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CAN THE CONCEPT OF SOCIAL LICENCE TO OPERATE FIND ITS WAY INTO THE FORMAL LEGAL SYSTEM?

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I INTRODUCTION

The imperative for a social licence to operate (SLO) is driving mining companies around the world to reconsider the way they do business, in particular, their relations with their host communities, other stakeholders and society at large. Flowing from the idea that mining companies need more than the approval of their host governments to operate, SLO is regarded as the acceptance of mining companies and their activities by the communities affected by them. This need for acceptance derives from the increasing capacity of local communities and civil society organisations to put pressure on governments and businesses to address the impacts of industrial activities.[1] For mining companies whose societal image is quite negative due mainly to their inability to manage the sociocultural and environmental impacts of their operations, mere compliance with legal and regulatory directives is no longer considered sufficient to address especially the sociocultural impacts of their operations and fend off opposition to their operations.[2] They must do more to secure 'social licence'. Unlike mining permits

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1 Robyn Mayes, 'A Social Licence to Operate: Corporate Social Responsibility, Local Communities and the Contribution of Global Production Networks' (2015) 15 *Global Networks* 112.

2 Tapio Litmanen, Tuija Jarta and Eero Rantala, 'Refining the Preconditions of a Social Licence to Operate (SLO): Reflections on Citizens' Attitudes Towards Mining in Two Finnish Regions' (2016) 3 *Extractive Industries & Society* 782.

issued by the government, such a licence is not given in some formal or official way. Rather, companies obtain the licence typically through developing good relationships with their host communities. There is no uniform way of developing such relationships. Each company therefore has to fashion how best it can do so with its particular host communities and other stakeholders.

Although the concept of SLO has been around since the 1990s when Canadian mining executive Jim Cooney first coined the term,[3] scholarly engagement with it is fairly recent. Yet, a large body of literature has already emerged seeking to explain and analyse its meaning, origin, importance and application from multiple perspectives.[4] In all the literature, however, there is a great emphasis on its extra-legal nature, compared to the mining licence and regulatory approvals issued by governments. It has been argued that due to its existence outside the formal legal system, the concept's normative claims often conflict with the rule of law.[5] Some scholars believe that the concept legitimises physical violence by activists[6] while others believe that the already existing impact assessment

[3] Larissa Riabova and Vladimir Didyk, 'Social License to Operate for Mining Companies in the Russian Arctic: Two Cases in the Murmansk Region' in Lassi Heininen, Heather Exner-Pirot and Joel Plouffe (eds), *Arctic Yearbook 2014* (Northern Research Forum, 2014) 527, 528.

[4] See, eg, Richard Parsons and Kieren Moffat, 'Constructing the Meaning of Social Licence' (2014) 28 *Social Epistemology* 340; Kieren Moffat and Airong Zhang, 'The Paths to Social Licence to Operate: An Integrative Model Explaining Community Acceptance of Mining' (2014) 39 *Resources Policy* 61; Dwight Newman, *Be Careful What You Wish For: Why Some Versions of 'Social Licence' are Unlicensed and May be Anti-Social* (Macdonald-Laurie Institute Commentary, November 2014); Jason Prno and D Scott Slocombe, 'Exploring the Origins of 'Social License to Operate' in the Mining Sector: Perspectives from Governance and Sustainability Theories' (2012) 37 *Resources Policy* 346; R G Boutilier, L Black and I Thomson, 'From Metaphor to Management Tool: How the Social License to Operate can Stabilise the Socio-Political Environment for Business' (International Mine Management 2012 Proceedings, Australian Institute of Mining and Metallurgy, Melbourne, Australia).

[5] Newman, above n 4, 4.

[6] Ibid. See also, Brian Lee Crowley, 'When Demands for "Social Licence" Become an Attack on Democracy', *Inside Policy: The Magazine of the Macdonald-Laurier Institute* (Macdonald-Laurier Institute, December 2014) 19 calling SLO 'a polite term for mob rule'.

processes in the mining sector provide a sufficient mechanism to address the issues that SLO is intended to address, thus rendering SLO superfluous.[7] Some commentators have therefore warned against allowing the concept to become institutionalised into the formal legal system, some call for the discarding of the use of the word 'licence'[8] while others call for the abandonment of the concept altogether to avoid the potentially disastrous consequences of its institutionalisation.[9] Is SLO capable of finding (or ought it to find) its way into the formal legal system?

