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Investor-State Dispute Settlement and Indigenous Rights in Conflicts: An Analysis from the Social Licence to Operate Approach

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ABSTRACT: Investor-State Dispute Settlement mechanisms (ISDS) have sparked significant discussion, particularly regarding the impact of foreign investment on non-disputant stakeholders, such as Indigenous communities. This discourse emphasises the necessity for inclusive approaches that incorporate the perspectives of vulnerable communities. While states bear responsibilities upon ratifying international treaties, foreign investors do not bear the same level of accountability, as they lack international legal personality. This gap has led to the development of international frameworks aimed at promoting responsible business practices, corporate social responsibility, and sustainable business strategies. These voluntary standards are designed to protect the environment and uphold social, cultural, and human rights values, positioning the local community, including Indigenous peoples' rights, at the forefront of these discussions due to their vulnerability to the adverse effects of business activities. The notion of a "social licence to operate" (SLO) has gained importance in ensuring that corporations fulfil their ethical and social responsibilities, particularly in areas inhabited by Indigenous communities. This study examines ISDS cases through the lens of international law, focusing on the requirement to adhere to SLO at the initial stage of a project. It also explores the consequences for foreign investors and host states if they fail to comply. Findings suggest that compliance with SLO ensures a positive relationship with the local community in general and particularly with Indigenous communities. The discussion emphasizes the importance of maintaining a social licence to operate in the modern business environment, not only for operational sustainability but also as a fundamental component of corporate social responsibility. The study employs doctrinal and qualitative methodologies, drawing on both primary and secondary sources, with SLO serving as the theoretical approach to the research

KEYWORDS: indigenous rights, dispute settlement, right to consultation, duty to consult, social license

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I. INTRODUCTION

In recent times, many investor-state disputes have arisen due to public pressure and protests, particularly in areas where environmentally sensitive projects are initiated.[1] Generally, the relationship between foreign direct investment (FDI) and the environment is a highly debated topic, often analysed from various theoretical perspectives. For instance, the Environmental Kuznets Curve Theory posits that there is an inverted U-shaped relationship between income per capita and environmental degradation.[2] Similarly, the Pollution Haven theory posits that investors may seek regions with less stringent or even absent regulatory frameworks for their investment activities.[3] For instance, the OECD emphasizes the Pollution Haven Hypothesis that competitive forces may drive FDI away from countries with stringent environmental standards and attract it towards those with more lenient regulations.[4] This raises a critical discussion on 'grow now, clean up later' or 'pollute now, clean later'.[5] These perspectives often drive countries toward a 'race to the bottom,' where environmental regulations may be compromised in favour of short-term economic gains. Based on these theoretical perspectives, FDI brings potential benefits to receiving states, but also causes disadvantages to the local population. While existing theories, as mentioned above, primarily focus on developing countries as a whole, it remains relevant to discuss how unregulated FDI can negatively impact the environment and human rights, especially on vulnerable communities such as indigenous people.

Many disputes related to environmental degradation arise from foreign investment projects that tend to overlook the importance of engaging with the local population. When these projects are initiated without proper

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1 At least 175 such cases have been filed against States, representing approximately 15 per cent of all 1,190 known ISDS cases based on IIAs. See, *Treaty-Based Investor-State Dispute Settlement Cases and Climate Action*, by UNCTAD, in *UNCTAD IIA Issues Note No 4* (Geneva: UNCTAD, 2022) at 3–5.

2 . Nnyeneime Usenata, "Environmental Kuznets Curve (EKC): A Review of Theoretical and Empirical literature" (2018) MPRA Paper (MPRA Paper) 1–19 at 2–3; Giedrė Lapinskienė, Manuela Tvaronavičienė & Pranas Vaitkus, "Greenhouse gases emissions and economic growth – evidence substantiating the presence of environmental Kuznets curve in the EU" (2014) 20:1 Technological and Economic Development of Economy 65–78 at 70–74; David I Stern, "The Rise and Fall of the Environmental Kuznets Curve" (2004) 32:8 World Development 1419–1439 at 1419–1420.

3 Colin Kirkpatrick, Clive George & Silviu Serban Scrieciu, "The Implications of Trade and Investment Liberalization for Sustainable Development: Review of Literature" (2004) Impact Assessment Research Centre (IARC) Working Papers (Impact Assessment Research Centre (IARC) Working Papers) , online: <https://ideas.repec.org//p/ags/idpmia/30576.html> at 35.

4 Lyuba Zarsky, *Havens, halos and spaghetti : untangling the evidence about foreign direct investment and the environment* (Den Haag: OECD, 1999) at 1–3.

5 Hossein Azadi, Gijs Verheijke & Frank Witlox, "Pollute first, clean up later?" (2011) 78:3 Global and Planetary Change 77–82 at 81; Fathima Shamila Dawood Lebbe Mohamed Razik, *Foreign Investment and Sustainable Development: A Critical Analysis from the Sri Lankan Legal Perspective* 2019) at 13.

consultation, they often lead to conflict with local communities. This also results in a lack of trust. Investment treaties generally lack provisions that acknowledge the regulatory rights of the host state, despite the emphasis that local laws may emphasise such rights. Moreover, foreign investment projects tend to bypass local mandatory requirements, particularly those related to environmental impact assessment and community participation.[6]

Foreign investment projects in resource extraction sectors such as mining, logging, and agriculture may exert substantial environmental and social impacts on indigenous communities. These activities are frequently associated with extensive deforestation, destruction of natural habitats, contamination of air and water systems, and disruptions to the traditional livelihoods of indigenous populations, thereby negatively affecting both ecological systems and community health.[7] The decline in biodiversity represents a serious concern, as the disturbance of natural habitats can lead to the extinction of unique species and the weakening of ecological integrity. Such environmental degradation also undermines the livelihoods and cultural practices of indigenous groups that rely heavily on these ecosystems. Furthermore, foreign investment activities often result in the marginalization of indigenous communities, including the appropriation of their lands and natural resources without adequate consultation or fair compensation. This situation threatens their continued existence and contributes to the erosion of cultural heritage. Accordingly, there is a growing need for the implementation of sustainable approaches that respect and protect the rights and well-being of indigenous peoples. For example, Gilbert, in *Land Grabbing, Investments & Indigenous Peoples' Rights to Land and Natural Resources: Case Studies and Legal Analysis*, presents case studies and legal examinations of how land acquisition for foreign investment affects indigenous communities.[8]

In addition, Foster argues that foreign direct investment (FDI) presents both potential risks and benefits for indigenous populations. However, the adverse

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[6] See generally, *Environmental Rule of Law: First Global Report*, by United Nations Environment Programme (Nairobi: United Nations Environment Programme, 2019) at 13.

[7] See generally, George Foster, "Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights" (2012) 33:4 Michigan Journal of International Law 627–691 at 630 Also available as Lewis & Clark Law School Legal Studies Research Paper No 2012-25.

