

265. INT'L. TROPICAL TIMBER ORG., VOLUNTARY GUIDELINES FOR THE SUSTAINABLE MGMT. OF NAT. TROPICAL FORESTS, http://www.itto.int/partner/id=4330 [https://perma.cc/E58K-BTSZ] (archived Oct. 21, 2017).

266. *See, e.g.*, *id.* at 51–55 (providing detailed recommendations for the prior assessment, mitigation, and ongoing monitoring of environmental impacts of timber harvesting and related activities); *id.* at 56 ("Forest management decisions should be participatory and inclusive, and the costs and benefits should be shared equitably among stakeholders."); *id.* at 22, 26, 32, 36, 54–64 (outlining protocols for promoting stakeholder participation in forestry management and benefit-sharing).

267. *See* Milton C. Regan, Jr. & Kath Hall, *Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights*, 84 FORDHAM L. REV. 2001, 2007 (2016) ("Compliance with voluntary standards is often monitored by NGOs, consumer groups, and investment consultants who may then criticize a company for noncompliance. This can serve as a form of informal enforcement, with serious financial and reputational consequences . . . . "); David B. Spence, *Corporate Social Responsibility in the Shale Patch?*, 21 LEWIS & CLARK L. REV. 387, 389 (2017) (attributing oil companies' voluntary corporate social responsibility initiatives to "some combination of short term self-interest, concerns over long-term reputational risk for the firm, and the desire to be a good corporate citizen").

community opposition, which can delay projects or jeopardize them altogether.[268]

### B. *Community Development Agreements*

Another private innovation is the "community development agreement" (CDA)—a type of agreement negotiated between a project developer and the local government or community groups.[269] CDAs take many forms and have many different names, but they generally provide for the developer to provide specified benefits to the community, or mitigate project impacts, in exchange for community support.[270]

One such contractual device that has become common in the United States is known as a "development agreement." Under such an agreement, the developer agrees to exactions sought by the local government and waives its right to challenge them, in exchange for a commitment by the local government to approve the project and refrain from adopting any new land-use restrictions during the term of the agreement.[271] Local governments have used development agreements to secure a wide range of community benefits that likely would have failed the *Nollan-Dolan* test, because the benefits were unrelated or disproportionate to project impacts.[272] Such benefits can include, for example, monetary payments in excess of the cost of public services

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268. *See* Luke Danielson, *Allocation of Resources to Communities From Mining and Oil and Gas Operations*, ROCKY MT. MIN. L. INST. 2C-1, at 5 (2009) (asserting that a failure to abide by minimum international standards frequently provokes community resistance, and citing examples of projects in Argentina, Peru, Colorado, Romania, and Guatemala that "have been delayed, sometimes for years, or stopped entirely by local opposition").

269. *See Mining Community Development Agreements Source Book*, WORLD BANK 5 (March 2012), http://siteresources.worldbank.org/INTOGMC/Resources/mining_community.pdf [https://perma.cc/DNF2-53RS] (archived Oct. 23, 2017) (defining CDA and listing alternative names for these agreements); *see also* Jennifer Loutit, Jacqueline Mandelbaum & Sam Szoke-Burke, *Emerging Practices in Community Development Agreements*, COLUMBIA CENTER ON SUSTAINABLE DEVELOPMENT (Feb. 2016), http://ccsi.columbia.edu/files/2016/02/Emerging-practices-in-CDAs-Feb-2016-sml.pdf [https://perma.cc/K2M8-LHZQ] (archived Oct. 23, 2016) (describing several different types of agreements as forms of CDAs).

270. *See* Ciaran O'Faircheallaigh, *Community Development Agreements in the Mining Industry: An Emerging Global Phenomenon*, 44 COMMUNITY DEV. 222, 222–23 (2013) (describing "an explosion in the negotiation of agreements between commercial developers and local communities throughout the globe" and providing examples).

271. Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 597 (2011) ("In these contracts, developers agree to provide negotiated benefits to a municipality, such as increased infrastructure, that the city often could not require under its regulatory authority. In return, the city agrees to allow a specific development and to 'vest' the developer's right to build against any future land use changes.").

272. *Id.* at 610 (observing that "local government's attraction to contract stems largely from a reaction to the Supreme Court's decisions in *Nollan* and *Dolan*").

required by the development, infrastructure improvements not necessary to address project impacts, and job training programs.[273]

Some local governments in the United States have also negotiated agreements with developers that establish technical requirements that these governments could not impose unilaterally because of state law preemption. For example, at least thirty municipalities in Colorado have negotiated "operator agreements" with oil companies that place restrictions on fracking that go above and beyond state requirements.[274] These municipalities decided to negotiate these agreements—rather than banning fracking or establishing the requirements by ordinance—because Colorado law preempts local governments from imposing such restrictions.[275] The oil companies, in turn, agreed to sign because the local governments agreed to expedite the land-use approvals over which they *did* have authority.[276] The companies likely also calculated that the agreements would facilitate better relations with the communities more generally.

Another type of agreement that has become common in the United States is known as a "community benefit agreement" (CBA). Under a

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273. Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment One*, 24 STAN. ENVTL. L. J. 3, 31–32 (2005) (providing examples of benefits negotiated by municipalities that likely would have violated the *Nollan-Dolan* test if the developer had not consented).

274. *See, e.g.*, Peter Marcus, *Colorado Legislature Kills Fracking Bill that Would Have Given Local Control*, DURANGO HERALD (Apr. 04, 2016), http://www.durangoherald.com/article/20160404/NEWS01/160409877/Colorado-Legislature-kills-fracking-bill-that-would-have-given-local-control [https://perma.cc/9ZJ7-GJFW ] (archived Oct. 23, 2017) ("More than 30 communities across Colorado already have entered into private contracts with oil and gas companies that allow those communities to invoke rules that go above and beyond" state requirements); Cathy Proctor, *Encana, Erie Reach Groundbreaking Agreement on Oil and Gas Operations*, DENVER BUS. J. (Aug. 26, 2015), https://www.bizjournals.com/denver/blog/earth_to_power/2015/08/encana-erie-reach-groundbreaking-agreement-on-oil.html [https://perma.cc/RR55-G7X8] (archived Oct. 23, 2017) (describing agreement between the town of Erie and the Encana Corporation).