This article seeks to contribute to the above debate by critiquing the extent to which the concept of SLO is outside the realm of law. Specifically, it engages with the literature to examine some of the criticisms leveled against attempts to institutionalise SLO into the formal legal system. While the article acknowledges the inherently extra-legal nature of the concept, it argues that the acquisition of an SLO can also and does go through the formal legal system as well. This occurs through the codification of concepts such as community development agreements (CDAs) and impact benefit agreements (IBAs) intended to enhance community support for mining projects. The merit of legal institutionalisation is that it elevates the concept above the realm of corporate social responsibility, which is a voluntary initiative subject to the goodwill of businesses without much community input. Such elevation helps to guarantee that social dialogue between companies and communities affected by their projects is carried out. The tremendous emphasis on the extra-legal nature of the concept may have emanated from corporate executives who fear the consequences of having another layer of legally binding obligations imposed on their companies.[10] Therefore they resist any

7 David Bursey, 'Rethinking Social Licence to Operate — A Concept in Search of Definition and Boundaries' (May 2015) 7(2) *Business Council of British Columbia, Environment and Energy Bulletin* 3; Crowley, above n 6, 19.

8 Newman, above n 4, 4.

9 John R Owen and Deana Kemp, 'Social Licence and Mining: A Critical Perspective' (2013) 38 *Resources Policy* 34.

10 Nelson has observed that 'many mining companies have discovered that voluntary initiatives that surpass regulatory compliance result in less interference in their business practices by outsiders': Jacqueline Laura Nelson, *Social Licence to Operate: Integration into Mine Planning and Development* (Master of Applied Science Thesis, University of British Columbia, 2007) 1.

attempt to 'legalise' SLO, that is, to bring it within the remit of formal law. This article contributes to bridging the gap between SLO and the formal legal system. It rejects calls for the abandonment of the concept and identifies how the concept is, explicitly or implicitly, already being institutionalised particularly through the legal sanctioning of CDAs in several recent mining laws around the world. A major part of my argument addresses the perceived challenges in incorporating SLO into formal law with a view to demonstrating that the challenges are not insurmountable and that the law has been able to grapple with similar challenges in connection with the application of other concepts and principles, such as Free, Prior and Informed Consent (FPIC), and public participation in natural resource management. The article examines the legal and social scientific literature on the SLO concept as well as some national mining laws, particularly in Africa.

Following this introduction, Part II analyses the origin and nature of SLO. One of SLO's most defining characteristics is its extra-legal nature. Part III therefore looks at the question of whether SLO should remain outside the realm of law. Here, the article argues that claims that incorporation of SLO into the formal legal system would legitimise physical violence by anti-mining activists as well as claims that the already existing impact assessment processes provide sufficient tools to address the issues that SLO is intended to address are erroneous. They are erroneous in their provision of an incomplete account of SLO. Part IV examines the difficulties of integrating SLO into the formal legal system and identifies and analyses how those difficulties may be tackled. One of its arguments is that most of those difficulties are not unique to SLO but are fully applicable to other concepts that have been generally accepted as deserving of legal recognition and the difficulties are not as insurmountable as they are at first sight. Part V concludes the discussion.

II ORIGIN, MEANING AND NATURE OF SLO

Although the coinage of the term SLO is credited to Cooney who used it in the 1990s, the very idea has been traced back to mining operations in the 1970s where mining companies maintained their capacity to operate by collaborating with local communities affected by their operations.[11] Cooney is said to have used the term during a meeting with the World Bank in early 1997 while he was Director of International and Public Affairs of Placer Dome to refer to the idea of companies needing something more than the legal licence granted by the state,[12] especially in developing countries where regulatory and accountability mechanisms that uphold the rule of law are weak.[13] His aim was to explain how the relationship between mining companies and their host communities could be stabilised so as to reduce the ability of communities to stop mining projects through self-help.[14] The concept surfaced again later in mid-1997 during a World Bank-sponsored conference on mining and communities in Quito, Ecuador.[15] It has been pointed out, however, that other persons had used terms akin to SLO earlier than Cooney and that some even appeared to have used exactly the same term.[16] It appears, however, that it was Cooney's use of the term that arrested public attention, presumably because of his position as a mining executive. And while the term emerged within the context of the mining industry, it has been adopted by other industries, such as the pulp and paper industry, the alternative energy industry, and in the agricultural sector.[17] Actors like civil society and non-governmental

[11] Michal C Moore, 'The Question of Social Licence and Regulatory Responsibility' (March 2016) 8(7) *The School of Public Policy SPP Communiqué* 1.

[12] Riabova & Didyk, above n 3, 2; Newman, above n 4, 1.

[13] Nigel Bankes, *The Social Licence to Operate: Mind the Gap* (24 June 2015) ABlawg.ca <http://ablawg.ca/2015/06/24/the-social-licence-to-operate-mind-the-gap/>.

[14] Boutilier, Black and Thomson, above n 4, 6.

[15] I Thomson and R G Boutilier, 'The Social License to Operate' in P Darling (ed), *SME Mining Engineering Handbook* (Littleton Co, 2011) 1779.

[16] Newman, above n 4, 1.

