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When Yes means Yes: Free, Prior & Informed Consent in "One Belt One Road" Projects in the context of Transnational Investment Law and Arbitration

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Abstract

Opposition from local stakeholders to greenfield foreign investment projects and the resulting conflicts have caused major concern for host States, foreign investors and financiers in recent years. With the One Belt, One Road ('OBOR')'s routes crossing over politically fragile countries, the potential impact of OBOR investment projects on the rights of the local communities, including indigenous population, and the adverse reaction this might generate towards these projects could have serious financial, social and geo-political implications. This contribution first highlights the importance of local participation in decision-making on foreign investment projects in the context of transnational investment law and arbitration ('TILA'). It then studies the different sources of international law to scope the right of indigenous peoples to free, prior and informed consent ('FPIC') in the context of OBOR projects. It then analyses the obligations on the host States and investors in relation to such a right to FPIC, particularly by drawing on recent jurisprudence in TILA

1. Introduction

This article provides a preview of the legal issues concerning the principle of free, prior and informed consent ('FPIC') in the One Belt, One Road ('OBOR') initiative in the context of transnational investment law and arbitration ('TILA') and is divided into four substantive sections. Section I sets the stage for the articulation and operationalisation of the right to FPIC and the related right to consultation by highlighting the importance of local participation. Section II surveys different sources of international law to scope the right to FPIC. Section III analyses the corresponding obligations of the States hosting OBOR projects. Section IV analyses the corresponding obligations of investors investing in OBOR projects.

2. Interface of Transnational Investment Law and Arbitration with Local Participation in Foreign Investment Projects: FPIC as a Potential Game Changer

Up until now, the issue of fair and equitable decision-making with distributive implications between communities within countries hosting foreign investments, including the decision on whether a target resource should be exploited at all, does not feature prominently in the practice of TILA. The issue is, however, crucial for local communities affected by the foreign investment hosted by their State ('host State'). Opposition from local stakeholders to greenfield foreign investment projects and the resulting conflicts have caused major concern for host

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States, foreign investors and financiers in recent years.[1] With OBOR's routes crossing over politically fragile countries, the potential impact of OBOR investment projects on the rights of the local communities, including indigenous population, and the adverse reaction this might generate towards these projects could have serious financial, social and geo-political implications.

The bulk of the existing research and jurisprudence in TILA emphasize the review of state-investor relations in the post-establishment phase[2] to balance host states' right to regulate foreign investment and foreign investors' property rights, thereby potentially neglecting the societal costs of an investment and the situation of local communities in the events leading to the establishment of an investment. The asymmetrical structure of investment treaties in allowing investors (but not host States) to initiate claims for violation has traditionally led to the one-sided right for investors to seek quasi-judicial review of national regulatory action. A state that is being sued under investment treaties may respond by claiming that the investor also breached its obligation, through a counterclaim, which is possible under most investment agreements and arbitration rules but only if the state's counterclaim is clearly connected with the main dispute. This has resulted in the traditionally narrow vision of the jurisdiction of arbitration tribunals ('AT')[3] that excludes considerations not directly related to the 'investment', such as human rights issues.[4]

The traditional view in TILA is that the ATs derive their competence to arbitrate over a dispute solely from the will of the parties based on the arbitration clause in the relevant investment agreement, and their jurisdiction is 'consequently both based on and limited to that agreement'.[5] In most 'old-generation' treaties, while the arbitration clauses are drafted in a variety of ways, their delimitation of the AT's jurisdiction over disputes is quite similar, e.g. '[a]ny dispute arising from an investment',[6] '[a]ny dispute under this Agreement',[7]

[1] See e.g. the *Aguas del Tunari v Republic of Bolivia*, ICSID Case No ARB/02/3 and Indonesian Constitutional Court, decision of 20 February 2015 repealing Act No. 7/2004 on water resources. See also the decision of the Central Jakarta District Court of March 24, 2015 which terminates the contract of privatisation of the water with the concessionaire.

[2] Each Party allows investors of other Party(ies) to establish an investment in their territory. 'Post-establishment' phase refers to the phase after the entry and admission of investments and investors of a Party (member country of an investment agreement) into the territory of another Party.

[3] Most investment treaties assign to tribunals the authority to arbitrate disputes directly arising out of an investment only. See art 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') and David A.R. Williams and Simon Foote, 'Recent developments in the approach to identifying an 'investment' pursuant to Article 25 (1) of the ICSID Convention' in Chester. Brown and Kate Miles, (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 42, 43.

[4] E.g. the Model BITs of China (2003), France (2006), Germany (2005), the United Kingdom (2005) and the United States (2004) do not refer to human rights. Mention of human rights is equally absent from the ICSID Convention, the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT). The most important print source for decisions on TILA, the ICSID Reports, does not include the term 'human rights' in its index. Clare Reiner and Christoph Schreuer, ′Human Rights and International Investment Arbitration′ in Pierre-Marie Dupuy, Ernst-Ulrich (eds.), *Human Rights in International Investment Law* (Oxford University Press, Oxford 2009) 82, at 83.

[5] 'Hence, the mere allegation of a human rights violation would not suffice to confer jurisdiction on a tribunal. To determine whether an investment tribunal is competent to decide on human rights issues, the clause establishing jurisdiction is decisive.' Reine and Schreuer, (n 4), 83. See also e.g. arts 26 (1) and (2) of the ECT delimit ECT's applicability only to breaches of Part III, i.e. to breaches of ECT obligations; art 1116 of NAFTA delimits NAFTA's applicability to only breaches of Section A, i.e. to breaches of NAFTA obligations.

[6] Belgium-China BIT (1984), art10.

[7] Austria-India BIT (1999), art 9.

'[d]isputes … concerning the interpretation or application of this Agreement',[8] 'disputes in connection with the Treaty' etc.[9] Regarding human rights issues, including the potential right for certain local communities to participate in making decision about hosting foreign investment, some commentators on TILA acknowledged that '[i]t is not impossible for treaties for the protection of investments, such as bilateral investment treaties (BITs), to provide for human rights, but this would be highly unusual', and 'the present role of human rights in the context of investment arbitration is peripheral at best'.[10]

The ATs' jurisdictional restrictions to disputes originating from the breach of a treaty obligation coupled with the fact that the relevant treaty usually contains no substantive human rights provisions means that ATs generally lack the competence to arbitrate on human rights issues.[11] As a result, measures taken by the host states to address human rights-related issues are unlikely to be considered by an AT even though they raise legal questions regarding the relationship between foreign investors' property and economic rights, and host States' right to enact measures to protect human rights and similar societal matters. However, the welfare of local communities is inextricably linked to foreign investment projects in such sectors as mining, infrastructure, provision of basic services and the like. The traditional practice in TILA that excludes the consideration of their human rights, including the right of local communities to participate in making decisions to host foreign investments led to the *de jure* situation that 'it is the locality that needs to adapt to the rationality of the business project and not otherwise'.[12] Yet, the traditional absence of consideration in TILA of the human rights of local populations, including their right to participate in making decisions to host foreign investment, has a history of generating local opposition to, or even violent conflicts with, foreign investors and the host State, leading to a *de facto* 'lose-lose' situation for the local communities, the foreign investors and the host State.