275. Minor, *supra* note 49, at 99, 102 (describing technical conditions that courts have held preempted, including setback requirements, noise abatement, and visual impact provisions); Tayvis Dunnahoe, *Colorado Communities Collaborate with Operators*, OIL & GAS J. (Dec. 13, 2013), http://www.ogj.com/articles/uogr/print/volume-1/issue-4/colorado-communities-collaborate-with-operators.html [https://perma.cc/7CJ5-HFL8] (archived Oct. 23, 2017) (asserting that Erie opted to negotiate an agreement with Encana in part because "[i]n Colorado, oil and gas development is considered a statewide concern" and hence local regulation is preempted).

276. *See, e.g.*, Operator Agreement Between the Town of Erie and Encana Oil & Gas (USA), Inc., art. IV(1)(b)(i) ("This Agreement shall constitute final approval by Erie of the Identified Pad Sites, all wells, facilities, and operations located at such Pad Sites, all adjacent tanks used for such Pad Sites, and all storage facilities for such Pad Sites . . . "); *see also* Proctor, *supra* note 274 (quoting statements by Erie and Encana representatives describing their rationales for signing the agreement).

CBA, the developer offers a package of benefits to community groups likely to be impacted by the project, in exchange for a commitment by community signatories to support it.[277] CBAs are sometimes criticized as a product of insufficient public participation, because they are negotiated in private and the groups involved may not reflect the community as a whole.[278] Nevertheless, CBAs can provide groups that participate with a significant voice in how projects are carried out, in addition to whatever community benefits the agreement secures.[279]

Another contractual device that is becoming popular in the United States is the "good neighbor agreement" (GNA).[280] Like CBAs, GNAs are negotiated directly between project developers and community groups but focus on mitigating the impacts of industrial activities.[281] For example, a GNA may require the developer to meet specified emissions standards, make disclosures to the public, and establish a monitoring role for community groups.[282] The developer typically offers any such measures in exchange for an agreement by the community signatories to drop citizen suits or other forms of opposition.[283] Some have criticized GNAs because they can allow companies to avoid the full cost of any environmental violations, including public relations damage and monetary penalties that might be imposed following a successful citizen suit.[284] Critics have also asserted that GNAs reduce the pressure that might otherwise exist to improve state and federal

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277. *See* Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power*, 18 J. L. & POL'Y 157, 159, 177 (2009) (describing CBAs).

278. *See* Alejandro E. Camacho, *Community Benefit Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation*, 78 BROOKLYN L. REV. 355, 370 (2013) (explaining that critics of CBAs have questioned "whether the full range of interests are represented in negotiations" and "whether a representative of a particular interest group is truly representative, including whether they have properly managed diverse points of view").

279. *Id.* at 364–65 ("CBAs grant communities, including low-income and minority groups, a voice in the development process, empowering them with a degree of control where corporate interests usually dominate. As such, CBAs offer community groups the opportunity for procedural justice by enabling them to participate directly in decision making.").

280. Douglas S. Kenney et al., *Evaluating the Use of Good Neighbor Agreements for Environmental and Community Protection*, NATURAL RES. L. CTR., UNIV. OF COLO. SCH. OF L. (2004), http://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1018&context=books_reports_studies [https://perma.cc/GT8Q-G7XZ] (archived Oct. 23, 2017) (describing the rise of the GNA and disputes resolved through these agreements).

281. *See* Salkin & Lavine, *supra* note 277, at 182 (comparing CBAs and GNAs).

282. *See id.* at 182–83 (describing common terms of GNAs); Janet V. Siegel, *Negotiating for Environmental Justice: Turning Polluters into "Good Neighbors" Through Collaborative Bargaining*, 10 N.Y.U. ENVTL. L. J. 147, 171–72 (2002) (same).

283. *See* Kenney et al., *supra* note 280, at 1 (describing concessions typically offered by developers in GNAs and noting that these are offered "in exchange for a community commitment to stop litigation, a permit challenge, or some other form of activism against the company").

284. Siegel, *supra* note 282, at 180–81 (identifying drawbacks to GNAs).

enforcement regimes.[285] Yet it is not difficult to see the appeal of GNAs. These agreements can allow community groups to secure immediate redress without the cost and uncertainty of litigation, and without having to wait for hypothetical future regulatory reform. GNAs can also secure innovative remedies that could not be ordered by a court.[286]

Various types of CDAs are becoming popular in other countries as well.[287] Outside the United States, such agreements are known by a multitude of names, including impact benefit agreement,[288] indigenous land use agreement,[289] and social responsibility agreement,[290] to name a few.

Like GNAs in the United States, CDAs negotiated in other countries often give the community a role in monitoring and managing environmental impacts. The agreement may, for example, establish a committee with community representation to monitor project impacts,[291] provide funding for the community to hire independent technical experts, or even train community members as environmental technicians.[292] Such agreements also often provide some form of community benefits, which may include monetary payments that are fixed in amount or tied to production or profits.[293] It is also common for CDAs around the world to include commitments by the developer to build local hospitals, schools, or other infrastructure.[294] The

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285. *See* Thalia González & Giovanni Saarman, *Regulating Pollutants, Negative Externalities, and Good Neighbor Agreements: Who Bears the Burden of Protecting Communities?*, 41 ECOLOGY L. Q. 37, 77 (2014) ("GNAs can promote community policing and private monitoring efforts, but they fail to incentivize comprehensive regulatory monitoring.").

286. *See* Kenney et al., *supra* note 280, at 8 (noting that GNAs "often employ[] creative remedies not usually available through regulatory or litigation mechanisms").

287. *See* O'Faircheallaigh, *supra* note 270, at 225 (asserting that such agreements are regularly negotiated in Australia, Canada, Africa, South America, Central Asia, South East Asia, and the former Soviet Union).