[17] Moffat and Zhang, above n 4, 61.

organisations, academics, governments and various consultants have helped to popularise it.[18]

Despite the relative novelty of SLO, its theoretical anchorage can be traced to the earlier notion of corporate social responsibility (CSR), understood broadly as 'the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the community and society at large'.[19] SLO has also been linked to the FPIC doctrine, adopted by the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP) to address the local impacts of projects that affect the lands, territories or resources of Indigenous peoples.[20] Broadly speaking, FPIC requires that the 'consent' of those to be affected by a proposed project be obtained before the project takes off. The consent must be *freely* given (ie it must be entirely voluntary and not procured by fraud or coercion), *prior* to the start of the project and the grantor of the consent must be fully *informed* as to what they are granting, in terms of the nature of the project and the project's potential impact on them.[21] The concept of SLO has also been linked to social contract theory. According to the Minerals Council of

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[18] Ibid.

[19] World Business Council for Sustainable Development, 'Stakeholder Dialogue on CSR, The Netherlands, 6-8 September 1998' cited in World Business Council for Sustainable Development, *Corporate Social Responsibility: Meeting Changing Expectations* (World Business Council for Sustainable Development, 1999) 3.

[20] S H Baker, 'Why the IFC's Free, Prior, and Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities Affected by Development Projects' (2012) 30 *Wisconsin International Law Journal* 688. The relevant provision of the Declaration is art 32 which provides as follows: 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources'.

[21] Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law' (2011) 10 *Northwestern Journal of International Human Rights* 54.

Australia, SLO is 'an unwritten social contract'.[22] Franks and Cohen regard SLO as 'the intangible and unwritten, tacit, social contract with society, or a social group, which enables an extraction or processing operation to enter a community, start, and continue operations'.[23] But the concept also has links with the broader concept of public participation and consultation in natural resource and environmental decision-making.[24]

There is no commonly accepted definition of SLO. Instead, it is regarded as a 'metaphorical concept' meant to signify that companies 'cannot operate sustainably without the support of society'.[25] Simply put, SLO is a community's acceptance or approval of a project or the project operator's ongoing presence in the community. Some scholars view it as a set of demands and expectations that local stakeholders and other components of civil society hold regarding how a company should conduct its operations.[26] The Australian Centre for Corporate Social Responsibility defines the term as 'the level of acceptance or approval continually granted to an organisation's operations or project by local community and other stakeholders'.[27] The Sustainable Business Council views it as including 'a measure of confidence and trust society has in business to behave in a legitimate, transparent, accountable and socially acceptable way' and as 'an unwritten contract between companies and society for

[22] Minerals Council of Australia, *Enduring Value: The Australian Minerals Industry Framework for Sustainable Development — Guidance for Implementation* (Minerals Council of Australia, 2005) 2.

[23] Daniel M Franks and Tamar Cohen, 'Social Licence in Design: Constructive Technology Assessment Within a Mineral Research and Development Institution' (2012) 79 *Technological Forecasting and Social Change* 1231.

[24] Prno & Slocombe, above n 4, 349.

[25] Dev Sanyal, 'Obtaining a Social Licence to Operate — A Challenge for the Industry' (Presentation to PETEX Conference 2012, London, 22 November 2012).

[26] Neil Gunningham, Robert A Kagan and Dorothy Thornton, 'Social Licence and Environmental Protection: Why Businesses go Beyond Compliance' (2004) 29(2) *Law and Society Inquiry* 308.

[27] Leeora Black, *Defining the Elusive and Essential Social Licence to Operate* (August 2011) Organisations, Ethics & Society <http://oeands-blog.tumblr.com/post/9327692575/defining-the-elusive-and-essential-social-licence>.

companies to acquire acceptance or approval of their business operations'.[28] Cooney is said to have explained during a recent interview with *The Canadian Press* that SLO has three characteristics: 'a precautionary approach to environmental impacts, a specific contractual agreement outlining benefits to the community and ongoing communication'.[29]

Thus, SLO is not a 'licence' as that term is understood by lawyers. It is not a formal agreement between communities and mining companies but, rather, it is 'a descriptor of the state of the relationship between a [project] proponent and the community in which the proponent is operating and, therefore, as a process of continual negotiation'.[30] The term 'social' indicates that the source of the licence is not some government regulator but society, which could theoretically mean the entire society or a subset of it, such as a community or even a subset of a community.[31] Second, the term 'licence' does not connote the idea of permission or authorisation that is granted by some person whose permission or authorisation is required by law. Rather, licence is used as a 'metaphor' that 'conveys the impression that companies must satisfy some formal criteria if society and local communities are to allow them to operate'.[32] It is a metaphor because there are no clear or formal criteria that companies must satisfy in order to obtain a SLO. And no one can point to any document evidencing that a SLO has been issued. In fact, as Parsons and Moffat have observed, the existence of a SLO is always presumed, putting the burden on the community to prove its absence.[33] Lastly, the 'to operate' in the concept suggests that the concept is not concerned with the commencement of a project alone, but with the entire life of a project — from

[28] Sustainable Business Council, *Social Licence to Operate Paper* (Sustainable Business Council, nd) 4.