On 3 March 2016, Berta Cáceres, co-founder of the Council of Indigenous Peoples of Honduras that campaigned against the Agua Zarca Dam along the Gualcarque River, which is sacred to the Lenca people in Honduras, was brutally murdered at her home.[13] Less noted was the fact that Sinohydro, the Chinese hydro power construction firm that had been engaged to build the dam had already withdrawn from the project earlier due to the protest by the Lenca people.[14] The project nevertheless went ahead because a local construction firm was engaged and European and Central American financiers provided financing, which was not withdrawn until after Berta Cáceres's murder.[15] This incident directly contradicts the popular belief that Chinese investors are less concerned about the social impact of their investments than their Western counterparts. It also illustrates that the systematic neglect of indigenous peoples' objection not only could derail projects but also create motives to silence these indigenous peoples, thereby putting their lives at risk, particularly in politically fragile countries where

[8] Germany-Russia BIT (1989), art 9.
[9] US-Latvia BIT (1995), art V.
[10] Reine and Schreuer (n 4), 1.
[11] ibid 83.
[12] Nicolás Perrone, 'The international investment regime and local populations: are the weakest voices unheard?' (2016) 7(3) *Transnational Legal Theory* 7(3) 383, 388-89.
[13] 'Berta Cáceres, Indigenous Activist, Is Killed in Honduras', New York Times, 3 March 2016, <https://www.nytimes.com/2016/03/04/world/americas/berta-caceres-indigenous-activist-is-killed-in-honduras.html?mcubz=1> accessed 21 August 2017
[14] ibid.
[15] 'Backers of Honduran dam opposed by murdered activist withdraw funding', 4 June 2017, The Guardian, <https://www.theguardian.com/world/2017/jun/04/honduras-dam-activist-berta-caceres> accessed 21 August 2017

local institutions of law and order are weak. With massive investments expected from Chinese firms and financiers in infrastructure projects that could have deep impact on local populations, and especially indigenous peoples in OBOR countries, it is timely and important to clarify the scope of the right to FPIC in the context of OBOR and its corresponding obligations for both host States and foreign investors, which will be undertaken in the rest of this article.

3. Scoping the Legal Right to FPIC

As the precise content of a legal right to FPIC is highly controversial, this section surveys different international and regional instruments and standards that either explicitly provide for or have been interpreted to provide for the requirement of indigenous communities' consent in order to define the scope of a legal right to FPIC.

3.1. Treaties

3.1.1. ILO C169

The ILO Indigenous and Tribal Peoples Convention, 1989 No. 169 ('ILO C169')[16] provides generally for tribal and indigenous peoples' 'right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development'.[17] It obliges State parties to 'consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly', which consultation 'shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures'.[18] It also specifically prohibits the removal of these peoples from the lands they occupy unless it is 'considered necessary as an exceptional measure' and 'only with their free and informed consent'.[19] If such consent 'cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.'[20]

The impact of ILO C169 on OBOR projects is currently limited for only one out of the 68 OBOR countries[21] has ratified it (Nepal).

3.1.2. Human rights treaties

More relevant to OBOR countries are the obligations stemming from human rights conventions to which many of the OBOR countries are parties. Although these human rights conventions may not explicitly provide for specific rights of indigenous peoples as a group, human rights treaty bodies have interpreted certain rights as entailing an obligation on States to seek, or

[16] Convention concerning Indigenous and Tribal Peoples in Independent Countries (adopted in Geneva during 76th ILC session held 27 Jun 1989, entered into force 5 September 1991) C169 (ILO C169).
[17] ibid, art 7.
[18] ibid, art 6.
[19] ibid, art 16(1) and (2).
[20] ibid, *see also* art 16(3) to (5) for the conditions to the right of return.
[21] 'Profiles' (*Belt and Road Portal*) <https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10076> accessed 2 August 2017.

consult with a view to obtaining, the FPIC of local communities affected by projects including indigenous peoples.

For instance, the Committee on Economic, Social and Cultural Rights (CESCR) has interpreted the guarantee of non-discrimination under art 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as encompassing indigenous peoples' rights to their ancestral lands and resources. It has recommended Russia to '[s]eek the free informed consent of indigenous communities and give primary consideration to their special needs prior to granting licences to private companies for economic activities on territories traditionally occupied or used by' them.[22] CESCR has additionally invoked the right to the means of subsistence under art 1(2) of ICESCR and the right to an adequate standard of living under art 11 of ICESCR in calling on Indonesia to 'guarantee legal assistance to communities during consultations on extractive projects affecting them and their resources with a view to ensuring their free, prior and informed consent'.[23]

The Committee on the Elimination of Racial Discrimination (CERD) has interpreted the prohibition on racial discrimination in the enjoyment of property and other economic, social and cultural rights under art 5(d)(v) and 5(e) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) as encompassing tribal communities' land ownership rights. It has urged India to 'seek the prior informed consent of communities affected by … projects on their traditional lands in any decision-making processes related to such projects'.[24] It has also invoked the prohibition on racial discrimination under art 2 and 5 of ICERD to conclude that Indonesia should, in the context of the Kalimantan Border Oil Palm Mega-project that threatened 'the rights of indigenous peoples to own their lands and enjoy their culture', 'ensure that meaningful consultations are undertaken with the concerned communities, with a view to obtaining their consent and participation in it'.[25]

On some occasions, these human rights treaty bodies have gone one step further to invoke these human right treaties to call on State parties not only to seek or to consult with a view to obtaining, but to *actually obtain*, FPIC from indigenous peoples. CESCR has invoked the right to the means of subsistence under art 1(2) of ICESCR to urge Sri Lanka 'to establish a state authority for the representation of Veddahs [an indigenous people whose traditional land was converted into a national park] which should be consulted and should give consent prior to the implementation of any project or public policy affecting their lives'.[26] CERD has in its General Recommendation no. 23 called upon States to '[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent'.[27] More specifically, it has invoked the prohibition on racial discrimination under art 2 and 5 of ICERD

[22] Committee on Economic, Social and Cultural Rights, 'Concluding observations of the Committee on Economic, Social and Cultural Rights for the Russian Federation' (1 June 2011) UN Doc E/C.12/RUS/CO/5, para 7.
[23] Committee on Economic, Social and Cultural Rights, 'Concluding observations on the initial report of Indonesia' (19 June 2014), UN Doc E/C.12/IDN/CO/1, para 28.
[24] Committee on the Elimination of Racial Discrimination, 'Concluding observations of the Committee on the Elimination of Racial Discrimination for India' (5 May 2007) UN Doc CERD/C/IND/CO/19, para 19.
[25] Committee on the Elimination of Racial Discrimination, 'Concluding observations of the Committee on the Elimination of Racial Discrimination' (15 August 2007) UN Doc CERD/C/IDN/CO/3, para 17.
[26] Committee on Economic, Social and Cultural Rights, 'Concluding observations of the Committee on Economic, Social and Cultural Rights for Sri Lanka' (9 December 2010) UN Doc E/C.12/LKA/CO/2-4, para 11.
[27] Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples in 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2003) UN Doc HRI\GEN\1\Rev.6 at 212, para 4(d).

to recommend Cambodia to 'develop appropriate protective measures, such as a delay in the issuance of a concession on lands inhabited by indigenous communities … until … after consultation with and the informed consent of the indigenous peoples'.[28] Similarly, it has invoked the same provisions of ICERD to recommend Israel to enhance its efforts to consult with the inhabitants of unrecognised Bedouin villages in the Negev/Naqab about their relocation to planned towns and to note that Israel 'should in any case obtain the free and informed consent of affected communities prior to such relocation'.[29]

3.2. Soft law

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the United Nations General Assembly (UNGA) on 13 September 2007,[30] provides generally for states' obligation to 'consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'[31] or approving 'any project affecting their lands or territories and other resources'.[32] This has been interpreted as an obligation of conduct of consultation to obtain FPIC,[33] not an obligation of *result* of actually obtaining FPIC. UNDRIP does impose such obligation of result in cases of (i) the relocation of indigenous peoples from their lands or territories;[34] (ii) the storage or disposal of hazardous materials on their lands or territories.[35] In addition, UNDRIP obliges States to recognise and protect indigenous peoples' right to maintain, control, protect and develop cultural heritage, traditional knowledge, and traditional cultural expressions.[36]

3.3. Financial institutions' requirements

The World Bank Board of Executive Directors approved in August 2016 a new Environmental and Social Framework (ESF).[37] In it, Environmental and Social Standard 7 (ESS7) requires FPIC for 'project design, implementation arrangements and expected outcomes related to risks and impacts on the affected Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities'[38] in four situations. These situations are where projects (i) 'have adverse impacts on land and natural resources subject to traditional ownership or under customary use or occupation'; (ii) 'cause relocation of Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities from land and natural resources subject to traditional ownership or under customary use or occupation'; (iii) 'have significant impacts on Indigenous Peoples/Sub-Saharan African Historically Underserved

[28] Committee on the Elimination of Racial Discrimination, 'Concluding observations of the Committee on the Elimination of Racial Discrimination for Cambodia' (1 April 2010) UN Doc CERD/C/KHM/CO/8-13, para 16.
[29] Committee on the Elimination of Racial Discrimination, 'Concluding observations of the Committee on the Elimination of Racial Discrimination' (14 June 2007) UN Doc CERD/C/ISR/CO/13, para 25.
[30] UNGA Res 61/295 (13 September 2007).
[31] UNDRIP, art 19.
[32] UNDRIP, art 32.
[33] Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 European Journal of International Law 141, 157.
[34] UNDRIP, art 10.
[35] UNDRIP, art 29(2).
[36] UNDRIP, art 31.
[37] World Bank Environmental and Social Framework <http://www.worldbank.org/en/programs/environmental-and-social-policies-for-projects/brief/the-environmental-and-social-framework-esf> accessed 4 August 2017.
[38] ibid ESS 7, para 25(a) at 80.