[8] *Land Grabbing, Investments & Indigenous Peoples' Rights to Land and Natural Resources: Case Studies and Legal Analysis*, by Jeremie Gilbert (International Work Group for Indigenous Affairs, 2017) at 11–15 [*Land Grabbing, Investors, and Indigenous Peoples*].

consequences tend to dominate, largely because governments often prioritize economic development over indigenous rights, while existing local and international legal frameworks are insufficient to adequately reconcile these competing interests. The author further emphasizes the limitations of these frameworks and proposes possible solutions aimed at achieving a more balanced and equitable approach.[9]

The study *Land Grabbing and Human Rights: The Involvement of European Corporate and Financial Entities in Land Grabbing Outside the European Union* demonstrates that access to land and natural resources is fundamental to the realization of various human rights, including rights to food, water, sanitation, health, housing, employment, and cultural participation. The rights of women and indigenous peoples are particularly dependent on secure access to land and natural resources. However, land acquisition processes frequently undermine local food production systems by disrupting people's ability to grow or gather food, thereby increasing food and nutritional insecurity. In many cases, agricultural production also serves as a primary livelihood source, enabling households to meet basic needs and supplement their diets.[10] The study further notes that land deals commonly jeopardize the right to adequate housing, contribute to displacement, and adversely affect both physical and mental health, while also restricting participation in cultural life. Case examples include sugar plantation developments influenced by the EBA initiative in Cambodia and the activities of Neumann Kaffee Gruppe in Uganda. Moreover, culturally and spiritually significant sites for local communities, including burial grounds, are often destroyed or placed at risk by investment projects.[11]

Empirical findings from Sulawesi, Indonesia, indicate that nickel extraction activities—frequently promoted as part of the "green" transition for electric vehicles—have produced significant negative impacts on surrounding communities. The results show that the anticipated economic benefits are often outweighed by environmental degradation, health risks, land displacement, and social conflict. These outcomes illustrate the use of

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[9] Foster, "Foreign Investment and Indigenous Peoples", *supra* note 7 at 632.

[10] *Land grabbing and human rights: The involvement of European corporate and financial entities in land grabbing outside the European Union*, by Saturnino Borras et al, EP/EXPO/B/DROI/2015/02 (European Parliament, 1 May 2016) at 36, 60.

[11] *Ibid* at 36.

greenwashing narratives to justify the rapid expansion of environmentally harmful industrial activities.[12] Similarly, the Eppawala mining project has faced considerable resistance and legal scrutiny due to its environmental implications and its potential to undermine the livelihoods of local farming communities. A proposed large-scale extraction initiative involving a foreign corporation was ultimately halted following the landmark Supreme Court decision in *Bulankulama and Others v. Secretary, Ministry of Industrial Development,*[13] in which local residents challenged a non-transparent agreement entered into with a United States-based company.[14]

Although the case formally concerned indigenous populations, its broader implications extend to the wider local community, as Justice Amerasinghe, in delivering the judgment, emphasized the principle of public trust doctrine—stating that natural resources are held by the state in trust for the benefit of the people.[15] Collectively, these cases illustrate that the absence of a balanced regulatory framework that adequately integrates both public and private interests may result in violations of the human rights of local communities. This highlights the necessity of an inclusive approach that considers the interests of affected populations while also ensuring meaningful protection for vulnerable groups, including Indigenous peoples.

The lack of a balanced regulatory framework that clearly defines the rights and obligations of all parties may result in the host state being held liable, particularly when efforts to protect the environmental interests of Indigenous peoples lead to financial losses for foreign investors. Such circumstances commonly arise in conflicts between foreign investors and Indigenous communities.[16] Consequently, when projects are delayed, suspended, or cancelled, host states may be required to provide substantial compensation to

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[12] Mongabay, "How global EV nickel demand is polluting Indonesia's indigenous communities | NEWS" (5 June 2025), online: *Reccessary* <https://www.reccessary.com/en/news/how-global-ev-nickel-demand-polluting-indonesia-indigenous-communities>; Michaela G Y Lo et al, "Nickel mining reduced forest cover in Indonesia but had mixed outcomes for well-being" (2024) 7:11 One Earth 2019–2033 at 2024–2025.

[13] *Banda Bulankulama and Others v Secretary, Ministry of Industrial Development and Others*, [2000] 3 Sri Lanka Law Reports (SLR) 243.

[14] Globalisation, Environment and Development, "Mining in Sri Lanka: Community Action Against Environmental Hazards • PolSci Institute" (16 March 2024), online: <https://polsci.institute/globalisation-environment-development/mining-sri-lanka-community-action-environmental-hazards/>.

[15] Shamila Dawood, "Safeguarding Right to Regulate to Promote Sustainable Development -An Analysis of Foreign Investment Laws of Sri Lanka" (2021) SSRN 1–45 at 8.

[16] . Chao Wang, Jing Ning & Xiaohan Zhang, "International Investment and Indigenous Peoples' Environment: A Survey of ISDS Cases from 2000 to 2020" (2021) 18:15 International Journal of Environmental Research and Public Health 7798 at 7.

foreign investors.[17] This situation highlights the reciprocal responsibilities of foreign investors, host states, and other stakeholders in relation to the "right to consultation" and the corresponding "duty to consult".[18] In this context, the concept of a social licence to operate (SLO) is intended to bridge the gap between the parties involved and reduce the risk of investor-state dispute settlement (ISDS). However, existing studies indicate that SLO mechanisms are often not effectively implemented as part of meaningful consultation processes, thereby limiting their contribution to informed and participatory decision-making.

For example, research on *Land Grabbing and Human Rights* demonstrates that the involvement of affected communities in land-related investments remains problematic. Companies and investors frequently assert that consultations have been conducted and that consent has been obtained from local populations. Nevertheless, in many cases, significant deficiencies exist in how such consultations are carried out and recorded, with limited evidence indicating that affected communities are genuinely able to refuse project implementation. These shortcomings undermine fundamental rights, including participation in public affairs, access to information, self-determination, and freedom of expression, and ultimately violate the principle of free, prior, and informed consent.[19]

The concept of a social licence to operate (SLO) reflects a broader understanding of stakeholder engagement in decision-making processes. As noted by Hughes, stakeholder involvement encompasses a wide range of actors, including governmental and non-governmental institutions, business entities, service providers, and the general public. In this context, a distinction is drawn between "consultation" and "participation," where participation enables stakeholders to actively influence decisions that affect them, while consultation provides more limited opportunities for input and control.[20]

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[17] Foreign investors use the dispute settlement process to seek exorbitant compensation from States that strengthen environmental protection/78/168: *Paying Polluters: The Catastrophic Consequences of Investor-State Dispute Settlement for Climate and Environment Action and Human Rights*, by United Nations General Assembly, A/78/168 (13 July 2023) at 2, 4, 20.

[18] The *right* focuses on the party that must be consulted (a recognition of Indigenous communities' rights), whereas the *duty* emphasizes the responsibility of the consulting party (investor & host government) to initiate and conduct the consultation appropriately.

[19] Borras et al, *supra* note 10 at 39.

[20] *Environmental Impact Assessment and Stakeholder Involvement*, by Ross Hughes, in *Environmental Planning Issues No 11* (International Institute for Environment and Development, 1998) at 3 online: <https://www.iied.org/7789iied>.