[29] Laura Kane, 'How Social Licence Came to Dominate the Pipeline Debate in Canada', *The Canadian Press* (online), 20 May 2016 <http://www.canadianbusiness.com/business-news/how-social-licence-came-to-dominate-the-pipeline-debate-in-canada/>.

[30] Franks and Cohen, above n 23, 1231.

[31] Bankes, above n 13, 1.

[32] Parsons and Moffat, above n 4, 356.

[33] Ibid.

commencement to completion.[34] In other words, the holder of a SLO must continue to hold it throughout the life of the project to which it relates.

SLO's most talked about characteristic is its extra-legal nature. According to Newman, '[t]he presence of the term "licence" in the name gives it a more legal-sounding legitimacy than it has and may help perpetuate confusion'.[35] Compared to the term 'legal', the term 'social' expresses a weakened level of obligation. However, the terms 'acceptance' and 'approval' associated with the definition of SLO, suggest that some form of consent is required. It has been observed that companies are averse to speak of consent because of the capacity of the term to give substantial power to their host communities; they are therefore unwilling to equate social licence with 'community consent'.[36] The distinction between social licence and community consent is regarded as critical because community consent connotes something more concrete and a higher standard whereas social licence is vaguer.[37] This is because if a community's consent is required, companies would be obliged to engage more fully with the community and to provide the community all the information it needs in order to make an informed decision regarding whether to allow a company to operate.[38] What makes the term 'social licence' vague, however, is the word 'social' pre-fixing the word 'licence'. 'Community' seems to convey something more concrete than 'social' even though 'community' is itself a loaded term.[39]

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[34] Bankes, above n 13, 1.

[35] Newman, above n 4, 5.

[36] Keith Slack, *Corporate Social Licence and Community Consent* (21 November 2008) Policy Innovations <http://www.policyinnovations.org/ideas/commentary/data/000094>.

[37] Ibid.

[38] Ibid.

[39] In 1955, George Hillery Jr found 94 definitions of community in the literature and noted that even the 94 were not all of the definitions of community: George A Hillery Jr, 'Definitions of Community: Areas of Agreement' (1955) 20 *Rural Sociology* 112. A 1981 review of the academic literature regarding its meaning revealed 'an amalgam of vague formulations and selective perceptions' of the concept, raising questions as to why the concept 'has maintained its popularity in the face of its acknowledged shortcomings': L

The foregoing analyses have led scholars to conclude that SLO is 'a highly normative concept; you ought not to proceed or continue with this operation without the permission of the affected community'.[40] Failure to obtain that permission carries negative implications. The company that loses its SLO would be 'forced to operate in a world full of regulations and restrictions'.[41] Affected communities may seek to block or delay projects through extra-legal means. Activists may exploit the doctrine to undermine projects. The affected company's reputation may suffer, resulting in turn to a fall in its share prices.[42] The significance of SLO may thus be seen in 'the economic cost of its absence'.[43]

III SHOULD SLO REMAIN OUTSIDE THE REALM OF LAW?

Newman believes that while aspiring towards higher social and environmental standards than the law obligates is commendable, turning our attention to SLO 'can confuse the public discourse' because of SLO's lack of 'structure and accountability'.[44] He argues vehemently that the concept should be quarantined from the legal sphere because any attempt to transform it into a new legal requirement for businesses is a 'mistake' that 'carries with it some extremely dangerous underlying assumptions', namely, that 'businesses should face risks of legal changes that damage their business interests and [risks] of extra-legal disruption of their business activities by those opposed to them'.[45] He believes that the concept puts undue extra-legal pressure on companies that often

Bryson and M Mowbray, 'Community: the Spray-on Solution' (1981) 16(4) *Australian Journal of Social Issues* 256.

40 Bankes, above n 13, 1.

41 Terrence O'Keefe, *Social License Provides Freedom to Operate* (24 June 2009) WATTAgNet.com <http://www.wattagnet.com/articles/315-sociallicense-provides-freedom-to-operate>.