288. *See* Laurin & Jamieson, *supra* note 170, at 458 (describing Canadian IBAs).

289. *See* Butzier & Stevenson, *supra* note 210, at 318; Langton & Mazel, *supra* note 236, at 41 (describing indigenous land use agreements in Australia).

290. *See, e.g.*, AHAFO SOC. RESPONSIBILITY AGREEMENT BETWEEN THE AHAFO MINE LOCAL CMTY. AND NEWMONT GOLD GHANA LTD., http://www.sdsg.org/wp-content/uploads/2011/06/Ahafo-Social-Responsibility-Agreement.pdf [https://perma.cc/L4ZH-7BV9] (archived Oct. 23, 2017).

291. Gibson & O'Faircheallaigh, *supra* note 18, at 169–70; Loutit, Mandelbaum & Szoke-Burke, *supra* note 269, at 11–12.

292. Gibson & O'Faircheallaigh, *supra* note 18, at 170; O'Faircheallaigh, *supra* note 270, at 228 (describing a 2008 CDA for the Goro nickel project in New Caledonia, which provides for community members "to be involved in the design of environmental management programs; have access to specialist environmental advice; establish businesses to undertake mine rehabilitation; and [be trained] as environmental technicians").

293. Gibson & O'Faircheallaigh, *supra* note 18, at 141–42; Loutit, Mandelbaum & Szoke-Burke, *supra* note 269, at 9.

294. Loutit, Mandelbaum & Szoke-Burke, *supra* note 269, at 9–10.

community may even secure an equity stake in the project, which can bring increased profit potential and allow the community to acquire valuable commercial expertise, but also exposes the community to greater financial risk.[295] CDAs also often provide hiring preferences for community members or locally owned businesses, sometimes featuring training programs to increase community members' employability.[296] Optimally, whatever benefits are secured will be sustainable—not simply providing a temporary infusion of cash, but building local capacity and positioning the community to thrive even after the project ends.

In many cases, developers are under no legal obligation to conclude CDAs and do so simply to avoid conflict with the community, or because having an agreement will make it easier to obtain required approvals.[297] In recent years, however, a number of countries have adopted laws or regulations making it *mandatory* for developers to enter into CDAs for particular types of projects:[298] a trend encouraged by international donors and regional intergovernmental organizations.[299] One factor that may make such CDA mandates appealing (or at least palatable) to central governments is that these mandates task the developer—rather than the government—with satisfying demands of local communities. Moreover, CDAs pose no threat to central governments' control over permitting processes or their own shares of project revenues.

## IV. EXPLAINING THE GLOBAL WAVE OF COMMUNITY PARTICIPATION

Parts II and III explored different facets of the global wave of community participation in development: the rise of community rights and powers formalized in domestic or international law, and the parallel emergence of private sources of community leverage. The present Part IV will offer a model for explaining these developments.

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295. Gibson & O'Faircheallaigh, *supra* note 18, at 143.

296. O'Faircheallaigh, *supra* note 270, at 230.

297. *See* Laurin & Jamieson, *supra* note 170, at 458 (noting significant risk of delay or invalidation in absence of a CDA); O'Faircheallaigh, *supra* note 270, at 227 (noting pitfalls where CDAs not negotiated); FRASIER INSTITUTE, *supra* note 234 (CDAs may help avoid delays).

298. *See* Kendra E. Dupuy, *Community Development Requirements in Mining Laws*, 1 EXTRACTIVE INDUSTRIES & SOC'Y 200, 200–02 (2014) (describing the spread of CDA mandates and noting that mine developers are required to enter into CDAs in Sierra Leone, Nigeria, Guinea, Mali, South Sudan, Afghanistan, and Yemen); Ibironke T. Odumosu-Ayanu, *Foreign Direct Investment Catalysts in West Africa: Interactions with Local Content Laws and Industry-Community Agreements*, 35 N.C. CENT. L. REV. 65, 83–84 (2012) (summarizing CDA legislation in Nigeria).

299. *See* Dupuy, *supra* note 298, at 204–05 (discussing the influence of international donors and regional inter-governmental organizations on the adoption of CDA mandates).

The first part of this model—outlined in Part IV.A—explains the origin of the various community rights and powers. Specifically, each arose in response to pressure from local interests and their supporters, who perceived higher authorities as insufficiently representative, lacking key information, or otherwise failing to protect local interests or the environment. Reform advocates pressed for change to address these concerns, and each new category of community rights and powers was the response.

The second part of the model, outlined in Part IV.B, identifies and accounts for recurring limitations in each category of community rights and powers. Specifically, while higher authorities have made a number of concessions in response to reform pressures, they have carefully tailored each category of community rights and powers to avoid outright local control over development. Higher authorities have had diverse reasons for resisting local control, including the protection of their own interests and those of powerful constituents, as well as concerns about limited local capacity and risks to minority groups and the broader public interest.

The third part of the model explains the place of private mechanisms. Part IV.C will demonstrate in particular that the private mechanisms described in Part III are designed to compensate for remaining weaknesses in domestic and international legal frameworks, and to provide—on a transaction-specific basis—at least some of what communities have failed to achieve in the political arena. Private mechanisms have a number of advantages that can make them effective at balancing competing interests and producing further gains for communities. At the same time, however, these mechanisms have significant limitations of their own and communities should approach them with caution.

### A. *Deficiencies of Higher Authorities and Demands for Reform*

The various rights and powers secured by communities in recent decades have all developed in response to a recurring set of pressures from local communities and their supporters, who perceived—and sought to address—specific deficiencies in higher-level decision making. In each case, reform advocates saw higher authorities as failing to protect local communities and the environment from adverse impacts of development, because these authorities were not sufficiently representative of, or lacked sufficient input from, those affected by their decisions.

As described in Part II.A.1, local governments in the United Sates have increasingly sought to regulate fracking and other extractive activities because of pressure from their citizens concerned about impacts not adequately addressed by state and federal law. Similarly, as explained in Part II.B, the driving force behind the global trend

toward decentralization has been a common view among international organizations, theorists, and local communities that higher authorities are too far removed from those affected by their decisions—or are not sufficiently representative of them.