Within this framework, SLO functions as an integrative concept that incorporates both consultation and participation in engagement with local communities. By combining these elements, SLO establishes a more comprehensive approach to community engagement, ensuring that stakeholders' perspectives are not only acknowledged but also meaningfully considered in decision-making processes. This approach contributes to building trust and transparency between investors and local populations, while simultaneously strengthening the legitimacy and long-term sustainability of investment projects. -Accordingly, SLO serves as a critical mechanism for facilitating meaningful community involvement and securing the continued support of affected populations, which is essential for the successful implementation of projects. In turn, this reduces potential conflicts and mitigates foreseeable risks associated with inadequate stakeholder engagement.

The concept of a social licence to operate (SLO) has recently attracted significant scholarly attention, particularly in relation to the notion of social acceptance of projects. Stephen et al. argue that a "social licence" constitutes a valuable and necessary precursor to formal legal licences, especially in the context of effective conservation initiatives. They conceptualize social licence as the implicit approval granted by civil society for an activity to proceed, arising from ongoing political and social interactions. According to the authors, conservation initiatives, much like extractive industries, require a social licence to operate, given that such activities inevitably produce both beneficiaries and adversely affected groups. In this regard, strong opposition from any segment of society is likely to result in the denial of a social licence. Moreover, the authors contend that the use of the term "social licence" is more transparent than referring to activities as merely "socially acceptable," as it more accurately reflects the binary nature of public support required for such initiatives to proceed.[21] They further emphasize that the concept is inherently flexible, and that its adoption by corporations signifies an explicit recognition that civil society holds the capacity to challenge and potentially reject a company's legitimacy to operate.[22]

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[21] Stephen T Garnett, Kerstin K Zander & Catherine J Robinson, "Social license as an emergent property of political interactions: response to Kendal and Ford 2017" (2018) 32:3 Conservation Biology: The Journal of the Society for Conservation Biology 734–736 at 734.
[22] *Ibid.*

In this context, the right of Indigenous peoples to a healthy environment—closely linked to their rights over land—possesses a distinct character and warrants particular prioritization for several reasons. First, their cultural identity, including their ways of life, traditions, and languages, is inherently connected to their ancestral lands.[23] Moreover, many Indigenous communities depend directly on land-based resources for their economic survival. -From a human rights perspective, the recognition of land rights constitutes a matter of justice, as it acknowledges both their historical relationship with the land and their right to self-determination.[24] In addition, Indigenous communities play a crucial role in climate change mitigation, as their territories often encompass significant carbon reserves and areas of high biodiversity.[25] Furthermore, their sustainable land management and agricultural practices contribute meaningfully to food production and biodiversity preservation.

This study seeks to examine the application of the social licence to operate (SLO) as an approach to strengthen local community participation and reduce the risk of investor-state dispute settlement (ISDS), while simultaneously recognizing and protecting the rights of affected communities, particularly Indigenous peoples. The paper begins by analyzing the concept of SLO and its core objectives in safeguarding Indigenous rights during the approval and implementation of investment projects. Subsequently, it addresses the rights to a healthy environment and meaningful participation, emphasizing the importance of ensuring that decision-making processes are consistent with the internationally recognized principle of free, prior, and informed consent. Finally, the study evaluates the advantages of adopting the SLO framework, highlighting its role not only in reinforcing both the right and the duty to consult, but also as an enabling mechanism for advancing broader corporate social responsibility initiatives.

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[23] See, *Indigenous Peoples' Collective Rights to Lands, Territories and Natural Resources: Lessons from IFAD-Supported Projects*, by International Fund for Agricultural Development (Rome: International Fund for Agricultural Development, 2009) at 4.
[24] *Ibid.*
[25] . Oxfam International, "Why indigenous and community land rights matter for everyone" (25 May 2022), online: <https://www.oxfam.org/en/take-action/campaigns/stand-land-rights/why-indigenous-and-community-land-rights-matter-everyone>.

II. METHODS

This study adopts a doctrinal and qualitative research approach. It examines recent landmark investor-state dispute settlement (ISDS) cases in which issues concerning Indigenous peoples constitute a central focus of analysis. Similar to other societies, Indigenous communities maintain a profound connection between their ways of life and their ancestral environments, recognizing the right to a healthy environment as a fundamental human right. -The research employs key terms such as Indigenous peoples, social licence to operate (SLO), environmental rights, land grabbing, the right to consultation, and the duty to consult to identify and analyze both primary and secondary sources. The findings are presented, where relevant, in the form of tables and charts to support the analysis.

III. INDIGENOUS PEOPLES: DEFINITION AND CONTEXT

Indigenous peoples are generally understood as the original inhabitants of a particular region, having existed long before the arrival of external settlers. They possess distinct cultures, languages, and traditions that are intrinsically linked to their ancestral lands, with their cultural identity and survival closely dependent on their surrounding environment. The World Bank Group estimates that there are approximately 476 million Indigenous peoples worldwide, accounting for around six per cent of the global population.[26] Indigenous communities are found across all continents; however, international law does not provide a single, universally accepted definition. -For example, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) does not establish a formal definition but affirms, through its provisions, the right of individuals to belong to an Indigenous community and to determine their own identity in accordance with the traditions and customs of that community.[27] Similarly, Cobo's study examines the definition

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[26] World Bank, "Indigenous Peoples | World Bank Group", online: <https://www.worldbank.org/ext/en/topic/social-development/indigenous-peoples>; *Who Are Indigenous Peoples?*, by United Nations Permanent Forum on Indigenous Issues (United Nations).UNPFII reveals that "among the indigenous peoples are those of the Americas (for example, the Lakota in the USA, the Mayas Guatemala or the Aymaras in Bolivia), the Inuit and Aleutians of the circumpolar region, the Saami of northern Europe, the Aborigines and Torres Strait Islanders of Australia and the Maori of New Zealand. These and most other Indigenous peoples have retained distinct characteristics which are clearly different from those of other segments of the national populations."

[27] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 2007 arts 9, 29, 32.

of Indigenous populations across 37 countries, identifying both objective criteria—such as ancestry, culture, and language—and subjective elements, including self-identification and recognition by the community.[28]

Determining who qualifies as Indigenous peoples remains a complex and context-dependent issue. In Sri Lanka, for instance, there is currently no formal constitutional or statutory definition of Indigenous peoples, unlike in some other jurisdictions. Nevertheless, the Vedda community is widely recognized as the country's Indigenous group based on historical, cultural, and anthropological considerations rather than formal legal acknowledgment. In May 2024, the Sri Lankan Cabinet approved the drafting of legislation aimed at protecting the rights of Indigenous communities, addressing key concerns such as land and resource governance, as well as the preservation of cultural and religious practices.[29] At the international level, the United Nations Permanent Forum on Indigenous Issues (UNPFII) outlines key identifying characteristics of Indigenous peoples, particularly emphasizing their close relationship with land and natural resources. These characteristics include historical continuity with pre-colonial societies; self-identification and recognition by the community; strong ties to territories, ecosystems, and natural resources; the maintenance of distinct social, economic, and political institutions; the preservation of unique languages, cultures, beliefs, and knowledge systems; a commitment to sustaining their identity and institutions; and their status as non-dominant groups within broader society.[30]

Furthermore, UNDRIP recognizes the rights of Indigenous peoples and underscores the importance of access to justice and effective remedies. Under Article 40, Indigenous peoples are entitled to fair and timely resolution of disputes when conflicts arise with governments or other parties. Such processes must be conducted in a transparent, respectful, and equitable manner, particularly in cases involving violations of individual or collective rights, and must ensure the availability of appropriate remedies.[31]

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[28] *Study of the Problem of Discrimination Against Indigenous Populations*, by José Martínez Cobo, E/CN.4/Sub.2/1986/7 (United Nations, 1986) at 4–5.