Traditional Local Communities' cultural heritage that is material to the identity and/or cultural, ceremonial, or spiritual aspects of the affected Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities' lives'; or (iv) propose to 'use the cultural heritage of Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities for commercial purposes'.[39]

Significantly, ESS 7 defines 'consent' as 'the collective support of affected Indigenous Peoples communities/Sub-Saharan African Historically Underserved Traditional Local Communities for the project activities that affect them, reached through a culturally appropriate process' and states that '[i]t may exist even if some individuals or groups object to such project activities'.[40] To satisfy this FPIC requirement, the World Bank requires its borrowers to document '(i) the mutually accepted process to carry out good faith negotiations that has been agreed by the Borrower and Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities; and (ii) the outcome of the good faith negotiations between the Borrower and Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities, including all agreements reached as well as dissenting views.'[41]

It is worth noting that the new ESF replaces[42] the World Bank's Operational Manual for Investment Project Financing 4.10 Indigenous Peoples (OP 4.10), last revised in April 2013, which required its borrowers to 'engage in a process of free, prior, and informed consultation' ('FPICon') 'for all projects that are proposed for Bank financing and affect indigenous peoples'.[43] According to OP 4.10, FPICon entailed 'a culturally appropriate and collective decisionmaking process subsequent to meaningful and good faith consultation and informed participation regarding the preparation and implementation of the project' without involving any 'veto right for individuals or groups'.[44] The World Bank would proceed with the project if, upon review of the social assessment and the record and outcome of the FPICon, it was satisfied that 'the affected Indigenous Peoples' communities have provided their broad support to the project'.[45] However, '[c]ommercial development of the cultural resources and knowledge of these Indigenous Peoples is conditional upon their prior agreement to such development.'[46]

This is significant in the context of OBOR because the terminology of FPICon was adopted in the Environmental and Social Policy (ESP) of Asian Infrastructure Investment Bank (AIIB), established in 2016 and slated to be a major financier to OBOR projects. AIIB's ESP, adopted in February 2016 - a few months before the World Bank's adoption of its new ESF - requires FPICon in case a project's activities have impacts on, or cause relocation of indigenous peoples from, land and natural resources subject to traditional ownership or under customary occupation or use or have significant impacts on their cultural heritage.[47] Such FPICon builds on 'the process of meaningful consultation and requires good faith negotiation' and requires documentation of '(i) the mutually accepted process of consultation between the Client and these Indigenous Peoples; and (ii) evidence of broad community support of these Indigenous

[39] ibid ESS 7, para 24 at 79-80 and para 33 at 82.
[40] ibid ESS 7, para 26 at 80.
[41] ibid ESS 7, para 25(c) at 80.
[42] World Bank Environmental and Social Framework (n 37), xi and fn 1 at 3.
[43] Operational Manual, OP 4.10 - Indigenous Peoples, para 1. <https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b0822f89d5.pdf> accessed 4 August 2017.
[44] ibid fn 4.
[45] ibid para 11.
[46] ibid para 19.
[47] AIIB's ESP, para 60.

Peoples on the outcome of the negotiations'.[48] 'Broad community support' 'does not require unanimity and may be achieved even when individuals or groups within or among these affected Indigenous Peoples explicitly disagree with support for the Project'.[49] In case of commercial development of the indigenous peoples' cultural resources, AIIB's Environmental and Social Standards (ESS) 3 requires the 'nature and content of agreements' to be reflected in the Indigenous Peoples plan.[50] AIIB's FPICon requirement is clearly more aligned with the replaced OP 4.10 than with the World Bank's new ESF, not only in the terminology of FPICon, but also in its scope covering 'impacts on land and natural resources subject to traditional ownership or under customary occupation or use', not just 'adverse impacts' as limited in the World Bank's new ESF.

It remains unclear how the kind of 'consent' required in the World Bank's new ESF based on the affected communities' 'collective support' despite possible objection by 'some individuals or groups' differs from the 'consultation' requirement in OP 4.10 and AIIB's ESP based on the 'broad community support' despite possible objection by 'individuals or groups'. It might be argued that the 'collective support' required in the World Bank's new ESF indicates an actual 'agreement', in whatever form defined by the 'culturally appropriate process' of 'good faith negotiation' while 'broad community support' indicates only a level of support not necessarily involving any actual 'agreement' resulting from 'a culturally appropriate and collective decisionmaking process' required in OP 4.10 or 'meaningful consultation' and 'good faith negotiation' required in AIIB's ESP. This argument finds some contextual support in the respective policy documents. The documentation requirement for 'collective support' in the World Bank's new ESF is formulated as 'including all agreements reached as well as dissenting views' and the implementation of such agreements is explicitly contemplated.[51] In contrast, the documentation requirement for 'broad support' is formulated less certainly as 'any formal agreements reached with Indigenous Peoples' communities and/or the [Indigenous Peoples' Organizations]' in OP 4.10,[52] suggesting their possible non-existence, or generically 'evidence of broad community support of these Indigenous Peoples on the outcome of the negotiations' in AIIB's ESP, [53] which gives no indication of agreement. This argument however does not necessarily indicate a clear break between the FPIC as formulated in the World Bank's new ESF and FPICon as formulated in OP 4.10 and AIIB's ESP because the notion of 'collective support' could be interpreted to merely emphasise the form of the support in the subjective view of the indigenous community (envisaging an agreement) while 'broad support' could be interpreted to emphasise the substance of the support from a more objective viewpoint (without denoting its form). This interpretation bears some similarity to the way Asian Development Bank defines 'the consent of affected Indigenous Peoples communities' as 'a collective expression by the affected Indigenous Peoples communities, through individuals and/or their recognized representatives, of broad community support for such project activities'.[54]

[48] ibid para 61.
[49] ibid.
[50] AIIB's Environmental and Social Standard 3: Indigenous Peoples, at 44.
[51] World Bank Environmental and Social Framework, ESS 7, para 28 at 80.
[52] Operational Manual, OP 4.10 - Indigenous Peoples, para 11(e).
[53] AIIB ESP, para 61.
[52] ADB Policy Paper, Safeguard Policy Statement, June 2009, available on <https://www.adb.org/sites/default/files/institutional-document/32056/safeguard-policy-statement-june2009.pdf> accessed 4 August 2017, at 18. The ascertainment of such consent is required for (i) commercial development of the cultural resources and knowledge of Indigenous Peoples; (ii) physical displacement from traditional or customary lands; and (iii) commercial development of natural resources within customary lands under use that

In sum, the new terminology of FPIC adopted in the World Bank's new ESF appears in its context to be a refinement of the requirement for FPICon in OP 4.10. Namely, it more concretely envisages an actual 'agreement' in a form that may vary according to the relevant 'culturally appropriate process', thereby giving primacy to such culturally appropriate process of the relevant indigenous community to define what amounts to an 'agreement', rather than adopting a purportedly more objective, but practically more vague, criterion of 'broad community support'. While the concept has still been criticised as 'hazy and ill-defined',[55] it seems that one way to dispel the ambiguity is to interpret it to require an actual 'agreement' resulting from a 'culturally appropriate process' and to formulate further concrete guidance to operationalise it accordingly e.g. the requirement and procedures for holding referendum or the means to determine its culturally appropriate alternatives. It seems that the most constructive strategy to resolve the long-standing controversy over the distinction between FPIC and FPICon lies in the concrete details still to be worked out by these financial institutions rather than in the terminology of abstract principles.