In the same vein, a key motivation for adopting EIA and public participation regimes has been the belief that responsible agencies historically have not adequately considered impacts on affected communities or the environment. Notably, in adopting NEPA and its implementing regulations, Congress and the CEQ were responding to pressure from the public to improve agency decision making and make agencies more sensitive to threats posed by development to the environment and stakeholders.[300] A related rationale is that agency decisions are more likely to be perceived as legitimate if affected communities have participated in the decision-making process.[301] Similarly, the rationale for the advent of the citizen suit is that higher authorities do not always have sufficient resources or motivation to enforce environmental laws.[302]

Finally, the IDSs described in Part II.C developed in response to a pattern of state authorities approving development activities with harmful—and potentially devastating—impacts on indigenous and traditional communities.[303] Commentators have cited a number of

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300. *See* S. REP. NO. 91-296, at 4 (1969) (asserting that the bill that became NEPA was necessary because "our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the nation faces"); Lorna Jorgensen, Note, *The Move Toward Participatory Democracy in Public Land Management Under NEPA: Is it Being Thwarted by the ESA?*, 20 J. LAND RESOURCES & ENVTL. L. 311, 314 (2000) (observing that the federal government adopted NEPA and its implementing regulations because "[t]he public was demanding more recognition of environmental values and an opportunity to participate in decisions regarding those values").

301. Dietz & Stern, *supra* note 117, at 10 ("Broader and more direct participation of the public and interested or affected groups in official environmental policy processes has been widely advocated as a way to increase both the legitimacy and the substantive quality of policy decisions."); Ebbesson, *supra* note 155, at 290 ("[P]ublic participation in decision-making serves to legitimize environmental decisions, which engage a mix of private and public interests.").

302. *See* Conservation Law Found. v. Browner, 840 F. Supp. 171, 174 (D. Mass. 1993) (discussing rationale for the Clean Air Act's private right of action); Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, 25 COLO. NAT. RESOURCES ENERGY & ENVTL. L. REV. 61, 65 (2014) ("Proponents of the citizen enforcement suit initially pointed to lax environmental enforcement by government agencies to justify inclusion of a citizen suit in the landmark air legislation, but later shifted their rationale to point to the efficiencies of supplementing limited government enforcement resources.").

303. *See* Saramaka Judgment, *supra* note 195, ¶ 85 ("[M]embers of indigenous and tribal communities require special measures that guarantee the full exercise of their rights . . . in order to safeguard their physical and cultural survival."); Nic Maclellan, *Indigenous Peoples in the Pacific and the World Conference Against Racism*, *in* RACISM AGAINST INDIGENOUS PEOPLES 90, 108 (Suhas Chakma & Marianne Jensen eds., 2001) (describing natural resource extraction projects in the Asia-Pacific region that have had

factors that can undermine the quality and fairness of state decision making when the interests of indigenous or traditional communities are at stake. State authorities may be dominated by majority groups that stand to benefit from the development activities in question, but will not experience the negative externalities.[304] Decision makers may even be prejudiced against their society's indigenous or traditional communities, leading them to tolerate impacts that they would not accept in other contexts, or to discriminate against indigenous or traditional groups when distributing compensation for project impacts.[305] Or authorities may simply not understand the significance to an indigenous or traditional community of particular lands, resources, or cultural sites, or the community's perception of impacts.[306]

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"major environmental consequences that have devastated local ecosystems, economies, and cultural practices"); Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 263, 400 (2010–2011) ("Infrastructure or development mega-projects, such as roads, canals, dams, ports or the like, as well as concessions for the exploration or exploitation of natural resources in ancestral territories, may affect indigenous populations with particularly serious consequences . . . .").

304. *See, e.g.*, Bibobra Bello Orubebe, *Environmental Impact Assessment Law and Land Use: A Comparative Analysis of Recent Trends in the Nigerian and U.S. Oil and Gas Industry*, *in* LAND USE LAW FOR SUSTAINABLE DEVELOPMENT 281, 290 (Nathalie J. Chalifour et al. eds., 2007) (attributing environmentally-destructive oil and gas development in the Niger Delta to the fact that the state is dominated by majority ethnic groups, while "the oil and gas resources are extracted from lands occupied by indigenous minority tribes who have inadequate or no representation in the Federal Government of Nigeria").

305. *See, e.g.*, Suhas Chakma, *Behind the Bamboo Curtain: Racism in Asia*, *in* RACISM AGAINST INDIGENOUS PEOPLES 176, 188–93 (Suhas Chakma & Marianne Jensen eds., 2001) (alleging that the Malaysian government has discriminated against indigenous landowners in favor of ethnic Malays when designating land for highway construction, approving dam and logging projects, and distributing compensation or benefits); Maclellan, *supra* note 303, at 108 (asserting that some governments in the Pacific have displayed "environmental racism" by targeting the lands and waters of indigenous communities for dumping toxic or radioactive wastes, which these governments would not allow in other locations); Mililani B. Trask, *Afterword: Implementing the Declaration*, *in* INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION 327, 327 (Elvira Pulitano ed., 2012) (asserting that indigenous advocates drafted UNDRIP to address "a legacy of racism and discrimination, exclusion, xenophobia, marginalization, and forced assimilation").