[29] Ceylon Daily News, "Sri Lanka to Introduce New Law for Indigenous Community" (28 August 2024), online: <https://ceylondailynews.lk/home/2024/08/28/indigenous-community/>.

[30] Foster, "Foreign Investment and Indigenous Peoples", *supra* note 7; S Anaya, "The Human Rights of Indigenous Peoples: United Nations Developments" (2013) University of Hawai'i Law Review, online: <https://scholar.law.colorado.edu/faculty-articles/1282> at 994–995.

[31] *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 27 art 40.

Although Indigenous peoples form part of the broader local community, and their rights are generally protected under various legal frameworks, including constitutional provisions, their distinct characteristics necessitate particular attention. The unique nature of their livelihoods, cultural practices, and relationships with land justifies a more nuanced and specialized approach to the protection of their rights.

A. THE SOCIAL LICENCE TO OPERATE FRAMEWORK: MITIGATING RISKS IN ISDS

1. Building Trust

A social licence to operate (SLO) is inherently informal and relies primarily on community trust and perceptions, in contrast to a legal licence, which is formally granted by the state.[32] Securing a social licence prior to obtaining formal regulatory approval is increasingly regarded as essential. While governments assess compliance with procedural and substantive legal requirements before issuing legal licences, SLO focuses on achieving broader societal acceptance. This process can be particularly complex, as it involves communicating project-related information to diverse groups who may have varying levels of awareness regarding its potential short- and long-term impacts. -Accordingly, existing scholarship emphasizes the importance of establishing clear criteria, assessment rubrics, and practical guidelines to support the development and maintenance of SLO. For example, the report *"Building Engagement and Social Licence: Unpacking Social Licence to Operate and Partnerships"* highlights structured rubrics designed to guide both evaluation and implementation processes. It underscores that building and sustaining SLO requires a comprehensive approach that begins with raising awareness and fostering a shared sense of purpose between stakeholders. Effective communication and engagement strategies are critical, as they accommodate diverse perspectives and facilitate both one-way and two-way dialogue. Furthermore, relationship-building is central to this process, as it promotes collaboration by addressing shared concerns and common objectives.

[32] *Building Engagement and Social Licence: Unpacking Social Licence to Operate and Partnerships – Developing Rubrics for Guidance and Assessment*, by Will Allen et al, Technical Paper No 2019/17 (Wellington: Biosecurity New Zealand, July 2019) at 12–15.

The management of SLO further requires recognition that social expectations differ across contexts, including variations in geographic, cultural, and operational settings. As such, organizations must remain responsive to community concerns, ensuring that stakeholder voices are both heard and meaningfully addressed. In this regard, both procedural and distributional fairness are essential. Procedural fairness ensures that affected groups perceive that they have had a genuine opportunity to participate in decision-making processes, whereas distributional fairness concerns the equitable allocation of benefits and burdens arising from projects. Continuous monitoring and evaluation are also necessary, as organizations must adapt to evolving social expectations in order to sustain their social licence over time.[33]

Assessment frameworks for SLO commonly incorporate structured rubrics, including partnership evaluation tools that apply a three-tier scale—"developing," "good," and "excellent"—supported by evidence-based performance indicators to enhance transparency and clarity in evaluation.[34] However, these criteria are not universally applicable. Rather, they vary considerably across sectors, types of activities, and levels of stakeholder engagement, reflecting the diverse social, economic, and environmental contexts in which different industries operate.

Collectively, these approaches to SLO emphasize the importance of robust stakeholder engagement processes that foster trust through both active participation and the broader positive impacts generated by such engagement, including among those not directly involved.[35] Unlike legal obligations, SLO is primarily grounded in moral responsibility rather than formal legal requirements, particularly as bilateral investment treaties (BITs) and free trade agreements (FTAs) have historically placed limited emphasis on responsible business conduct or corporate social responsibility.

Nevertheless, recent developments indicate a gradual recognition of regulatory authority for host states, although some jurisdictions continue to adhere to earlier generations of BITs.[36] Within this framework, investor-state dispute settlement (ISDS) mechanisms—commonly embedded in BITs and FTAs—provide investor-centric avenues for dispute resolution, aimed at reducing

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[33] *Ibid* at 12–14.
[34] *Ibid* at 15.
[35] *Ibid* at 19.
[36] See, Dawood, *supra* note 15.

perceived bias and addressing risks associated with political and regulatory uncertainty. ISDS claims frequently involve allegations of indirect expropriation,[37] where state measures intended to protect public interests—such as human rights, social welfare, and environmental protection—may adversely affect foreign investments. A key limitation of ISDS is that it typically grants standing exclusively to investors, thereby excluding affected third parties, including local communities, despite their direct exposure to project impacts. In this context, SLO becomes particularly significant as a mechanism to mitigate the adverse consequences of foreign investment projects, especially for vulnerable groups such as Indigenous peoples. For instance, Fyock critiques the limitations of ISDS reform, arguing that prevailing legal mechanisms inadequately address broader societal concerns, including those of local communities. The analysis suggests that current reforms tend to focus on technical and procedural improvements rather than addressing underlying structural issues.[38] This underscores the need for more comprehensive reforms that extend beyond mainstream approaches.[39]

Ultimately, ISDS mechanisms often fail to address deeper issues such as inclusivity, fairness, and legitimacy—areas where SLO frameworks offer more participatory and responsive alternatives, particularly in relation to Indigenous rights. Accordingly, SLO can be understood as a core component of corporate social responsibility (CSR), which should not be confined to the operational phase of projects but should extend to pre-operational stages as well. The SLO framework is commonly conceptualized as being grounded in three key pillars, as illustrated in Figure 1, based on the model developed by Robert G. Boutilier and Ian Thomson.[40]

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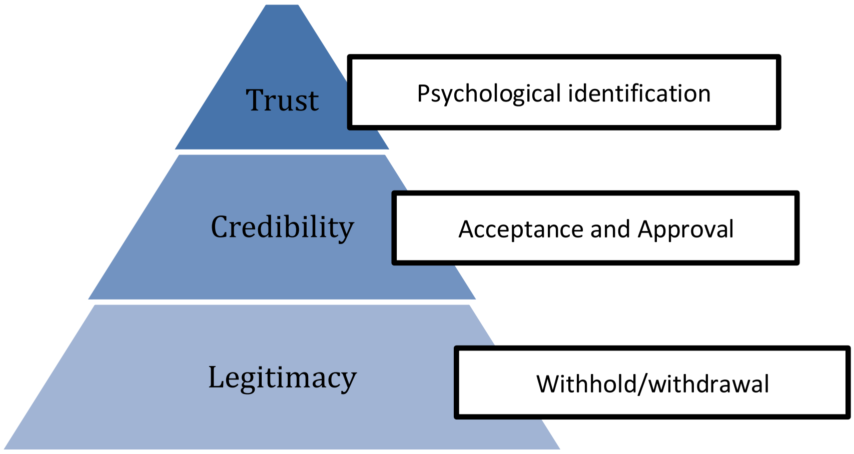
[37] UNCTAD, *supra* note 1.