The new terminology of FPIC adopted in the World Bank's new ESF more closely aligns with that in the Environmental and Social Performance Standards (ESPS) of the World Bank's private sector arm, the International Finance Corporation (IFC), which contains similar requirement for FPIC[56] in three situations. These situations are where indigenous peoples are relocated from 'communally held lands and natural resources subject to traditional ownership or customary use', [57] the project may 'significantly impact on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples lives'[58] or 'cultural heritage including knowledge, innovations, or practices of Indigenous Peoples' is used 'for commercial purposes'.[59] IFC's requirement for FPIC includes the documentation of '(i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations.'[60] However, IFC's ESPS also explicitly states that 'FPIC does not

would impact the livelihoods or the cultural, ceremonial, or spiritual uses that define the identity and community of Indigenous Peoples.

[55] Forest Peoples Programme, 'World Bank undermines decades of progress on building protections for the rights of indigenous peoples', 4 November 2016 <http://www.forestpeoples.org/pt-br/node/6209> accessed 4 August 2017.

[56] IFC, Performance Standard 7 Indigenous Peoples, January 1, 2012 <www1.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES> accessed 4 August 2017, at para 11.

[57] ibid para 15.

[58] ibid para 16.

[59] ibid para 17. There is an ambiguity as to whether a proposal 'to locate a project on, or commercially develop natural resources on lands traditionally owned by, or under the customary use of, Indigenous Peoples' with expected adverse impacts, as described in para 14 of Performance Standard 7 would also require FPIC. On the one hand, para 11 of Performance Standard 7 states 'the client will obtain the FPIC of the Affected Communities of Indigenous Peoples in the circumstances described in paragraphs 13–17 of this Performance Standard', which could be relied on to argue that the circumstances described in para 14 of Performance Standard 7 require FPIC, and Guidance Note 27 to Performance Standard 7 states that 'projects are required to facilitate a process of FPIC with the Affected Communities of Indigenous Peoples with regard to project design, implementation and expected outcomes if these are associated with any of the potentially adverse impacts identified below … Impacts on lands and natural resources subject to traditional ownership or under customary use'. On the other hand, para 14 of Performance Standard 7 does not itself state the requirement for FPIC and may be read as a complementary provision to para 15-17 of Performance Standard 7.

[60] ibid para 12.

necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.'[61]

IFC's requirement for FPIC has been incorporated by cross-reference into the latest edition of the Equator Principles (EP III),[62] a set of standards voluntarily subscribed to by private sector banks to guide their social and environmental risk in project financing. Notably, this requirement only applies to projects in countries not 'deemed to have robust environmental and social governance, legislation systems and institutional capacity designed to protect their people and the natural environment'[63] i.e. 'Non-designated Countries'.[64] Since the vast majority of the 68 OBOR countries fall under the definition of such 'Non-designated Countries', OBOR projects located in these countries would be subject to such requirement should they be financed by banks subscribing to Equator Principles.

3.4. Mining industry standards

The International Council on Mining and Metals (ICMM)'s Position Statement on Indigenous Peoples and Mining made a commitment[65] of means to '[w]ork to obtain the consent of indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of indigenous peoples and are likely to have significant adverse impacts on indigenous peoples, including where relocation of indigenous peoples and/or significant adverse impacts on critical cultural heritage are likely to occur'.[66] It explicitly qualifies that the committed consent processes 'should neither confer veto rights to individuals or sub-groups nor require unanimous support from potentially impacted indigenous peoples (unless legally mandated)'.[67]

4. Scoping the FPIC Obligations on States Hosting OBOR Projects

Despite the increasing recognition of the indigenous peoples' and other concerned communities' right to FPIC, the precise nature and scope of this right remains unclear from a legal perspective, which in turn introduces considerable uncertainty in the obligations of States hosting OBOR projects. The sources surveyed in the previous section reveal three different possible scopes of a 'legal right to FPIC' entailing different obligations and grounded on different legal bases.

[61] ibid.
[62] Equator Principles (EP III), Principle 5 (Stakeholder engagement) <http://www.equator-principles.com/index.php/equator-principles-3> accessed 5 August 2017.
[63] EP III <http://www.equator-principles.com/index.php/designated-countries> accessed 5 August 2017.
[64] ibid 18.
[65] 'All ICMM member companies implement the ICMM Sustainable Development Framework as a condition of membership. This includes commitments to implement 10 principles throughout their businesses, to report in line with the Global Reporting Initiative's (GRI) Sustainability Reporting Framework and to obtain independent external assurance that the ICMM commitments are being met. …. ICMM has also developed a number of position statements that further elaborate member commitments to particular issues.' ICMM Sustainable Development Framework, Overview 2 <https://www.icmm.com/website/publications/pdfs/position-statements/2013_icmm-ps_indigenous-peoples.pdf> accessed 5 August 2017.
[64] ICMM Sustainable Development Framework, Commitment 4 <https://www.icmm.com/website/publications/pdfs/position-statements/2013_icmm-ps_indigenous-peoples.pdf> accessed 5 August 2017.
[67] ibid.

4.1. A right commanding an international legal obligation of conduct for States to consult with a goal to obtain FPIC

As seen in subsection 3.1.1 above, art 6 of ILO C169 imposes an obligation on State parties to consult indigenous peoples with the objective of achieving agreement or consent for all 'legislative or administrative measures that may affect' them but this treaty obligation currently binds only one OBOR country, Nepal. As seen in subsection 3.1.2 above, both ICESCR and ICERD have been relied on by their respective monitoring treaty bodies to call on States to seek, or consult with a view to obtaining, indigenous peoples' FPIC in various circumstances affecting them although such obligation remains unspecified in the treaty texts themselves and these treaty bodies' authority to interpret their monitored treaties deserves closer scrutiny. As seen in subsection 3.2 above, UNDRIP provides that States will 'consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'[68] or approving 'any project affecting their lands or territories and other resources'.[69] However, UNDRIP is not a formal treaty and is stated in its preamble to be 'a standard of achievement to be pursued in a spirit of partnership and mutual respect'. Given the currently limited impact of ILO C169 on OBOR projects, this subsection focuses on (a) ICESCR and ICERD and (b) customary international law as possibly reflected by the content of UNDRIP, as potential bases for grounding an international legal obligation of conduct for States hosting OBOR projects to consult with a goal to obtain FPIC of indigenous peoples in the relevant circumstances envisaged by those instruments.

Whether ICESCR and ICERD creates an obligation on States to 'seek', or consult 'with a view to obtaining' FPIC from affected indigenous peoples, depends on the interpretive authority of CESCR and CERD which have invoked the relevant provisions in their respective monitored treaty to make such calls on States. Although neither CESCR nor CERD performs traditional judicial functions in terms of issuing binding legal judgments,[70] they do have formal bases under their respective monitored treaties to make suggestions or recommendations on the reports and information received from the States Parties[71] and, where the relevant State party has declared its recognition of the relevant committee's competence in this regard, on individual communications claiming violation of the relevant treaty.[72] If one adopts a traditional view towards treaty interpretation, the findings of treaty bodies would not amount to subsequent practice 'which establishes the agreement of the parties regarding its interpretation' for the purpose of article 31(3)(b) of the Vienna Convention on the Law of

[68] UNDRIP, art 19.

[69] UNDRIP, art 32(2). Doyle has interpreted art 32(2) of UNDRIP to entail both an obligation of conduct and an obligation of result when the same is read together with art 32(1) on the indigenous peoples' right to determine and develop priorities and strategies for development and art 3 on their right to self-determination. Cathal Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge 2014) 144–45. The potential international legal obligation of result to obtain FPIC will be addressed in subsection 4.2 below.

[70] Marco Odello and Francesco Seatzu, *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice* (Routledge 2014) 109.

[71] For CESCR, see art 16(2)(a) ICESCR and ECOSOC 'Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights' Res 1985/17 (28 May 1985). For CERD, see art 9 ICERD.

[72] For CESCR, see the Optional Protocol to ICESCR, art 5 and art 9 of which also grant CESCR the competence to take interim measures and follow-up actions. For CERD, see art 14 ICERD.