306. CARLY A. DOKIS, WHERE THE RIVERS MEET: PIPELINES, PARTICIPATORY RESOURCE MANAGEMENT, AND ABORIGINAL-STATE RELATIONS IN THE NORTHWEST TERRITORIES 77–80 (2015) (discussing a disconnect between how impacts are viewed in state EIA processes—namely, as something to be quantified and addressed with technical solutions—and by aboriginal communities, which may view impacts as a breakdown in the community's moral and physical relationships with animals and the land); Frank Vanclay, *Conceptual and Methodological Advances in Social Impact Assessment*, *in* THE INTERNATIONAL HANDBOOK OF SOCIAL IMPACT ASSESSMENT: CONCEPTUAL AND METHODOLOGICAL ADVANCES 1, 1 (Henk A. Becker & Frank Vanclay

The IDSs are designed to counteract any such factors that might affect state decision making in particular cases. As explained in Part II.C, the IDSs require state authorities to take particular steps to identify the full range of potential impacts specific to indigenous and traditional communities, consult with and potentially even defer to affected communities, and offer appropriate compensation when impacts are unavoidable. Yet states have not adopted these safeguards spontaneously. Rather, states have done so in response to pressure from indigenous communities and their supporters, who helped craft the international instruments that articulate the IDSs and have employed a mix of protest, litigation, and advocacy to secure parallel reforms at the domestic level.[307]

### B. *Political Concessions Short of Control*

In response to these pressures, higher authorities have made a number of concessions to local interests but have been willing to go only so far. Specifically, they have consistently crafted the various community rights and powers to provide a degree of *influence and benefits* to local interests, but not outright *control* over major development activities. Higher authorities may be swayed by

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eds., 2003) ("Too often, these costs (externalities) are not adequately taken into account by decision makers, regulatory authorities and developers, partly because they are not easily identifiable, quantifiable and measurable."); Libby Porter, *Rights or Containment? The Politics of Aboriginal Cultural Heritage in Victoria*, 37 AUSTRALIAN GEOGRAPHER 355, 368 (2006) (relating an instance in which ring trees having cultural significance to an Australian Aboriginal community were not recorded during a state-commissioned survey because the trees did not fit within criteria recognized by the state cultural management framework).

307. MATTIAS ÅHRÉN, INDIGENOUS PEOPLES' STATUS IN THE INTERNATIONAL LEGAL SYSTEM 113 (2016) ("Although under UN rules of procedures, states formally owned the process, in practice, indigenous peoples' representatives participated in the UNDRIP negotiations essentially on par with state negotiators."); ANAYA, *supra* note 22, at 45 (arguing that the movement to establish an international framework for indigenous rights "has involved, and substantially been driven by, indigenous peoples themselves," with important contributions from NGOs, independent experts, and human rights organs of international institutions); DERRICK HINDERY, FROM ENRON TO EVO: PIPELINE POLITICS, GLOBAL ENVIRONMENTALISM, AND INDIGENOUS RIGHTS IN BOLIVIA 168 (2013) (asserting that pressure from indigenous peoples and NGOs prompted the Bolivian government to ratify the ILO Convention, endorse UNDRIP, and establish consultation requirements in domestic law); Tracey Lindberg, *Contemporary Canadian Resonance of an Imperial Doctrine*, *in* DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES 126, 127 (Robert J. Miller et al. eds., 2010) (asserting that the Canadian government's recognition of a duty to consult with and accommodate indigenous groups "followed an era of Indigenous activism, legal challenges, and Canadian governmental response"); *Making the Most of ILO Convention 169*, CULTURAL SURVIVAL Q. MAG. (March 1994), https://www.culturalsurvival.org/publications/cultural-survival-quarterly/making-most-ilo-convention-169 (last visited Oct. 23, 2017) [https://perma.cc/Q3AH-Y3RD] (archived Oct. 23, 2017) (describing the role played by indigenous peoples, NGOs, and the ILO in the negotiation of the ILO Convention).

community input in particular cases but jealously guard their position as the dominant players in development.

### 1. The Line Between Influence and Control

One manifestation of this pattern is the careful tailoring of regulatory powers of local governments in the United States. As explained in Part II.A.1 above, state governments have delegated considerable regulatory responsibility to local governments and have generally allowed them to determine some aspects of how fracking and other development activities are carried out. Yet state and federal courts have consistently struck down local ordinances that prohibited or significantly impeded activities that were authorized by state law. In other words, higher authorities in the United States have generally accepted local *influence* over development activities but have pushed back when local authorities effectively sought to *veto* them. In addition, the US Supreme Court has used the *Nollan-Dolan* test to restrict local exactions on developers, seeking to ensure that any conditions imposed on developers are proportional to project impacts.

A similar pattern has played out abroad with local regulatory powers. In Spain, for example, despite having granted the autonomous communities a greater role in governance, the central government retained ownership of subsurface resources and sole authority to grant hydrocarbon concessions.[308] While the autonomous communities may express their views on whether or not concessions should be granted, they lack the power to block them.[309] Moreover, when communities have issued bans or moratoria on fracking within their territory, the Spanish Constitutional Court has struck them down, deeming them inconsistent with state prerogatives.[310] The Bolivian central government drew a similar line when it granted new forms of autonomy to the country's regions in the new constitution adopted in 2009 but retained control over resource development.[311]

In fact, even when central governments *have* purported to devolve powers to local authorities that give these authorities outright control over major development activities, central governments have frequently sought to take those powers back. As noted in Part II.A.2, despite having enacted a law that on its face requires consent from local governments for mining projects, the central government in the Philippines subsequently disputed local governments' authority to

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308. Lin, *supra* note 7, at 1047.

309. *Id.*

310. *Id.* at 1048–49 (discussing fracking bans enacted in the autonomous communities of Cantabria and La Rioja and rulings by the Constitutional Court).