[38] Claiton Fyock, "Getting 'real' about ISDS reform: a critical realist view of international investment law's status quo" (2025) 16:2 Journal of International Dispute Settlement 1–22 at 15.

[39] *Ibid.*

[40] Developed based on existing literature - According to Boutilier and Thomson, SLO operates at four levels - withholding or withdrawal, acceptance, approval, and psychological identification, see, *Modelling and Measuring the Social License to Operate: Fruits of a Dialogue Between Theory and Practice*, by Robert G Boutilier & Ian Thomson (Socialicense.com, 2011) at 2–3.

Figure I: Based on the Social Licence to Operate model developed by Boutilier and Thomson (2011), illustrating the levels of community acceptance[41]



Local communities hold legitimate expectations that projects or companies operating within their regions will generate tangible benefits that contribute to overall community well-being. The concept of legitimacy encompasses both economic and socio-political dimensions.[42] According to Boutilier and Thomson, a lack of legitimacy significantly reduces the likelihood of obtaining community approval.[43] The development of credibility depends on transparency and accountability, which operate at different levels, including acceptance and approval. This process requires active engagement between key stakeholders—particularly companies and local communities—in sharing information regarding project activities, decision-making processes, and anticipated impacts. As credibility strengthens, projects may progress from basic acceptance toward broader approval.

Trust represents the final and most critical relational component, developed over time through consistent and respectful engagement. It is reinforced by responsiveness to community concerns and a demonstrated commitment to ethical principles and responsible business conduct. Collectively, legitimacy, credibility, and trust constitute the core elements of SLO, forming a relational foundation of mutual confidence between companies and stakeholders. Table I summarizes these relationships, highlighting the connection between SLO

[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*

levels identified by Boutilier and Thomson and the corresponding key factors.[44]

Table 1: The Connection between SLO Levels and Key Factors

SLO Level	Key Factor(s)	Action Needed
Withholding/Withdrawal	Legitimacy	Align the project with social, ethical, and legal norms.
Acceptance	Legitimacy + Credibility	Demonstrate consistency and communicate transparently.
Approval	Credibility + Trust	Build trust through care, reliability, and commitment.
Psychological Identification	Legitimacy + Credibility + Trust	Promote shared values and mutual goals.

The concept of a social licence to operate (SLO) is increasingly central to contemporary discussions on sustainable development, corporate governance, and ethical investment practices. In this context, investors are encouraged to integrate environmental, social, and governance (ESG) considerations into their investment strategies by adopting the SLO framework, which promotes inclusive public participation in decision-making processes. Such participation involves a wide range of stakeholders, including local communities, Indigenous peoples, and other vulnerable groups.[45]

The SLO approach serves as an important mechanism for mitigating risks, particularly in projects that have direct environmental and social impacts on local and Indigenous communities. The *Bear Creek* arbitration case[46] illustrates the significance of effective public consultation and engagement

[44] *Ibid.*
[45] Will Kenton, "Understanding Social License to Operate (SLO) and Industry Standards" (31 August 2024), online: *Investopedia* <https://www.investopedia.com/terms/s/social-license-slo.asp>.
[46] *Bear Creek Mining Corporation v Republic of Peru*, International Centre for Settlement of Investment Disputes.

between foreign investors and host states to ensure that investment projects are socially accepted. In this case, the Canadian investor Bear Creek was prevented from proceeding with the Santa Ana mining project in Peru due to a lack of trust from the local population, which ultimately resulted in protests and social unrest. The majority of the tribunal emphasized the responsibility of host states to establish legal frameworks that facilitate effective consultation with affected communities. However, a dissenting arbitrator highlighted that foreign investors also bear responsibility in building trust with local populations, thereby underscoring the importance of corporate accountability and the integration of human rights considerations in investment-related disputes. In this regard, reference was made to ILO Convention No. 169 as reflecting relevant international obligations incorporated within the Free Trade Agreement (FTA).[47]

Article 837 of the Canada–Peru Free Trade Agreement (FTA) provides that disputes brought before a tribunal must be resolved in accordance with the provisions of the Agreement and applicable rules of international law. One such rule is ILO Convention No. 169, an international instrument that protects the rights of Indigenous and tribal communities, including the Aymara people in Peru. As Peru has ratified this Convention, it is legally binding within its jurisdiction and forms part of the broader legal framework that tribunals must consider. Accordingly, the tribunal is empowered to take ILO Convention No. 169 into account when assessing whether the claimant has fulfilled its obligations under the FTA, particularly in relation to respecting the rights, interests, and aspirations of Indigenous communities. This requires evaluating whether the conduct of the foreign investor aligns not only with the provisions of the FTA but also with broader international legal standards.[48] As noted by Philippe Sands QC, "the absence of transparency at the early stage of the Project can only have contributed to an undermining of the conditions necessary to build trust over the longer term[49]".

The case of *Chevron v. Ecuador*[50] further illustrates the limitations of existing legal mechanisms in addressing environmental harm and protecting affected

[47] Stefanie Schacherer, "Bear Creek v. Peru – Investment Treaty News" (18 October 2018), online: <https://www.iisd.org/itn/2018/10/18/bear-creek-v-peru/>.
[48] See, . *Bear Creek Mining Corporation v Republic of Peru,* 2017 at 11, Partial Dissenting Opinion (Philippe Sands QC).
[49] *Ibid* at para 6.
[50] *Chevron Corporation and Texaco Petroleum Corporation v Ecuador (II),* PCA.

communities. Between 1972 and 1993, Texaco, a United States-based oil company, discharged substantial amounts of toxic waste and crude oil into the Ecuadorian Amazon, resulting in severe environmental degradation and significant health impacts on local populations, including increased rates of cancer and birth defects. In response, approximately 30,000 Indigenous peoples and local farmers initiated legal proceedings against the company in 1993. In 2011, an Ecuadorian court found Chevron, as Texaco's parent company, liable for environmental damage and ordered compensation amounting to USD 18.2 billion, later reduced to USD 9.5 billion. However, Chevron subsequently initiated arbitration proceedings in 2009 under the United States–Ecuador Bilateral Investment Treaty, alleging that the domestic judgment was fraudulent. The tribunal ultimately ruled in favor of Chevron, concluding that Ecuador had breached its treaty obligations.[51]

This case demonstrates how ISDS mechanisms may be used to challenge domestic judicial decisions and, in doing so, potentially undermine environmental justice. Despite decades of litigation, affected communities have struggled to obtain effective remedies. The use of ISDS has enabled corporations to bypass national legal systems and democratic processes, thereby limiting the ability of vulnerable groups to hold multinational corporations accountable. Consequently, the *Chevron* case highlights the structural imbalance within ISDS, where corporate interests may be prioritized over human rights and environmental protection.[52] In response, there is an increasing demand for stronger legal frameworks that ensure corporate accountability and promote meaningful community participation. As emphasized in Dawood's work on "curbing corporate impunity," there is growing global support for mandatory due diligence obligations requiring companies to assess and address human rights risks throughout their operations and supply chains.[53] This further underscores the need for legal

[51] *Investigating the impact of corporate courts on the ground – the truth is out there!*, by War on Want (London: War on Want, April 2019) at 1 online: <https://waronwant.org/sites/default/files/ISDSFiles_Chevron_April2019.pdf>.