42 Slack, above n 36.

43 Parsons and Moffat, above n 4, 345.

44 Bursey, above n 7, 2.

45 Newman, above n 4, 3.

translates to violent attacks on company facilities by disgruntled local communities, thereby 'undermin[ing] legally determined rights'.[46] It amounts to 'a rejection of the rule of law', because it 'transforms a descriptive statement that a company *cannot* operate with [a] low-level [SLO] into a prescriptive statement that a company *cannot* legitimately operate' with a low-level SLO.[47] Newman's argument seems to be that SLO should remain no more than an epithet describing a reality of modern business and not be allowed to metamorphose into a legal requirement for businesses because it would inevitably legitimise disruptive and violent actions on mining operations by legally enabling communities to stop projects unless a certain level of SLO is present. Businesses are therefore advised to consider replacing the concept with a different phraseology to avoid 'support[ing] the development of a problematic discourse'.[48]

Other scholars have similarly cautioned strongly against industry usage of the term as an appropriate response to the challenges they face in their areas of operation. They believe that companies would be in a better position to engage in collaborative dialogue with communities where the 'politics of permitting' is not the informing principle of such engagements.[49] They regard SLO as an obstacle to the achievement of sustainable development:

> Nothing short of a move away from social licence at the project level is required to pave the way for a more proactive stance towards sustainable development. Such a move would require companies to listen and respond to what a community 'expects', including the poorest and most marginalised.[50]

Likewise, Bursey argues that the integration of SLO into the discussion of social responsibility is 'troubling' because of the idea of 'permission' that is the central conceptual focus of SLO. This is

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46 Ibid.
47 Ibid.
48 Ibid 5.
49 Owen and Kemp, above n 9, 34.
50 Ibid.

because '[t]he focus on permission emphasizes a governance role that is [unhelpful,] vague and unachievable'.[51] Bursey fears that institutionalisation of SLO would turn it into a public veto of mining projects and would therefore erode our legal institutions.[52] He believes that the existing formal environmental review processes provide sufficient safeguards to ensure that decisions incorporate the concerns of the potentially affected public, and where those processes are found wanting, they can be improved upon.[53] Policy makers are therefore advised against abandoning 'the formal process on the belief that direct civil action by public interest groups somehow represents a more democratically sound approach'.[54] This view has also been strongly echoed by Crowley who describes SLO as 'an attack on the rule of law' and the legitimacy of democratic institutions — the impact assessment agencies and other regulatory bodies.[55]

It is erroneous to equate institutionalisation of SLO with legitimisation of direct civil action or as a negation of the rule of law. It is true that some social activists may want to use the idea of SLO to thwart the takeoff or progress of particular projects. But this is no reason to equate institutionalisation of SLO within the law with the legitimisation of violence. Moreover, institutionalisation need not be conceptualised as requiring companies and communities to enter into a formal social licensing agreement before companies can operate, which would be binding and enforceable before the courts. Rather, in recognising and explicitly acknowledging the importance of SLO to sustainable mining development, lawmakers can identify the various ways in which a company can obtain community acceptance and legislate measures that would enhance the readiness of communities to accept a project and the ability of companies to earn that acceptance.

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51 Bursey, above n 7, 5.
52 Ibid 2.
53 Ibid 3.
54 Ibid.
55 Crowley, above n 6, 20.

One can observe instances where concepts intended to enable companies to obtain community acceptance have been legislated in several recent mining laws around the world, such as in Australia and Canada in connection with Indigenous peoples, and in an increasing number of African countries. These laws contain legal provisions that require companies to negotiate and sign CDAs (or IBAs) with their host communities before the commencement of any development activities.[56] For instance, section 109(1) of Kenya's *Mining Act 2016* requires holders of mining licences to sign a CDA 'with the community where mining operations are to be carried out in such manner as shall be prescribed in Regulations', the objective being to provide a legal basis on which to ensure that mining operations are conducted in a manner that benefits the communities affected by them. Most of these mining laws not only make such agreements binding and enforceable, they also prescribe the substance of the agreements and indicate how disagreements in concluding them shall be resolved.[57] Such agreements serve as a formal and legally sanctioned means of securing community support for projects.[58] They may be regarded as *quasi-legalisation* of SLO since they do not give communities the right to issue any formal licence to companies but the right to have a say in the takeoff and continuation of a project. To view this as a right to veto is very pejorative and mistaken. It carries the implication that communities are necessarily given the right to say no to a mining project over

[56] See, eg, *Nigerian Minerals and Mining Act 2007* (Nigeria) s 116; *Mines and Minerals Act 2009* (Sierra Leone), Supplement to the Sierra Leone Gazette vol CXLI, no 3, 30 December 2009, s 139; *Mining Act 2012* (South Sudan) s 128; *Mining Code 2011* (Guinea) s 130 (as amended in April 2013); *Mining Law 2014* (Mozambique) art 8(2)(f); *Mining Act 2016* (Kenya) s 109.

[57] For an analysis of the use of CDAs in the mining sector, see Jennifer Loutit, Jacqueline Mandelbaum and Sam Szoke-Burke, 'Emerging Practices in Community Development Agreements' (2016) 7(1) *Journal of Sustainable Development Law & Policy* 64; Kendra Dupuy, 'Community Development Requirements in Mining Laws' (2014) 1(2) *Extractive Industries & Society* 200; Columbia Center on Sustainable Investment, *Community Development Funds and Agreements in Guinea under the New Mining Code* (Columbia Center on Sustainable Investment, 2013).