311. *See supra* Part II.A.2.a.

withhold consent. Tellingly, however, even as the President sought to curtail that power, he signaled a willingness to accord local governments more *influence* and *benefits*. Specifically, Executive Order No. 79 directed responsible agencies to coordinate more closely with local governments in environmental regulation and enforcement,[312] to ensure the timely release of the funds promised to local governments pursuant to revenue-sharing mandates, and to study "the possibility of increasing [local governments'] share."[313] Further, Executive Order No. 79 declared that the central government would not enter into any new mining agreements "until a legislation rationalizing existing revenue sharing schemes and mechanisms shall have taken effect."[314]

Senegal provides another example. Despite having passed a law that gave local governments the right to determine whether or not local forests would be exploited commercially,[315] in practice Senegalese central authorities "retained almost all powers over commercial forestry decisions—they still decide how much production, where, when, and by whom."[316] Central authorities reportedly have done so by pressuring local officials to sign off on decisions made at the central level—even when the local population opposes commercial timber harvesting.[317]

As noted above in Part II.B, EIA and public participation regimes have similarly been calibrated to give local communities and other members of the public opportunities to provide input into environmental decision making, but not control over outcomes. Members of the public can express their views, but they do not have a veto over projects under consideration. And while higher authorities are required to take into account environmental, social, and cultural impacts, the fact that a project will have such impacts does not prevent these authorities from approving it.[318]

The same dynamic has played out as countries have incorporated protections for indigenous and traditional communities in their domestic legal frameworks. As noted above in Part II.C, states often have been willing to conduct EIAs, take measures to facilitate participation in decision making, and even share benefits. Yet states have generally resisted any binding legal obligation to secure FPIC

312. Executive Order No. 79, *supra* note 103, § 2.
313. *Id.* § 12.
314. *Id.* § 4.
315. Ribot, Agrawal & Larson, *supra* note 68, at 1867.
316. *Id.* at 1868.
317. *Id.*
318. *See* Neil Craik, *Principle 17: Environmental Impact Assessment*, *in* THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: A COMMENTARY 451–52 (Jorge E. Viñuales ed., 2015) (the basic characteristics of NEPA have been incorporated into other domestic and international EIA regimes, including the fact that its requirements are procedural and do not "require agencies to adopt the least impactful alternative or to necessarily mitigate identified environmental harms").

from impacted indigenous or traditional communities. While the Philippines seems on its face to be an exception, reports of widespread violations of the FPIC obligation suggest that indigenous groups' ability to withhold consent is limited in practice.

2. Reasons for Resisting Local Control

Numerous factors can contribute to higher authorities' resistance to granting local interests control over development activities and the greater benefits that would flow from such control. In some cases, higher authorities may be motivated by a simple desire to maintain their own power and privileges or those of favored interest groups.[319] Yet principled arguments can sometimes be made for resisting local control.

As discussed above in Part II.A.2, the results of decentralization processes have highlighted a host of potential problems that can result from giving greater influence or benefits to local governments. These problems can include weakening of regulatory standards and the resulting overexploitation of local resources, capture of benefits by corrupt local elites, increase in economic disparities within a country or region, and social conflict among groups competing for benefits. Whether or not these problems materialize depends on several factors, including the capacity of local governments and whether or not mechanisms exist for holding those governments accountable for their actions.[320] If higher authorities were to give local governments outright control over development activities, it may take away whatever upward accountability would otherwise exist.

In some cases, higher authorities may feel that they need to maintain control over decision making and revenues to protect the interests of low-income or minority groups.[321] For example, when the

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319. *See* Danielson, *supra* note 268, at 34 ("[T]here are national governments that do not want local people to receive more resources, especially where those local people are of a different ethnicity than the group who run the national government. At a minimum, national government may want resources channeled to its political allies . . . .").

320. *See* Ida Aju Pradnja Resosudarmo, *Closer to People and Trees: Will Decentralisation Work for the People and the Forests of Indonesia?*, *in* DEMOCRATIC DECENTRALISATION THROUGH A NATURAL RESOURCE LENS 110, 112 (Jesse C. Ribot & Anne M. Larson eds., 2005) (summarizing variables likely to determine the outcomes of decentralization); Stoa, *supra* note 26, at 34 (discussing risks associated with limited local governmental capacity).

321. *See* JESSE C. RIBOT, DEMOCRATIC DECENTRALIZATION OF NATURAL RESOURCES: INSTITUTIONALIZING POPULAR PARTICIPATION 18 (Martha Schultz ed., 2002) ("In decentralizations concerning natural resources, inequitable local decision making and benefit distribution is frequently observed. Local elites may be more prejudiced against the poor than those at higher levels. Dominant ethnic groups can use their new powers to take advantage of weaker ones.").

resource-rich regions of Bolivia sought control over resource development, some characterized the movement as an attempt by economic elites in those regions to protect their own wealth and privilege to the detriment of the country's indigenous and low-income communities.[322] Indeed, central government officials accused supporters of regional autonomy of racism—a perception reinforced by reported acts of discrimination and violence toward the local indigenous minority.[323]

Higher authorities may also be concerned that, if local communities were given outright control over development activities, they would reject some proposals without proper justification. Scholars have noted that communities can have an exaggerated perception of projects' risks, in part because of the difficulty that laypersons may have evaluating highly technical and scientific information.[324] Moreover, even if stakeholders know that a particular risk is very unlikely to manifest, it can still generate significant fear.[325] Finally,

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322. *See, e.g.*, Franz Chávez, *BOLIVIA: Local Indigenous Leaders Beaten and Publicly Humiliated*, INTER PRESS SERVICE (May 27, 2008), http://www.ipsnews.net/2008/05/bolivia-local-indigenous-leaders-beaten-and-publicly-humiliated/ (last visited Oct. 21, 2017) [https://perma.cc/NJ25-R4M3] (archived Oct. 21, 2017) (asserting that the autonomy movement is "spearheaded by the rightwing business and political elites" of European and mixed-race ancestry, while "[t]he aim of the leftwing Morales administration is to distribute the revenues from the eastern provinces' natural gas reserves and other sources of wealth more evenly, in order to improve the living conditions of the country's indigenous people, most of whom live in appalling poverty"); Nicole Fabricant, *Defending Democracy?: Human Rights Discourse in Santa Cruz, Bolivia*, NACLA REPORT ON THE AMERICAS 23, 24 (2011) (asserting that eastern elites perceived threats to their "economic investments and historic privilege" from President Morales' redistributive agenda, prompting them to seek "control [over] natural resources and their exploitation").