[52] *Ibid.*

[53] S Dawood, *A Trend Towards "Due Diligence Law": Curbing the Corporate Impunity* (Faculty of Humanities and Sciences,SLIIT, 2021) at 387 publisher: Faculty of Humanities and Sciences,SLIIT.

frameworks with extraterritorial reach to effectively regulate subsidiaries of multinational corporations headquartered in developed states.[54]

In *Glamis Gold Limited v. United States*[55], a Canadian mining company alleged that the United States had breached investor protection provisions under the North American Free Trade Agreement (NAFTA) by imposing stringent regulations on mining activities, including requirements related to site backfilling and the protection of Native American cultural and religious heritage sites. The company had initiated the permitting and approval process for its mining project in the mid-1990s; however, these efforts were subsequently affected by changes in government policies and increasingly complex environmental and cultural impact assessment requirements. In response to the stricter regulatory framework introduced in California, which applied to both existing and proposed mining operations, Glamis Gold initiated arbitration proceedings under NAFTA Chapter Eleven in July 2003. The company argued that the measures violated two principal obligations: first, the requirement to accord foreign investors treatment consistent with international minimum standards, and second, the prohibition against indirect expropriation without compensation. The tribunal, however, rejected both claims and ruled in favor of the United States.[56]

Evidently, ISDS mechanisms do not place significant emphasis on the role of the social licence to operate (SLO). Nevertheless, the absence of a social licence may lead to adverse consequences for both investors and host states, including increased costs and heightened risks. In many cases, despite strong opposition from local communities—particularly in response to environmental harm—tribunals may still render decisions in favor of investors. However, such opposition often plays a critical role at the domestic level, sometimes resulting in the termination of projects and subsequent compensation claims against host states. Accordingly, the SLO framework underscores the importance of securing free, prior, and informed consent (FPIC), particularly from

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[54] *Ibid*; Also see, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, by United Nations Human Rights Council, A/HRC/17/31 (New York and Geneva: United Nations, 2011) at 2–3, 25.

[55] *Glamis Gold Ltd v United States*, 2009 Ad hoc arbitral tribunal (UNCITRAL), dispatched 8 June 2009.

[56] See, Howard Mann, "Glamis v. United States – Investment Treaty News" (18 October 2018), online: <https://www.iisd.org/itn/2018/10/18/glamis-v-united-states/>. In this case, three sets of written arguments were accepted, one by a coalition of non-governmental organizations, one by a business association, and one by the locally-based Quechan Indian Tribe, whose sacred sites and traditions were affected by the proposed mining project.

Indigenous communities, within decision-making processes. This approach not only assists host states in minimizing the risk of compensation claims but also reflects a commitment to safeguarding community rights. Furthermore, the integration of SLO principles strengthens corporate social responsibility (CSR) by promoting more sustainable and ethically grounded business practices, as emphasized in various international instruments.[57]

IV. INDIGENOUS RIGHTS: ENVIRONMENTAL AND PARTICIPATORY DIMENSIONS

International law increasingly recognizes the right to a clean and healthy environment as a significant priority, often articulated through various soft law instruments[58]. These frameworks emphasize the adoption of a human-centered approach in decision-making, integrating both environmental and social dimensions of development. Such an approach necessarily includes all communities, particularly Indigenous peoples. The recognition of environmental rights can be traced back to the 1972 Stockholm Declaration.[59] Similarly, the preamble of the Universal Declaration of Human Rights (UDHR) affirms that all sectors of society share responsibility in promoting and upholding human rights.[60] In response to growing environmental, social, and human rights challenges, scholars such as Postiglione highlight the increasingly close relationship between environmental protection and human rights.[61] This linkage is further reflected in the 2030 Agenda for Sustainable Development, which adopts a people-centered and inclusive framework—

[57] United Nations Human Rights Council, *supra* note 54 at 2–3, 25; United Nations General Assembly, *supra* note 17 at 20; Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (Paris: OECD Publishing, 2008) at 39.

[58] United Nations General Assembly, *Universal Declaration of Human Rights*, United Nations art 25(1), provides that the right to a standard of living adequate for health and well-being; similarly; United Nations, *International Covenant on Economic, Social and Cultural Rights*, 1966 art 12, provides that the right to the highest attainable standard of physical and mental health, including environmental aspects; *Paris Agreement*, by United Nations (Paris: United Nations, 2016), recognizes the right to health and the importance of addressing climate change for the well-being of future generations.

[59] Thomas Ng, "Environmental rights: progressive development or obfuscation of international human rights law?" (2011) 7:3 Original Law Review 72–103 at 77.

[60] *Universal Declaration of Human Rights*, by United Nations General Assembly, in *Resolutions adopted by the General Assembly during its 3rd session, Volume I*, A/RES/217 (III) [A] (Paris: United Nations, 10 December 1948) GA Res 217 A (III), UN GAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948), Preamble.

[61] Amedeo Postiglione, "Human rights and the environment" (2010) 14:4 The International Journal of Human Rights 524–541 at 541.

captured in the phrase "We the people"—to ensure that marginalized and vulnerable groups are not excluded.[62]

One of its specific targets, SDG 3.9, seeks to significantly reduce deaths and illnesses caused by hazardous chemicals and environmental pollution. The protection of the environment is therefore fundamental to the realization of a wide range of human rights. Rights enshrined in the UDHR—including the rights to life, health, work, social security, adequate living standards, food, property, dignity, and liberty—are intrinsically linked to environmental conditions. This vision aligns closely with Principle 1 of the Stockholm Declaration, which affirms that all individuals are entitled to conditions of life that ensure dignity and well-being within a healthy environment.[63]

The right to a healthy environment is increasingly recognized as a fundamental human right within international law. For instance, the United Nations General Assembly Resolution (2022) formally acknowledged the right to a clean, healthy, and sustainable environment as a universal human right.[64] Similarly, the Human Rights Council Resolution (2021) affirmed this right within the broader framework of international human rights law.[65] However, the recognition and protection of Indigenous peoples' rights within domestic legal systems—such as constitutional provisions and other relevant statutory frameworks[66]—often depend on factors including demographic representation, as well as broader social and political recognition of their status and significance.[67]

Judicial decisions also carry significant normative and symbolic weight in shaping the development of environmental and human rights standards. The

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[62] *Transforming Our World: The 2030 Agenda for Sustainable Development*, by United Nations General Assembly, A/RES/70/1 (New York: United Nations, 2015) at para 25; also see, Razik, *supra* note 5.

[63] *Declaration of the United Nations Conference on the Human Environment*, by United Nations (Stockholm: United Nations, 1972), Principle 1.

[64] Resolution also recognise - Recognizing that, while the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by women and girls and those segments of the population that are already in vulnerable situations, including Indigenous peoples, children, older persons and persons with disabilities. See, *The Human Right to a Clean, Healthy and Sustainable Environment*, by United Nations General Assembly, A/RES/76/300 (United Nations, 2022) at para 10.