[58] Owen and Kemp, above n 9, 33; Katherine Trebeck, 'Corporate Social Responsibility and Democratisation: Opportunities and Obstacles' in Ciaran O'Faircheallaigh and Saleem Ali (eds), *Earth Matters: Indigenous Peoples, the Extractive Industries and Corporate Social Responsibility* (Greenleaf Publishing, 2008) 12-13.

which the operator has been granted legal licence. While it may in some instances result in communities delaying or holding up the takeoff or continuation of a project that has been licensed by law, the central idea is to give communities a sense of belonging in the project. In some cases, in fact, it may be legitimate for communities to withhold their consent to a project until vital issues are addressed.

In a recent article, Gathii and Odumosu-Ayanu explore the shift in contractual arrangements relating to natural resources and how this shift expands the potential for the law of contract to promote CSR for the benefit of those adversely affected by natural resource development.[59] The new contractual arrangements include 1) recent State-investor contracts that include provisions imposing obligations on investors towards third parties affected by their operations; 2) investor-local community contracts, such as CDAs; and 3) investor-state-local community contracts (tripartite contracts).[60] Tripartite agreements involving States, investors and communities are less common but do exist, such as in the form of environmental agreements that are found in Canada, an example being the environmental agreement between the Government of the Northwest Territories, local communities and De Beers Canada Inc.[61] Gathii and Odumosu-Ayanu also note that some CDAs take the form of tripartite agreements involving the state, the investor and local communities and that some tripartite exploration contracts can be found, such as in South Australia where, as part of its agreement with Indigenous communities under the *Native Title Act 1993* (Cth), the government of South Australia allows for the negotiation of exploration agreements between the government, investors and native title claim groups.[62] Agreements under the *Native Title Act* (called Indigenous Land Use Agreements), however, need not include the government as a party but can be entered into between only the affected Indigenous community and the resource

[59] James Gathii and Ibironke T Odumosu-Ayany, 'The Turn to Contractual Responsibility in the Global Extractive Industry' (2016) 1(1) *Business and Human Rights Journal* 69.
[60] Ibid 81-91.
[61] Ibid 90-1.
[62] Ibid 91.

developer.[63] Gathii and Odumosu-Ayanu's goal, however, is to highlight the fact that these new contractual arrangements are 'under-emphasised' in the CSR literature whereas they have 'real potential' to contribute to filling the governance gap in the globalisation of commerce particularly in terms of enforcing corporate obligations towards local communities affected by the adverse impacts of extractive resource development.[64] Essentially, these new arrangements are, at least in part, a means of using the law of contract to enable extractive companies to acquire SLO.

It is a mistake, also, to think that the legally mandated impact assessment processes to which mining companies are generally subject in most jurisdictions provide a sufficient mechanism to address the impact of mining on local communities and to earn a company the level of public support that it needs in order to operate sustainably and stave off future obstacles. In the first place, those impact assessment processes are highly formalistic and are usually controlled by outsiders (regulatory authorities, impact assessment experts etc) rather than the communities themselves. They do not provide communities the flexibility that CDAs would afford them in terms of determining what their priorities are because they do not involve negotiation and agreement between affected communities and resource developers. Even where affected communities do not agree with the results of the legal and regulatory assessments, the extractive activity may still be approved. Because of the absence of negotiation and agreement there is little or no room for compromise. The adoption of the FPIC principle in the context of Indigenous peoples in fact represents recognition that consultation is not enough to address the legitimate concerns of Indigenous peoples. It is equally a mistake to think that the impact assessment processes can conceivably be improved upon to such an extent that requiring companies to obtain the acceptance of their host communities by additional means would be an unnecessary imposition of duty with potentially dangerous consequences. Even in jurisdictions, such as

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[63] See Michael Limerick et al, *Agreement-making with Indigenous Groups: Oil and Gas Development in Australia* (Centre for Social Responsibility in Mining, University of Queensland, 2012) 33.

[64] Ibid 69-70.

Canada, with generally good governance and rule of law practices, where such processes are highly developed and affected, communities are aware of their rights, the demand for companies to obtain a SLO is also significant, suggesting that the consultations carried out in the impact assessment processes are not adequate to enable companies to obtain the level of societal support needed for their projects.[65] CDAs can enhance social dialogue on the impact of mineral development by compelling companies to engage with communities potentially impacted by their projects with a view to obtaining the communities' support for the projects. Incorporating SLO into the formal legal system, such as through CDAs, would therefore help to ensure that this social dialogue between companies and communities is carried out and not left almost entirely to the goodwill of companies or subject to the highly formalistic and outsider-controlled nature of impact assessment processes.