Treaties (VCLT) which is limited to practice by States for only the latter has the quality of 'authenticity',[73] which in turn makes it particularly reliable and endows it with binding force.[74] Nevertheless, the responses of individual States or of the States parties as a whole to the findings of these treaty bodies would constitute such practice.[75] In the context of human rights treaties with third-party beneficiaries and an independent monitoring mechanism such as ICESCR and CERD, it has been argued that subsequent practice includes 'the considered views of the treaty bodies adopted in the performance of the functions conferred on them by the States parties'.[76] This argument would clearly be strengthened if those considered views of treaty bodies are not disputed by States.[77]

While FPIC as a veto right has been openly rejected by a few States as will be seen below, few States have openly rejected the requirement of FPIC as merely a goal to be reached in defining an obligation of conduct to consult – indeed it could be questioned whether a consultation that does not adopt the goal to reach agreement can meet the standard of 'good faith'.[78]

Whether the provisions in UNDRIP reflect the positions under customary international law depends on States' positions towards them. The fact that 143 States voted for, and only four States voted against UNDRIP[79] (which have since reversed their positions and now support it)[80] might be relied on to argue for a 'sufficiently widespread and representative, as well as consistent' state practice,[81] which when undertaken with a sense of legal obligation,[82] would constitute customary international law. [83] Admittedly, some States have expressed their views that UNDRIP is not legally binding, thus precluding the construction that their practice in accordance with UNDRIP, e.g. their consultation with indigenous peoples with a goal to obtain

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[73] Georg Nolte, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (International Law Commission Sixty-fifth session, Geneva, 6 May-7 June and 8 July-9 August 2013) UN Doc A/CN.4/660 para 114.

[74] Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (BRILL 2009) 429.

[75] International Human Rights Law and Practice Committee, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, International Law Association, Berlin Conference (2004), para 21 <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1153&StorageFileGuid=eb197a77-77a9-417d-b22f-49e43decebc4> accessed 5 August 2017.

[76] ibid para 22.

[77] ibid para 23.

[78] E.g. in the context of the WTO Understanding on rules and procedures governing the settlement of disputes, art 3.10 states the understanding that 'requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute' and art 4.3 envisages 'consultations in good faith' should be conducted 'with a view to reaching a mutually satisfactory solution'. Likewise, in the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, GATT Doc LT/UR/A-1A/1/GATT/U/4 (15 April 1994), members are to enter negotiations 'in good faith with a view to achieving mutually satisfactory compensatory adjustment' at 5.

[78] See voting record of UNDRIP <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295> accessed 5 August 2017.

[80] See UN DESA <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> accessed 5 August 2017.

[81] Draft conclusion 8(1) of 'Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee', A/CN.4/L.872.

[82] ibid, draft conclusion 9(1).

[83] In UNCITRAL *Grand River Enterprise Six Nations, Ltd. v. the United States*, the AT stated that it may well be that there does exist a principle of customary international law requiring governmental authorities to consult indigenous peoples as collectivities on governmental policies or actions significantly affecting them. See *Grand River Enterprises Six Nations, Ltd. v. United States*, UNCITRAL case 2011, paras. 210 and 212, see e.g. <www.state.gov/documents/organization/156820.pdf> accessed 5 August 2017.

FPIC, is undertaken with a sense of legal obligation, but these views need to be interpreted against the background of these States' specific concerns.

Canada, for instance, in expressing such a view when announcing its support for UNDRIP after initially voting against it at the UNGA, specifically formulated its concern regarding FPIC as 'free, prior and informed consent when used as a veto'.[84] This can be read conversely that it would not be similarly concerned when FPIC is not understood as a veto, but merely a goal to be reached in defining the obligation of conduct to consult.

In a similar fashion, the US in announcing its support for UNDRIP, while noting its non-binding nature, 'recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken'.[85]

Australia's statement of support of UNDRIP states that '[a]lthough the Declaration is non-binding, in issuing its statement in support of the Declaration, Australia accepted the document as a framework for recognising and protecting the rights of Indigenous Australians'.[86] Importantly, it states further that 'the Declaration also affirms the right to free, prior or informed consent. In practice, this means that when making policies, laws or undertaking activities that affect indigenous peoples, governments and other parties such as corporations should negotiate with, to obtain the consent of, Indigenous people.'[87]

New Zealand's position is more complex. In its statement of support for UNDRIP, it first acknowledges that '[t]he Declaration is an affirmation of accepted international human rights and also expresses new, and non-binding, aspirations.'[88] And then it takes a two-pronged approach in stating that '[i]n moving to support the Declaration, New Zealand both affirms those rights and reaffirms the legal and constitutional frameworks that underpin New Zealand's legal system.'[89] That second prong was couched in the reference to the 'unique feature of [its] constitutional arrangements' i.e. 'the Treaty of Waitangi, signed by representatives of the Crown and Māori in 1840'.[90] Against this background, its statement that 'where the Declaration sets out principles for indigenous involvement in decision-making, New Zealand has developed, and will continue to rely upon, its own distinct processes and institutions that afford opportunities to Māori for such involvement'[91] can be understood not so much as a rejection of UNDRIP's requirement but rather an attempt to carve an exception for itself from that requirement because of the Treaty of Waitangi.

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[84] Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, <www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> accessed 5 August 2017.

[85] Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples, available on www.achp.gov/docs/US%20Support%20for%20Declaration%2012-10.pdf, at 5

[86] Reconciliation Australia, United Nations Declaration on the Rights of Indigenous Peoples <https://www.reconciliation.org.au/wp-content/uploads/2013/12/United-Nations-Declaration-on-the-Rights-of-Indigenous-Peoples.pdf> accessed 5 August 2017, at 1.

[87] ibid at 2.

[88] Announcement of New Zealand's Support for the Declaration on the Rights of Indigenous Peoples <https://www.beehive.govt.nz/release/supporting-un-declaration-restores-nz039s-mana> accessed 5 August 2017, at para 7.

[89] ibid para 8.

[90] ibid para 4.

[91] ibid para 12.

While neither ground for finding an international legal obligation for States hosting an OBOR project to consult with a view to obtaining FPIC from indigenous peoples is straightforward, there are clear legal arguments that could be used to support it. The geographical coverage of the two legal bases is quite similar from the perspective of OBOR projects. While customary international law applies universally except for the persistent objectors, both ICESCR and ICERD have been ratified by most OBOR countries. While many of the OBOR countries have not accepted the CERD's competence to hear individual communications under ICERD and most OBOR countries have not accepted CESCR to hear individual communications under ICESCR, they still have reporting obligations under both conventions which provide opportunities for the relevant treaty bodies to scrutinize OBOR projects undertaken without consultation with a goal to obtain FPIC from affected indigenous peoples.

4.2. A right commanding an international legal obligation of result for States to actually obtain FPIC

As seen in subsection 3.1.1 above, while art 16 of ILO C169 imposes an explicit obligation of result to actually obtain FPIC from indigenous and tribal peoples whose relocation is considered necessary as an exceptional measure, its non-performance can be excused by 'following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned'. As seen in subsection 3.1.2 above, ICESCR and ICERD have occasionally been relied on by their respective monitoring treaty body to call on States to actually obtain FPIC from indigenous peoples in various circumstances affecting them. As seen in subsection 3.2 above, UNDRIP provides that States shall obtain FPIC in relation to relocation of or storage/disposal of hazardous materials on the lands or territories of indigenous peoples, without any fallback procedures in case FPIC is not obtained. Similar obligation of result to obtain FPIC under the World Bank's ESF and the EPIII surveyed in subsection 3.3 above[92] cover also significant impact on cultural heritage and its use for commercial purpose and in the case of the World Bank's ESF, adverse impact on indigenous lands and natural resources. Again, given the currently limited impact of ILO C169 on OBOR projects, this subsection focuses on (a) ICESCR and ICERD and (b) customary international law as possibly reflected by the content of UNDRIP, the World Bank's ESF and EPIII, as potential bases for grounding an international legal obligation of result for States to actually obtain FPIC in the relevant circumstances envisaged by those instruments.

CESCR and CERD's interpretive authority has been considered in subsection 4.1 above. On a traditional view to treaty interpretation, these findings of CESCR and CERD do not qualify to illuminate the content of the relevant provisions of their respective monitored treaty. Even with the argument specific to human rights treaties, its strength is still weakened by the vocal, specific objection of some States to the obligation to actually obtain FPIC as surveyed above.