[65] *The Human Right to a Clean, Healthy and Sustainable Environment*, by United Nations Human Rights Council, A/HRC/RES/48/13 (United Nations, 2021) at para 8.

[66] *United Nations Declaration on the Rights of Indigenous Peoples Act*, 2021, Canada; *The Sámi Act*, 1987, Norway; *Indigenous Peoples' Rights Act of 1997*, 1997, Philippines.

[67] See generally, Benjamen Franklen Gussen, "A comparative analysis of constitutional recognition of Aboriginal peoples" (2017) 40:3 Melbourne University Law Review 867–904 at 871–873.

Gabcikovo-Nagymaros Project Case,[68] for example, highlights the historical extent of human interference with nature, particularly in pursuit of economic development, often without adequate consideration of environmental consequences. The case underscores how increased scientific awareness and concern for future generations have led to the emergence of new legal norms over time. These evolving standards emphasize the need to integrate environmental protection into both existing and future development activities, reflecting the principle of sustainable development.[69] Similarly, Justice Amerasinghe's judgment in the *Eppawala Phosphate Mining Case* in Sri Lanka has received international recognition for its emphasis on the role of soft law in advancing sustainable development. The ruling reiterates that human beings are central to sustainable development and are entitled to a healthy life in harmony with nature, as reflected in Principles 1 and 4 of the Rio Declaration.[70]

Furthermore, Justice Amerasinghe stresses the importance of prioritizing environmental protection over purely economic considerations. Drawing on the work of David Korten, he critiques the capitalist model for prioritizing monetary gain over the preservation of life-supporting resources. Korten argues that true wealth lies not in financial metrics but in essential resources such as food, fertile land, and infrastructure necessary for human survival.[71]

In this context, key international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention No. 169[72] play a central role in recognizing and protecting the rights of Indigenous communities. UNDRIP, in particular, affirms the right of Indigenous peoples to conserve and protect their environment and the productive capacity of their lands, territories, and resources, as stated in Article 29(1). Additionally, Article 32(1) recognizes their right to determine priorities and strategies for the use and development of their lands and territories.[73]

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[68] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 1997 International Court of Justice.
[69] *Ibid* at 140.
[70] *Banda Bulankulama and Others v Secretary, Ministry of Industrial Development and Others*, *supra* note 13.
[71] *Ibid.*
[72] *Indigenous and Tribal Peoples Convention, 1989 (No 169)*, 1650 UNTS 383 1989 arts 1–12 Adopted: 27 June 1989 Entered into force: 5 September 1991.
[73] Gilbert, *supra* note 8.

Indigenous peoples are also entitled to participate in decision-making processes affecting their rights, through their own representative institutions.[74] Similarly, ILO Convention No. 169[75]75 reinforces the protection of Indigenous land and resource rights. Article 7 requires states to ensure Indigenous participation in policies affecting their territories, while Article 15 safeguards their rights to natural resources.[76] Together, these instruments promote principles of recognition, participation, consultation, and non-discrimination. They collectively emphasize the importance of environmental rights as a core component of Indigenous rights. While balancing these rights with development objectives remains complex, the SLO approach offers a potential framework for achieving such balance. Despite challenges in implementation, these instruments acknowledge the integral relationship between Indigenous socio-economic and cultural rights and their connection to traditional lands. Nevertheless, key issues—particularly the right to development in alignment with Indigenous worldviews—remain contested in international discourse.[77]

V. FPIC: RIGHT TO CONSULTATION AND DUTY TO CONSULT

Various international conventions and agreements emphasize the importance of recognizing and preserving Indigenous knowledge systems, as well as ensuring their meaningful participation in environmental governance. For instance, the Convention on Biological Diversity (CBD, 1992) contains provisions that highlight the need to respect and protect Indigenous knowledge, innovations, and practices relevant to the conservation and sustainable use of biodiversity.[78] Similarly, Article 5 of the Paris Agreement (2015) acknowledges the significance of Indigenous knowledge and practices in addressing climate change and promotes their integration into climate-related actions. In addition, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean guarantees Indigenous peoples' rights to

[74] *Ibid* at 18.
[75] *Indigenous and Tribal Peoples Convention, 1989 (No 169)*, *supra* note 72.
[76] *Ibid.*
[77] Jessie Hohmann, "Introduction" (2019) 23:1–2 The International Journal of Human Rights 1–6 at 1–6.
[78] *Convention on Biological Diversity*, by United Nations, 1760 UNTS 79 (United Nations, 5 June 1992) arts 8, 17 Entered into force 29 December 1993.

access environmental information, participate in environmental decision-making, and seek justice in environmental matters.[79]

Meaningful participation in environmental decision-making processes is essential for upholding the right to consultation and fulfilling the corresponding duty to consult. As illustrated in Figure I and Table I, such engagement must go beyond formal endorsement and reflect genuine involvement of affected communities. The right to consultation entails the ability to grant or withhold consent, whereas the duty to consult imposes an obligation on states and relevant actors to actively seek such consent. These principles play a critical role in shaping decision-making frameworks. This approach is consistent with the principles articulated by the UN Expert Mechanism on the Rights of Indigenous Peoples, which underscores the importance of obtaining free, prior, and informed consent (FPIC) prior to project approval.[80] FPIC represents a fundamental safeguard for Indigenous peoples, ensuring both participation and self-determination. Under this framework, states are required to obtain consent in a manner that enables Indigenous communities to make autonomous decisions regarding matters affecting them, rather than merely being included in the process.[81]

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) reinforces the principle of FPIC through several of its provisions.[82] Articles 10 and 19, for example, affirm that Indigenous peoples are entitled to free, prior, and informed consent prior to any relocation, ensuring that their rights are respected and protected. States are required to consult and cooperate in good faith with Indigenous communities, including providing fair compensation and, where appropriate, options for return.[83] Furthermore, Article 32 recognizes the right of Indigenous peoples to determine priorities and strategies for the development and use of their lands and resources. It obliges states to conduct genuine consultations through representative

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[79] *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, by United Nations Economic Commission for Latin America and the Caribbean (United Nations, 2018) Adopted 4 March 2018; entered into force 22 April 2021.

[80] See, *Handbook on Free, Prior and Informed Consent for Practical Use by Indigenous Peoples' Communities*, by International Alliance of Indigenous and Tribal Peoples of the Tropical Forests & Indigenous Peoples' Foundation for Education and Environment (30 July 2018) at 4–7.

[81] . *Report of the Expert Mechanism on the Rights of Indigenous Peoples: Final Study on Indigenous Peoples and the Right to Participate in Decision-Making*, A/HRC/18/42 (United Nations, 2011) at 22.

[82] *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 27 arts 10, 11, 19, 28, 29, 32.