IV INTEGRATING SLO INTO THE FORMAL LEGAL SYSTEM — ADDRESSING THE DIFFICULTIES

The difficulty of integrating SLO into the formal legal system stems from a number of factors: 1) its imprecise nature, 2) the difficulty of knowing when an SLO has been achieved, 3) the difficulty of measuring or monitoring compliance, 4) the multiplicity of constituents involved whose permission may be required, and 5) the changing nature of societal approval/acceptance of projects (the impact of generational change within local communities). Wilburn and Wilburn have summarised the difficulties posed by the multiplicity of stakeholders whose consent may be required in connection with a single project:

> That 'array of constituents' may be so diverse and numerous that consent from all of them becomes impossible. Each stakeholder group may have expectations and requirements that conflict with those of other stakeholders as well as with the corporation and the government.

[65] Newman's criticisms of the SLO are based on the demand by Aboriginal communities in Canada that mining companies obtain the SLO.

> There may be many companies who have a legal right to operate from the government and are willing to negotiate for a social license to operate that does not include consent.[66]

To begin with, none of these difficulties is unique to SLO. They are equally well associated with various concepts that have developed into legal principles or doctrines recognised in almost all jurisdictions in the world. For example, the principle of public participation in natural resource development and environmental decision-making has assumed a prominent status in international law[67] which some have argued may have attained the status of customary international law.[68] A second example is the FPIC doctrine discussed above which the International Finance Corporation has made mandatory for its projects[69] and which the International Council on Mining and Metals has made mandatory for its corporate members.[70] The term 'public' in public participation is no less vague than the term 'social' in SLO. Efforts to define and to understand what is meant by 'public' and 'participation' in the context of the public participation principle and 'consent' in the context of the FPIC doctrine can help to understand the meaning of SLO and how it can be acquired.

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66 Kathleen M Wilburn and Ralph Wilburn, 'Achieving Social Licence to Operate Using Stakeholder Theory' (2011) 4(2) *Journal of International Business Ethics* 8.

67 See Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press, 2008) 146-150.

68 While it remains unsettled whether public participation is a principle of customary international law, there is increasing support for the view that given the widespread nature of the principle in national laws, it may have assumed the status of customary international law: See, eg, Uzaezo Etemire, *Law and Practice on Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective* (Routledge, 2016) 9.

69 International Finance Corporation, *Performance Standard 7: Indigenous Peoples* (International Finance Corporation, 2012); Shin Imai, 'Consult, Consent and Veto: International Norms and Canadian Treaties' (Osgoode Hall Law School Legal Studies Research Paper No 23, 2016) 5-6; Robert Goodland, 'Responsible Mining: The Key to Profitable Resource Development' (2012) 4 *Sustainability* 2105.

70 International Council on Mining and Metals, *Indigenous Peoples and Mining: Position Statement* (May 2013) <http://www.icmm.com/document/5433>.

It has been argued, however, that the comparison of SLO to FPIC falls short in several key respects. First, while FPIC relates precisely to Indigenous peoples who have distinguishable rights within their territory affected by resource development, SLO lacks clearly defined boundaries as it applies to diverse public groups. Second, while FPIC relates to the duty of the State, SLO relates to the duty of companies. Third, while FPIC has clearly defined elements and is therefore easier to understand, SLO is 'amorphous' and lacks 'legal force or recognition'.[71] And fourth, while FPIC is associated with a once-and-for-all consent that is granted before the commencement of a project, SLO is expected to be granted and maintained throughout the lifespan of a project.[72]

All of these arguments may be addressed, however. It is not accurate to say that FPIC is applicable only to Indigenous peoples. While it originated in the context of Indigenous peoples, it has been applied beyond that context. For example, in 2009 — barely two years after the FPIC doctrine was adopted in the UNDRIP — the Economic Community of West African States (ECOWAS) adopted the *Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector*[73] (ECOWAS Directive) requiring companies to obtain the FPIC of 'local communities before exploration begins and prior to each subsequent phase of mining and post-mining operations'.[74] Although the term 'local communities' is not defined in the Directive, there is nothing in the Directive's provisions that suggests that 'local communities' is restricted to Indigenous peoples.[75] Although Indigenous peoples are more well-defined than community, both groups are highly fragmented internally and it is often difficult for their members to speak with

[71] Bursey, above n 7, 5.
[72] Owen and Kemp, above n 9, 33.
[73] *Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector* (27 May 2009). (ECOWAS Directive)
[74] Ibid art 16(3).
[75] See Lorenzo Cotula and Kyla Tienhaara, 'Reconfiguring Investment Contracts to Promote Sustainable Development' in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy 2011–2012* (Oxford University Press, 2013) 301.

one voice.[76] Consequently, consent under FPIC may be no less difficult to acquire than consent under SLO. It is equally as challenging to know when consent has been granted under FPIC as it is under SLO. Therefore the distinction being drawn between FPIC and SLO in this respect falls short.