Likewise, these same objections also undermine the argument that the provisions in UNDR providing for States to actually obtain FPIC in the relevant circumstances reflect customary international law. Apart from the objections voiced specifically against UNDRIP, the actual domestic law and policy that does not reflect such obligation also goes against that argument. In Australia, for example, the Native Title Act 1993 provides native title holders and claimants

[92] EPIII could be relevant to the obligations of States in case the relevant banks subscribing to EPIII lends to a sovereign borrower. IFC's ESS is not relevant to the obligations of States because IFC only lends to private entities. The Articles of Agreement of AIIB contemplates AIIB lending to sovereign borrowers but AIIB's ESP does not express a requirement in terms of FPIC.

with a procedural 'right to negotiate' over mining projects, but does not grant indigenous peoples a power of veto.[93] Commentators also note that in many countries, an obligation to actually obtain FPIC from indigenous peoples in the relevant circumstances is either not recognised or not supported by domestic law.[94] The weakness of this argument is further demonstrated by the Resource Kit on Indigenous Peoples' Issues prepared by the Department of Economic and Social Affairs of the United Nations Secretariat, which states that:

> "It should also be noted that, in most countries, neither indigenous peoples nor any other population group actually have the right to veto development projects that affect them. The concept of free, prior and informed consent is therefore a goal to be pursued, and a principle to be respected to the greatest degree possible in development planning and implementation."[95]

The fact that States, when they borrow from the World Bank or banks subscribing to EPIII to develop projects within their territories, might obtain FPIC from indigenous peoples in the relevant circumstances prescribed by the World Bank's ESF or EPIII does not per se reflect any rule of customary international law for they could be acting under a sense of obligation under their financing agreements with the relevant financial institutional, rather than under customary international law.[96]

This is not to suggest that the right to FPIC could never command an obligation of result to actually obtain FPIC. Indeed, such obligation has been found in regional human rights system outside the OBOR route. In *Sarayaku v. Ecuador*[97] concerning the indigenous community's opposition to an oil and gas project, the Inter-American Court of Human Rights (the 'IACtHR') held that, based on the Ecuadorian Constitution,[98] the American Convention on Human Rights ('ACHR)[99] and the ILO C169,[100] Ecuador was in breach of the indigenous community's right

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[93] Native Title Act (Australia) (1993), <http://www.austlii.edu.au/au/legis/cth/consol_act/nta1993147/> accessed 5 August 2017.

[94] 'In most national jurisdictions the standard of FPIC remains something which indigenous peoples assert and States refuse to recognize.' See Doyle (n 69) 186. 'Despite the fact that most Latin American states already ratified the International Labour Organisation Convention 169 about the rights of indigenous peoples (ILO C169) in the 1990s, the great majority of them fail to implement these processes and, with the exception of Peru and Panama, no country has yet promulgated a framework law for regulating the right to prior consultation and FPIC. The frustrated legal initiatives for adopting such a law in Bolivia […], Brazil and Ecuador have revealed the profound divergences related to the interpretation and regulation of this right.' Almut Schilling-Vacaflor, 'Who controls the territory and the resources? Free, prior and informed consent (FPIC) as a contested human rights practice in Bolivia' (2016) *Third World Quarterly* 1, 3.

[95] Department of Economic and Social Affairs of the United Nations Secretariat, Resource Kit on Indigenous Peoples' Issues 18,
<http://www.un.org/esa/socdev/unpfii/documents/resource_kit_indigenous_2008.pdf> accessed 5 August 2017.

[96] In the *North Sea Continental Shelf Cases*, the ICJ stated that 'over half the States concerned . . . were or shortly became parties to the [1958 Geneva Continental Shelf] Convention, and were therefore presumably . . . acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law', in *North Sea Continental Shelf Cases* [1969] ICJ Rep 42, [76]. In the *Military and Paramilitary Activities (Nicaragua/USA) Case* the ICJ found that '[w]here two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule . . . binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough', see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [184].

[97] *Sarayaku v. Ecuador IACtHR* (2012). Inter-American Court of Human Rights Case of the Kichwa Indigenous People of Sarayaku v. Ecuador Judgment of June 27, 2012 (Merits and reparations).

[98] The Ecuadorian Constitution, art 163.

[99] ACHR, art 21.

[100] ILO C169, art 16.

to give or withhold their FPIC on all decisions potentially affecting their property or rights. This case also illustrates the potential role played by domestic law (e.g. the national constitution) in commanding obligations to realise the right to FPIC, which will be further surveyed in the next subsection.

4.3. A right commanding domestic legal obligations for States to either consult with a view to obtaining, or actually obtain, FPIC

This subsection considers the possibility of domestic legal obligations of conduct for States to consult with a goal to obtain FPIC, or domestic legal obligations of result for States to actually obtain FPIC. While it is beyond the scope of this article to survey all OBOR countries' domestic law, a few examples can provide some illustration where domestic law could envisage such obligations. In India, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006[101] imposes a requirement of free informed consent of the village council for resettlement, which requirement was later extended to cover impact on cultural and religious rights.[102] In New Zealand, the Crown Minerals Act 1991 prohibits entry into certain indigenous Maori land e.g. those regarded as *waahi tapu* (sacred areas) to carry out any minimum impact activities without the consent of the land owners.[103] In the Philippines, the Indigenous Peoples Rights Act 1997 grants to indigenous cultural communities/indigenous peoples the right to FPIC for relocation from their ancestral land,[104] the taking of their cultural, intellectual, religious, and spiritual property[105] and the licensing of the exploitation of natural resources affecting their interests.[106] In South Africa, the Constitutional Court's recognition[107] of indigenous peoples' ownership of sub-soil resources based on traditional usage implies that FPIC is automatically required should the State wish to pursue extractive activities in those peoples' territories.[108]

While EPIII explicitly requires that projects affecting indigenous peoples 'will need to comply with the rights and protections for indigenous peoples contained in relevant national law', [109] the World Bank's ESF is silent in this regard except for the general requirement that the borrower will take 'the country's applicable policy framework, national laws and regulations' into account in the environmental and social assessment,[110] which will in turn be taken into account in the Environmental and Social Commitment Plan forming part of the legal agreement between the World Bank and the borrower.[111] The more concrete and explicit requirement to comply with national law in EPIII stems from the position of IFC's ESPS**,**[112] whose difference from the World Bank's ESF might arguably be attributable to the fact that IFC's borrowers are private entities while the World Bank in the form of the International Bank of Reconstruction

[101] Chapter III, section 4(2)(e) of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006.
[102] Doyle (n 69) 198–99.
[103] Section 51 of the Crown Minerals Act 1991.
[104] Section 7(c) of the Indigenous Peoples Rights Act 1997.
[105] ibid, Section 32 and 33(a).
[106] ibid, Section 46(a).
[107] *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18.
[108] Doyle (n 69) 197.
[109] EP III, Principle 5.
[110] The World Bank's ESF, ESS1, para 26 at 19.
[111] ibid, ESS1, para 37 at 21.
[112] IFC's Performance Standards on Environmental and Social Sustainability, para 5; Performance Standard 7 Indigenous Peoples, fn 1.

and Development only makes loans, to or guaranteed by, States,[113] whose presumed commitment to abide by their own internal law might be seen as being put in doubt by a perceived need to impose it as a contractual obligation.

The ESP of AIIB, which also has capacity to lend to sovereign borrowers to finance their projects, bears a certain degree of resemblance to the World Bank's ESF in requiring the national legal framework to be included in the environmental and social assessment of the project.[114] It also requires the measures to manage and mitigate the identified risks and impacts to be reflected in an environmental and social management plan (ESMP)[115] or environmental and social management planning framework (ESMPF)[116] to be monitored and reviewed on an on-going basis,[117] and in the case of ESMPF, to be further developed in subsequent ESMPs.[118] To incorporate this into the contractual arrangement, it requires that '[t]he agreements with [AIIB] governing the Project contain, as applicable … specific provisions reflecting all actions required … to ensure compliance with the ESP and the applicable requirements of the ESSs, including implementing the Project in accordance with the applicable environmental and social documents',[119] which would presumably include the ESMP or ESMPF.