323. Rory Carroll & Andres Schipani, *Bolivia: Revolt Against the Peasant President*, GUARDIAN (May 3, 2008) (last visited Oct. 23, 2017) [https://perma.cc/B2QX-QDD2] (archived Oct. 23, 2017) (quoting a central government official as asserting that "[r]acism and exclusion is a part of this autonomy process."); Chávez, *supra* note 322 (reporting attacks by autonomy supporters on indigenous individuals and officials' reactions); Fabricant, *supra* note 322, at 25 (discussing incidents of "racist and discriminatory behavior" including attacks on "anyone who looked indigenous"); Monte Reel, *Bolivia's Richest Region Votes Solidly for Autonomy*, WASH. POST (May 5, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/05/04/AR2008050402147.html (last visited Oct. 23, 2017) [https://perma.cc/Z95S-8AAK] (archived Oct. 23, 2017) (some opponents of regional autonomy "believe the autonomy drive is fueled by racism").

324. *See* Dietz & Stern, *supra* note 117, at 55 (citations omitted) ("[P]ublic estimates of the risk of injury or death associated with various technologies do not match the estimates of experts or actuarial and epidemiological studies."); *id.* at 142 ("Many interested and affected parties lack sufficient technical and scientific background to understand the scientific issues as scientists present them."); ECCLESTON, *supra* note 30, at 177 ("Fears associated with controversial projects such as hazardous waste incineration frequently far exceed the actual risks.").

325. David B. Spence, *Responsible Shale Gas Production: Moral Outrage vs. Cool Analysis*, 25 FORDHAM ENVTL. L. REV. 141, 183 (2013) (discussing neurobiological

there is a well-documented tendency for communities to oppose socially beneficial projects when the impacts will be felt locally, but the benefits will be distributed more broadly: the "not in my backyard" or NIMBY phenomenon.[326] Accordingly, it is sometimes argued that giving local communities a veto over development decisions could hold the broader public interest hostage to unfounded local fears or NIMBYism.[327]

Finally, some states have contended that any obligation to secure FPIC from impacted indigenous or traditional communities would be "discriminatory" toward others in society.[328] This view of FPIC contrasts with the obligation's intended purpose, which is the precise opposite: to mitigate power discrepancies and overcome patterns of discrimination by buttressing the position of particularly vulnerable communities. Moreover, the international authorities discussed in Part II.C.1 suggest that an FPIC obligation applies only in narrow circumstances, including when a development project will require a community's relocation or will have a major impact on its lands and resources.[329] Nevertheless, the argument that safeguards for indigenous or traditional groups are a form of reverse discrimination likely resonates with some voters, who see deference to these groups as an obstacle to development initiatives that would produce benefits for the broader society.

### C. *Private Mechanisms as Supplements to Public Gains*

Whatever reasons higher authorities have had for limiting communities' formal rights and powers, by doing so these authorities

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evidence of the impact on fear on decision making and its implications for community views about fracking).

326. Krause et al., *"Not in (or Under) My Backyard": Geographic Proximity and Public Acceptance of Carbon Capture and Storage Facilities*, 34 RISK ANALYSIS 529, 530 (2014) (discussing the NIMBY phenomenon and carbon capture and storage facilities canceled due to community opposition); *see generally* Susan Lorde Martin, *Wind Farms and NIMBYs: Generating Conflict, Reducing Litigation*, 20 FORDHAM ENVTL. L. REV. 427 (2010) (discussing NIMBYism in the context of wind farms and cell phone towers).

327. *See, e.g.*, Nickie Vlavianos & Chidinma Thompson, *Alberta's Approach to Local Governance in Oil and Gas Development*, 48 ALBERTA L. REV. 55, 56 (2010) ("[C]entralized decision-making guarantees that local concerns do not prevail over the concerns of the greater whole. Allowing all decisions to be subject to a local veto could promote a 'not in my backyard' phenomenon that could undermine the well-being of the whole province in the interests of a few.").

328. *See* Miller, *supra* note 209, at 80 (discussing state objections to the concept of FPIC during the drafting of UNDRIP).

329. *See* James Anaya (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), *Promotion and Protection of All Human Rights, Civil Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 47, U.N. Doc. A/HRC/12/34 (July 15, 2009) (describing circumstances in which FPIC is required under UNDRIP and jurisprudence of the Inter-American Court of Human Rights).

have left local interests without the ability to address, unilaterally, some legitimate concerns about development activities. It is in this context that the private mechanisms outlined in Part III have proliferated. These mechanisms represent attempts to compensate for remaining gaps in domestic legal frameworks and secure for communities the equivalent of a veto right, or at least forms of influence and benefits beyond those formalized in law.

The gap-filling role of financial institution standards and non-binding private-sector guidelines is evident from the fact that they contemplate minimum environmental and social protections notwithstanding the content or effectiveness of local law.[330] Indeed, some financial institution standards have been crafted to provide protections that are often absent from domestic legal frameworks—such as a requirement to obtain FPIC from affected indigenous communities[331]—or that may exist on paper but are rarely enforced.[332] The OECD Guidelines and UN Guiding Principles similarly call for enterprises to comply with the standards they articulate whether or not local law so requires.[333]

Furthermore, as explained above in Part III.B, communities increasingly employ private agreements with developers to secure benefits or forms of influence that are not mandated by law. In some cases, local governments have even negotiated benefits or impact mitigations that those governments would have been precluded from imposing unilaterally due to state law preemption or takings jurisprudence. Examples include development agreements in the United States that provide for community benefits that would violate the *Nollan-Dolan* test, and operator agreements between

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330. Morgera, *supra* note 244, at 325 (observing that financial institution standards and non-binding guidelines go "beyond legal requirements at the national level" in establishing protections for affected communities).

331. Ariel Meyerstein, *Transnational Private Financial Regulation and Sustainable Development: An Empirical Assessment of the Implementation of the Equator Principles*, 45 N.Y.U. J. INT'L L. & POL. 487, 502, 514, 562–63 (2013) (asserting that the law in some countries may allow projects to go forward without input from affected communities, and discussing the consequent adoption of consultation requirements in the Equator Principles, as well as the IFC's ultimate adoption of an FPIC requirement for projects impacting indigenous peoples).