[83] *Ibid* arts 10, 19.

institutions in order to secure FPIC before approving projects that may affect Indigenous territories, particularly those involving natural resource exploitation. In addition, states must establish appropriate mechanisms for redress and take measures to mitigate adverse environmental, economic, social, cultural, and spiritual impacts.[84]

Guidance provided by the UN Expert Mechanism on the Rights of Indigenous Peoples further clarifies the elements of FPIC. It defines "free" as the absence of coercion or manipulation; "prior" as consent obtained before the commencement of activities, allowing sufficient time for internal deliberation; "informed" as requiring full and transparent disclosure of relevant information; and "consent" as the expression of agreement, which may include specific conditions.[85]

The report *State of the World's Indigenous Peoples* highlights the ways in which neoliberal policies have been imposed on Indigenous communities, often disregarding their autonomy, traditional rights, and self-determination. It demonstrates that multinational corporations have frequently exploited natural resources within Indigenous territories without obtaining free, prior, and informed consent or providing adequate compensation to affected communities.[86] These developments are closely linked to broader structural adjustment frameworks, which prioritize market liberalization and economic growth over social justice and Indigenous sovereignty.[87] In this context, neoliberalism is not merely an economic system but a dominant force that reshapes Indigenous governance structures, livelihoods, and relationships with land. By transforming traditional territories into market commodities and weakening collective rights, such approaches perpetuate colonial patterns under the guise of development.

V. FINDINGS AND DISCUSSIONS

From the perspective of domestic legal systems in many developing countries, the social licence to operate (SLO) carries significant importance, particularly in contexts where legal procedures are sometimes bypassed in order to expedite project implementation. This is especially evident in processes

[84] *Ibid* art 10,19.
[85] note 81 at 22.
[86] *State of the World's Indigenous Peoples*, by United Nations (New York: United Nations, 2009) at 203–206.
[87] United Nations, *supra* note 86.

related to obtaining licences and approvals.[88] In this regard, SLO functions as a crucial "enabler" that supports the effective realization and implementation of rights and responsibilities within a broader governance framework.

Compliance with corporate social responsibility (CSR) principles, reinforced through the SLO framework, strengthens the commitment of foreign investors to act ethically and contribute positively to society. Moreover, adherence to CSR and SLO supports companies in fulfilling mandatory Environmental, Social, and Governance (ESG) reporting obligations. Such requirements, often embedded in company law and related legislation, demand transparency and accountability in managing environmental impacts, social relations, and governance practices. By integrating CSR and SLO into their operational strategies, companies are better positioned to meet these legal requirements while simultaneously advancing sustainable development objectives. This approach aligns with the human-centered business model promoted by the United Nations Guiding Principles (UNGPs), which are structured around three core pillars: the duty to protect, the responsibility to respect, and access to remedy.[89]

Compliance with environmental regulations—particularly through impact assessment mechanisms such as Environmental Impact Assessments (EIA), Health Impact Assessments (HIA), and Social Impact Assessments (SIA)[90]—is essential for evaluating both the positive and negative implications of development projects. These assessments also play an important role in raising awareness and educating local communities through scientifically grounded approaches.

In this context, SLO reinforces the importance of adhering not only to environmental laws but also to broader administrative and bureaucratic procedures. By emphasizing compliance with local regulatory frameworks, SLO helps reduce the likelihood of both host governments and foreign investors circumventing legal requirements. Furthermore, it ensures that the rights of all communities are respected by positioning local populations as

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[88] For instance, In the Eppawala Phosphate Mining case, the Cort held that; the proposed agreement does not provide for an environmental impact as required by the National Environmental Act but provides for a feasibility and environmental study by an international consultant following exploration for phosphate deposits. ... Legal rights of the people are mere paper rights: the proposed agreement is biased in favour of the Company and in the event of disagreement

[89] United Nations Human Rights Council, *supra* note 54.

[90] Environmental Impact Assessment, Human Rights Impact Assessment, Sustainability Impact Assessment.

active participants in decision-making processes. This approach also facilitates the practical implementation of international standards, particularly those requiring consultation with local and Indigenous communities.

Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) generally contain substantive provisions aimed at protecting foreign investments. However, they often fail to adequately incorporate the interests of host states, including the right to regulate, promote responsible business conduct, and pursue sustainable development objectives. Although some modern treaties have begun to address these gaps, many still reflect the traditional frameworks of earlier generations of BITs. There is considerable potential for these agreements to integrate provisions relating to corporate social responsibility, responsible business conduct, and similar principles. Such developments would contribute significantly to strengthening the protection of Indigenous peoples' rights within international investment law.[91]

The ISDS mechanism primarily provides foreign investors with the ability to initiate claims before neutral forums, such as the International Centre for Settlement of Investment Disputes (ICSID). Nevertheless, tribunals may allow limited participation from non-disputing parties (amicus curiae), subject to specific considerations. For example, ICSID tribunals may accept submissions that offer relevant factual or legal perspectives, particularly where the non-disputing party demonstrates a significant interest in the proceedings and can contribute meaningfully to the tribunal's assessment.[92] -Such submissions are typically permitted only after consultation with the disputing parties and must not disrupt the proceedings, while ensuring that both parties retain the opportunity to respond 93.[93] Similarly, tribunals operating under UNCITRAL Arbitration Rules possess comparable authority. Under Rule 15, arbitral tribunals are empowered to conduct proceedings comprehensively, including organizing hearings for the presentation of evidence, witness testimony, expert opinions, and oral arguments when requested by either party.[94]

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[91] See generally, Razik, *supra* note 5.

[92] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 575 UNTS 159 1965; *Rules of Procedure for Arbitration Proceedings*, 2022 r 67; *ICSID Additional Facility Rules*, 2022 art 41.

[93] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, *supra* note 92; *Rules of Procedure for Arbitration Proceedings*, *supra* note 92 r 67; *ICSID Additional Facility Rules*, *supra* note 92 art 41.

[94] *UNCITRAL Arbitration Rules*, 2010 rr 17–29.

V. CONCLUSION

The concept of the social licence to operate (SLO) underscores both the ethical imperatives and practical necessities for foreign investors and host states to prioritize the rights and well-being of Indigenous communities, primarily through adherence to the principle of free, prior, and informed consent (FPIC). By integrating SLO principles, stakeholders can promote sustainable development and enhance the long-term viability of investment projects, while also addressing structural power imbalances between foreign investors and Indigenous peoples. In doing so, the SLO framework contributes to the mitigation of ISDS-related risks. -This approach is closely aligned with international standards on corporate social responsibility (CSR), which, although often framed as voluntary, may also carry mandatory elements within certain jurisdictions. CSR obligations are frequently embedded in domestic legal frameworks, such as company law, requiring businesses to operate in a socially and environmentally responsible manner. Moreover, recent developments in bilateral investment treaties (BITs) and regional investment instruments have begun to incorporate elements of responsible business conduct, even where explicit references to Indigenous rights or consultation mechanisms remain limited. Nonetheless, their broader relevance in strengthening these protections remains significant.

Accordingly, it is essential for domestic legal frameworks governing foreign investment, as well as BITs and investment agreements, to incorporate clear provisions that safeguard the regulatory authority of host states and ensure that investment activities align with national development priorities. Embedding such safeguards would enable governments to effectively regulate foreign investment while protecting public interests and vulnerable communities, including Indigenous peoples. -When all parties acknowledge and adhere to these responsibilities, the likelihood of ISDS disputes can be reduced, while simultaneously fostering more equitable and sustainable development outcomes for the countries involved.

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