There may however be three situations in which compliance with national law in countries hosting OBOR projects, including any law that imposes an obligation to either consult with a goal to obtain, or actually obtain, FPIC for OBOR projects, could be excluded from AIIB's contractual arrangement with the borrower. The remainder of this subsection considers the implications of the occurrence of these three situations in case the borrower is the State hosting the relevant OBOR project.

The first situation is where AIIB determines that 'the timing of the [State borrower]'s environmental and social assessment of identified activities under the Project, and the timing of [AIIB]'s environmental and social due diligence and the [State borrower]'s environmental and social assessment, may follow a phased approach that takes place following the Bank's approval of the Project'.[120] However, this may only occur '[i]n exceptional circumstances, duly justified by the [State borrower]'[121] and the State borrower may not carry out any project activity covered by the phased approach until the required environmental and social risk and impact assessment has been conducted, approved and implemented as required 'except in situations of urgent need of assistance'[122] such as 'a natural or man-made disaster or conflict' in which case AIIB 'may approve a deferral of certain of the environmental and social requirements … to the Project implementation phase'.[123] Given the generality of the

[113] Daniel Bradlow, 'World Bank, the IMF, and Human Rights' (1996) 6 Transnational Law and Contemporary Problems 47, 53.
[114] AIIB's ESP, para 28.
[115] ibid para 28 and 39.
[116] ibid para 28.
[117] ibid para 44 and 62.
[118] ibid para 46
[119] ibid para 71.
[120] ibid para 50. It is unclear why the borrower's 'environment and social assessment' appears twice in this formulation; it could be that the first reference relates exclusively to the assessment of the identified activities while the second reference relates to the assessment of the project as a whole, including activities that are not yet identified.
[121] ibid.
[122] ibid.
[123] ibid para 51. For similar arrangements with World Bank's investment project financing, see OP 10.00, para 12, available on

considerations AIIB will take into account in its determination, such as 'an initial review of environmental and social implications of the Project' and the borrower's 'capacity, commitment and track record in managing environmental and social risks and impacts and to implement relevant national laws',[124] it is difficult to predict whether this phased approach might be relied on to exclude from the contractual arrangement provisions to comply with an obligation under national laws to either consult with a goal to obtain, or actually obtain, FPIC from indigenous peoples for the project. However, if it is successfully relied on, it is not inconceivable that some national law systems might accommodate an excuse from adhering to the relevant national laws on the basis that a multilateral financial institution such as AIIB also does not require compliance with them but the form of and the procedures for invoking such excuse will depend on the national law systems concerned.

The second situation is where AIIB specifically determines that the host country's environmental and social requirements are more stringent than AIIB's ESP or ESSs but are nevertheless in violation of AIIB's Articles of Agreement. This situation is implicitly contemplated in paragraph 9 of AIIB's ESP:

> "If the Bank determines that the relevant environmental and social requirements of the country in which the Project is located are more stringent than the requirements of the ESP or ESSs, the country's own requirements will apply, provided that they are not in violation of the Bank's Articles of Agreement."

However, in our context, it would seem far-fetched that an obligation under the host State's national law for the State to consult with the goal to obtain, or to actually obtain, FPIC from indigenous peoples (which would likely be considered 'more stringent' than the FPICon requirements under AIIB's ESP) could violate AIIB's Articles of Agreement. One possibility is to argue that requiring compliance with national law requirement to obtain FPIC would violate the prohibition on AIIB from 'interfer[ing] in the political affairs of any member' or being 'influenced in their decisions by the political character of the member concerned',[125] but that argument would be in no way straightforward. It is therefore difficult to rely on such determination by AIIB to exclude from the contractual arrangement between AIIB and the State borrower provisions for the latter to comply with an obligation under its national laws to either consult with a goal to obtain, or actually obtain, FPIC from indigenous peoples for the project.

The third situation is where the host country's requirement is indeed FPIC and AIIB specifically determines that the State borrower will nevertheless implement the FPICon requirements as set out in AIIB's ESP. This situation is implicitly contemplated in paragraph 61 of AIIB's ESP:

> "If the laws of the country in which the Project is located mandate free, prior and informed consent (FPIC), [AIIB] *may*, in accordance with paragraph 9 of this ESP, and provided that in its view, such application is consistent with the requirements of FPICon …, determine that the [State borrower] is required to apply FPIC as defined in those laws."[126]

<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=4035&VER=CURRENT> accessed 5 August 2017.

[124] ibid para 50.

[125] AIIB's Articles of Agreement, para 31(2).

[126] Emphasis added.

The word 'may' suggests that it is a matter of AIIB's discretion to require the State borrower to comply with the FPIC requirements under national law. The only express condition for the exercise of such discretion, that the application of FPIC requirements be 'consistent' with the FPICon requirements set out in AIIB's ESP, should be interpreted narrowly so that being 'more stringent' does not mean being 'inconsistent'. This narrow interpretation is supported by the express cross-reference to paragraph 9 of AIIB's ESP which envisages the national law requirements to be 'more stringent' than the requirements under AIIB's ESP or ESSs. And if the 'more stringent' FPIC requirements under national law could at least plausibly be 'consistent' with FPICon requirements under AIIB's ESP, then the mere 'greater stringency' does not rule out 'consistency'. What could render FPIC requirements under national law 'inconsistent' with FPICon requirements under AIIB's ESP then would likely relate to the procedures by which the FPIC is obtained e.g. the engagement of 'suitably qualified and experienced independent experts',[127] the scope of the project activities required to be covered by the consent, the process of meaningful consultation and good faith negotiation or the documentation requirements.[128] In case the compliance with the FPIC requirements under national law is excluded from the contractual arrangement between AIIB and a State borrower pursuant to AIIB's determination, whether compliance with the FPIC requirements under national law can be excused and replaced with the FPICon requirements under AIIB's ESP will depend on the national law systems concerned. Whether the continuing compliance with the FPIC requirements under national law will constitute a violation of the FPICon requirements under AIIB's ESP will depend on the nature and extent of the inconsistencies between the two.

5. Scoping the FPIC Obligations on Foreign Investors

This section examines the FPIC-related obligations of non-state foreign investors (including state-owned enterprises that are nevertheless not considered as States) that develop OBOR projects.

5.1. A right commanding a domestic legal obligation of conduct for foreign investors to consult with a goal to obtain FPIC/a domestic legal obligation of result for foreign investors to actually obtain FPIC

The examples of national law obligations to actually obtain FPIC cited in subsection 4.3 above could potentially apply to foreign investors unless it explicitly imposes the relevant obligation on the State (as in the example of South Africa). Similar considerations regarding the potential application of the supremacy clauses in AIIB's ESP concerning FPICon as analysed in subsection 4.3 above also apply here.

5.2. A right commanding an international legal obligation of conduct for foreign investors to consult with a goal to obtain FPIC

Regarding the treaty sources of obligation to consult with a goal to obtain FPIC surveyed in subsection 4.1, a traditional view on international law is that they are irrelevant to non-state actors, which are simply not party to these treaties. Alternatively, a more nuanced view is that non-state actors can still be the 'the subjects of international duties in all cases in which

[127] AIIB's ESP, para 60.
[128] ibid para 61.

international law regulates directly' their conduct.[129] An even bolder view is that international duties may be acquired by non-state actors through their capacity to undertake such duties rather than the designation as subjects, which often involved circular definitions[130] that 'erected an intellectual prison of our own choosing'.[131] Such international law duties could stem from treaties when 'the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts'.[132] While the treaty sources of obligations surveyed in Section 3.1 no doubt created obligations for States, whether they also created obligations for non-state actors requires closer examination.

Even if these treaties cannot be interpreted to create obligations for the non-state actors, it is still arguable such obligations arise under general international law on the view that 'the international legal order considers these rights and obligations as generally applicable and binding on every entity that has the capacity to bear them'.[133] The capacity of corporations to bear human rights obligations has been recognised in *The UN Guiding Principles on Human Rights and Transnational Corporations*, [134] Principle 12 of which states that '[t]he responsibility of business enterprises to respect human rights refers to internationally recognized human rights' and its commentary further elaborated that 'enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples'.