332. *See id.* at 503 (asserting that developing countries frequently have appropriate laws and regulations in place, but regulators in those countries often do not enforce them effectively).

333. *See* UN Guiding Principles, *supra* note 261, at 13 (asserting that businesses' responsibility to respect human rights "exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and . . . exists over and above compliance with national laws and regulations protecting human rights."); OECD Guidelines, *supra* note 257, at 39 (observing that the OECD Guidelines are "supplementary principles and standards of behaviour of a non-legal character" which "extend beyond the law in many cases").

municipalities and oil companies that impose technical restrictions on fracking more onerous than state oil and gas regulations.[334]

Private mechanisms have a number of advantages that account for their growing prominence and ability to produce these sorts of supplemental community gains. One such advantage is the simple fact that these mechanisms operate on a case-by-case basis and therefore do not require permanent, broad-based political change. While financial institution standards and non-binding guidelines may secure protections or benefits not required by domestic law in particular cases, they operate outside the domestic legal system and do not require any formal reallocation of authority or entitlements within society. Similarly, any agreement reached through private bargaining applies only to the parties; other communities cannot necessarily expect the same terms for similar projects. For obvious reasons, it is easier to strike bargains between individual parties than to adopt new laws apportioning authority and benefits between competing levels of government or among communities, or to raise the regulatory standards across the board for a particular activity.

Another advantage of private mechanisms is their flexibility. The community–developer consultations contemplated by standards and guidelines, as well as any actual agreements that may be negotiated, allow the conditions of the project to be tailored to the particular preferences of the interested parties. This contrasts with the one-size-fits-all approach typically employed when conditions are set via public regulation, or when benefits are distributed via intergovernmental revenue-sharing schemes.

At the same time, private mechanisms are subject to limitations that can undermine their utility in some cases. Financial institution standards apply only if the developer seeks funding from an institution that imposes them. And non-binding guidelines, by definition, depend on voluntary compliance. Moreover, bargaining between developers and communities may be undermined by corruption, lack of full disclosure, or other negotiating practices that would prevent any agreement signed from reflecting the informed will of the community as a whole.[335] In addition, whatever benefits are secured by the community may not be distributed equitably or may lead to social

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334. *See supra* Part III.B.

335. *See* Foster, *supra* note 241, at 68–76 (detailing reports of bribery and other questionable consultation practices in connection with development projects in Latin America, the Asia-Pacific Region, and Africa); Gibson & O'Faircheallaigh, *supra* note 18, at 55 ("Questions of legitimacy can surface as people fight over who should have the right to negotiate agreements. When organizations such as band or tribal councils make decisions about IBAs, they sometimes do so without the informed consent of all community members.").

disruptions.[336] Finally, in some cases bargaining may not be productive simply because the community will not consent to the project under *any* terms.

Accordingly, while private mechanisms can produce gains for communities, they are not guaranteed to do so and may even be counterproductive in some instances. Moreover, communities may not be able to bring developers to the bargaining table in the first place absent strong formal rights and powers. For example, municipalities in Colorado were able to induce oil companies to agree to technical restrictions on their fracking operations only because these municipalities could have delayed or denied certain local regulatory approvals that the companies required. Similarly, IBAs have become common in Canada largely as a result of the federal government having recognized a duty to consult with and accommodate Aboriginal groups, which gives these stakeholders opportunities to delay or hinder developers' plans—and hence vital leverage.[337] For all of these reasons, private mechanisms are best seen as supplements to public avenues of influence rather than as substitutes. Simply put, the more formal rights and powers that communities can secure in the political arena, the more successful they should be in negotiating private agreements that serve long-term community interests.

## V. CONCLUSION

This Article has demonstrated that a remarkable series of legal reforms in recent decades has transformed the position of local communities around the world vis-à-vis development. While communities have long been impacted by development, they are increasingly having impacts of their own in the other direction and

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336. *See* Danielson, *supra* note 268, at 34 (summarizing potential pitfalls of community benefits, including the risk of empowering one gender over another or "giving more money and power to one of the competing social or ethnic groups"); George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights*, 33 MICH. J. INT'L L. 627, 687 (2012) ("[A]fter experiencing . . . the sudden affluence associated with a development project, indigenous peoples can face a loss of culture and identity, a breakdown in familial bonds, increased substance abuse, and greater economic dependence."); Gibson & O'Faircheallaigh, *supra* note 18, at 141 ("[P]ayments can be quickly frittered away on consumer goods, including alcohol, if structures are not in place to ensure they are invested or allocated to family and community priorities.").

337. *See* Martin Papillon, *Introduction: The Promises and Pitfalls of Aboriginal Multilevel Governance*, *in* CANADA: THE STATE OF THE FEDERATION, 2013: ABORIGINAL MULTILEVEL GOVERNANCE 3, 12 (Martin Papillon & André Juneau eds., 2016) (attributing the rise of IBAs to the Canadian Supreme Court's recognition of a duty to consult and accommodate, which exposes developers to "potential economic costs of protracted legal challenges" and encourages negotiation over project impacts and benefit-sharing).

securing benefits that can transform their economic prospects in positive ways.

The discussion has also revealed, however, that under some circumstances increased local power and revenues can have unforeseen and troubling consequences. Not only can sudden infusions of cash lead to social disruptions, but local control without adequate capacity and accountability can produce a host of problems—from a weakening of regulatory standards to violations of minority rights. Because of these concerns and pressures from other actors—as well as their own self-interest—higher authorities have pushed back against some community demands and retained a dominant role in the development process.

Into this context of political gridlock have stepped private mechanisms, which have the potential to produce additional gains for communities on a case-by-case basis, without threatening the core interests of other actors. These private mechanisms are generally easier to implement than formal political change and offer considerable flexibility. Yet these mechanisms have limitations of their own and ultimately their effectiveness depends on communities possessing robust formal rights and powers. Consequently, as the wave of community participation in development continues to wash over the globe, continued innovation will be needed—and can be expected—in both the public and private realms.

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