However, human rights considerations were ruled to be outside the mandate of the AT in a recent ICSID arbitration. In *Von Pezold and Border Timbers v. Zimbabwe*, the investor claimed compensation for expropriation of its land by Zimbabwe under the BITs between Germany and Zimbabwe and between Switzerland and Zimbabwe. Four indigenous communities, whose traditional lands were the subject of proceedings, sought permission to submit an *amicus curia* claiming that both Zimbabwe and the investor incur shared responsibility towards them in respect of their right to land over which the investors' property is located.[135] It is notable that they urged the AT 'to give due consideration to the duties of States and the responsibilities of companies with respect to the rights of indigenous communities', making an apparent distinction between Zimbabwe's 'duties' versus the investor's 'responsibilities'.[136] In addition, they invoked art 26 UNDRIP on the right to indigenous land only against Zimbabwe but not the investor, which however 'should assess whether indigenous people may lay claim to

[129] Hersch Lauterpacht, 'General Rules of the Law of Peace' in E. Lauterpacht (ed.) Collected Papers, vol. 1 (Cambridge University Press, 1970) at 284.
[130] James Crawford, *Brownlie's Principles of Public International Law* (OUP Oxford 2012) 116; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 64.
[131] Rosalyn Higgins, Problems and Process: International Law and How We Use It (Oxford: Clarendon Press, Oxford University Press, 1994) at 49.
[132] Pecuniary Claims of Danzig Railway Officials who have passed into the Polish Service, against the Polish Railways Administration. Advisory Opinion No. 15, 3 March 1928, Series B, at 17–18.
[133] Clapham (n 130) 87.
[134] *Human Rights and Transnational Corporations and Other Business Enterprises: Resolution Adopted by the Human Rights Council*, UN General Assembly <www.business-humanrights.org/media/documents/un-human-rights-council-resolution-re-human-rights-transnationalcorps-eng-6-jul-2011.pdf> accessed 5 August 2017.
[135] *Von Pezold v. Zimbabwe* preliminary order (2012) ICSID, Bernhard Von Pezold And Others (Claimants) V. Republic of Zimbabwe (Respondent) (ICSID CASE NO. ARB/10/15) - and - Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited (Claimants) v. Republic of Zimbabwe (Respondent) (ICSID CASE NO. ARB/10/25) Procedural Order No. 2, [25].
[136] ibid [26].

territory in accordance with criteria set out in international rules, and should not assume that the absence of official recognition of indigenous communal ownership rights implies that such rights do not exist'.[137] In its procedural order, the AT was not persuaded that consideration of the indigenous communities' claim based on the 'assertion that international investment law and international human rights law are interdependent' or the 'powers delegated to it by Contracting Parties with concrete human rights obligations under international law' was part of its mandate.[138]

However, another ICSID tribunal in its award issued in December 2016 on *Urbaser v Argentina*,[139] made a 'U-turn' on the traditional understanding of AT's jurisdiction under investment agreements concerning human rights issues. In that case, the Spanish investor held shares in a water supply and sewerage services concessionaire in Buenos Aires that was affected by Argentina's austerity measures during the financial crisis in 2001-02 and eventually went insolvent. The investor filed ICSID arbitral proceedings against Argentina for violations of the Spain-Argentina BIT. Argentina filed a counter-claim related to the investor's investment obligations under the concession contract arguing that by failing to make the agreed investments, the investor violated the basic human rights to water and sanitation of the local population in the Province of Greater Buenos Aires, which affected their health and the environment. First of all, the AT dismissed the investor's objection to the host state's invocation of its right based on the BIT on grounds of the BITs' asymmetrical nature[140] and instead recognised the host State's counterclaim[141] as falling within the scope of the dispute settlement under the ICSID Convention.[142] In other words, the *Urbaser* AT rejected the investor's argument that a human rights claim falls outside the jurisdictional scope of the ICSID AT and instead ruled that an investment dispute and a human rights claim do not automatically exclude each other.[143] This decision is game-changing for it opened up the ICSID jurisdictional scope to a host-state's counterclaim based on human rights law. Significantly, it also recognized that as companies are the recipients of rights under international investment treaties (typically, BITs), they are subjects of international law and can also bear obligations in international law.[144] Specifically, the tribunal relied on art 5 of ICESCR and art 30 of UDHR to establish that non-state actors can bear human rights obligations. ICESPR art 5(1) stipulates that '[n]othing in the present Covenant may be interpreted as implying… any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein'. In a similar vein, art 30 of the UDHR states that '[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.' While this ruling does not concern FPIC, its opens up the possibility in the future to argue, on the basis that an indigenous people does have the right to FPIC, that the foreign investor also bears the obligation to seek such FPIC, lest it would serve to destroy

[137] ibid [27-28].
[138] ibid [58-59].
[139] *Urbaser et al. v The Argentine Republic*, ICSID Case No ARB/07/26, December 2016.
[140] The AT referred to the arbitration clause of the Spain-Argentina BIT, namely, art X (1)).
[141] For the possibility of counterclaim by the host State, see section 2 above. See also Stockholm Chamber of Commerce, ISDS Blog, <http://isdsblog.com/2016/04/04/when-states-file-claims-against-investors-in-isds/> accessed 5 August 2017.
[142] *Urbaser*, ICSID award (n 139) para 1154.
[143] ibid.
[144] ibid para 1195, making particular references to the ICESCR, the Universal Declaration on Human Rights (UDHR) and the ILO Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy in paras 1196-98.

such right, although the precise contour of that argument can only be seen in the future when it is actually made.

5.3. A right commanding an international legal obligation of result for Non-state Participants to actually obtain FPIC

As demonstrated in subsection 3.1.2 above, ICESCR and ICERD have occasionally been referred to by their respective monitoring treaty body to require States to actually obtain FPIC from indigenous peoples in various circumstances affecting them. The game-changing implications of the decision in *Urbaser* apply equally to the right commanding an international legal obligation of result for foreign investors to actually obtain FPIC. Adopting the same reasoning used in *Urbaser*, it may be argued that ICESCR and ICERD, to the extent they create obligations to actually obtain FPIC, may also bind non-state actors in the context of TILA.

The issue is likely to be tested in two pending cases. The first is the PCA case *South American Silver Mining v. the Plurinational State of Bolivia*,[145] where the investor seeking more than USD300 million for the alleged expropriation of 10 mining concessions by Bolivia argued that it had made legitimate efforts with the communities to actually achieve an overall consent while Bolivia argued that the project violated the rights recognised in UNDRIP and the investor had attempted to fabricate the consent of the concerned indigenous peoples.[146] The second is the ICSID case *Bear Creek Mining Corp. v. Peru*, where the investor, claiming over USD500 million for alleged indirect expropriation, argued that it had consulted the indigenous communities which supported the project and would benefit significantly as a result of employment and revenues[147] while Peru argued that the investor had failed to consult with and obtain the consent of all the affected indigenous peoples and communities, as it had been required to do under relevant international human rights law standards, Peruvian law (which served to implement the ILO C169), practices recommended by the government of Canada and the International Council on Mining and Metals guidelines.

In both cases, the eventual ruling by the ATs in these respects will further illuminate any potential international legal obligations on foreign investors to actually obtain FPIC.

6. Conclusion

Traditionally, TILA has focused on setting and enforcing the ground rules for regulating the relationship between the host state and the foreign investors relating to foreign investment projects, sidelining the concerns of local population, whose opposition has in reality posed intractable difficulties for developing these projects and whose positive engagement with, participation in decision-making on and ultimate approval of these projects could prove crucial to their success. The legal analysis presented in this article is intended as a modest contribution to the OBOR initiative by highlighting the right of a specific group of local population whose vulnerable situation merits the special attention of investors, host states and other stakeholders in OBOR projects.

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[145] *South American Silver Mining Ltd. (Bermuda) v. The Plurinational State of Bolivia*, case number 2013-15, in the PCA.

[146] See claimant's reply to respondent's counter-memorial, PCA <https://pcacases.com/web/view/54> accessed 5 August 2017.

[147] See claimant's memorial on the merits <https://icsid.worldbank.org/apps/icsidweb/cases/pages/casedetail.aspx?CaseNo=ARB/14/21&tab=DOC> accessed 5 August 2017.