In fact, the implication of the lack of a formal and clear definition of community for the purposes of obtaining community consent under the SLO principle may have been overstated, at least in relation to certain cultures. As Omorogbe has, for instance, argued in the context of local community participation in natural resource development in Nigeria, although the term community is not defined under any national (or even subnational) law in Nigeria, there is no controversy in Nigeria over what a community is or over who is a member of a community. She writes:

> In local parlance and ordinary meanings the local communities are those who are customarily resident or who are widely known as the owners of the land upon which the development is taking place. In Nigeria, one's origin continues to be determined by the place from which one's family originated. It takes several generations for a settler or the settlers' descendants to be accepted as being indigenes of the place of settlement. Therefore a member of a community is a person who originated from the community in question. This is irrespective of where any of these persons may habitually reside. No matter how long a person resides in a town that person remains a member of his or her ethnic group and a citizen of his or her home town of origin.[77]

[76] On the internal diversity within Indigenous groups, see Duane Champagne, *Increasing Indigenous Diversity: Classifying is Oversimplifying* (11 July 2015) Indian Country Today <http://indiancountrytodaymedianetwork.com/2015/11/07/increasing-indigenous-diversity-classifying-oversimplifying-162345>.

[77] Yinka Omorogbe, 'The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless' in Donald N Zillman, Alastair R Lucas and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002) 571.

She does not suggest, however, that communities are uniform and always share common interests. Her message is that the lack of a formal definition of community does not pose insurmountable difficulties with regard to the identification of what constitutes a community and who its members are.

There is however, the further question of who are the *affected* communities whose consent is required. Some proximity test would be needed to address this issue. Sierra Leone's *Mines and Minerals Act 2009*[78] offers some ideas. Section 139(1) of the Act requires holders of small- and large-scale mining rights 'to have and implement a community development agreement with the primary host community' under stipulated conditions. The Act goes further to define 'primary host community' as:

> the single community of persons mutually agreed by the holder of the small-scale or large-scale mining licence and the local council, but if there is no community of persons residing within thirty kilometres of any boundary defining the large-scale mining licence area, the primary host community shall be the local council.[79]

Where, however, the mining rights holder and the local council fail to agree on who the primary host community is, the power to make that determination devolves to the Minister of Mines.[80] In the case of large-scale mining, the primary host community whose, so to say, consent would be required would be the community of persons located within 30km of the mine or the local council where no such community of persons exist. This is a sensible approach to the definition of affected communities, an approach that aligns closely with the negligence-based common law doctrine of reasonable foreseeability. One criticism against the approach, however, is that the use of the term "primary host community" in the provision presupposes there are other communities that may be impacted by mining operations. The Act does not explain why those other communities are not to be considered. A more nuanced approach

78 Sierra Leone, above n 56.
79 Ibid s 139(2).
80 Ibid s 139(3).

that takes into account the fact that mining operations may impact communities of people who reside outside the immediate proximity of the mine site is required. However, the involvement of the local council in the determination of the host community is also sensible, as the council can help to handle tensions that may arise within actual communities. The council can enact by-laws spelling out modalities for representation of communities by which communities would be required to abide. It can also supervise the local democratic institutions within communities to ensure equitable representation of the various groups within them and also ensure the accountability of elected representatives.[81]

In addition, that FPIC relates to the duty of the State as against the duty of private resource developers to which SLO relates makes no relevant difference to the need to give SLO legal status. In fact, under the *ECOWAS Directive*, the duty is explicitly imposed on companies rather than on the State.[82] Lastly, the idea that SLO has no legal force or recognition is not entirely accurate. The imposition of duties on mining companies to enter into legally binding CDAs with their host communities is based, at least in part, on the recognition of the need for companies to obtain SLO from the communities affected by their operations. It has also been recognised that local content laws in the extractive sector could be utilised in such a manner, such as through the recognition of local community content (giving deliberate preference to the localities where the extractive activities take place), as to enable companies to obtain SLO from their host communities.[83] The original version of

[81] The role of local councils in the design and implementation of public participation mechanisms at the community level has been discussed at some length: See Chilenye Nwapi, *The Primacy of People in Development: Theoretical and Legal Perspectives on Public Participation in Oil and Gas Decision-Making* (Lambert Academic Publishing, 2012) 187; Chilenye Nwapi, 'A Legislative Proposal for Public Participation in Oil and Gas Decision Making in Nigeria' (2010) 54 *Journal of African Law* 211.

[82] *ECOWAS Directive*, above n 73.

[83] See Chilenye Nwapi, 'Defining the 'Local' in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' (2015) 8(1) *Law and Development Review* 188; Ana Maria Esteves, Bruce Coyne and Ana Moreno, *Local Content Initiatives: Enhancing the Subnational Benefits of the Oil, Gas and Mining Sectors* (Natural Resource Governance Institute, 2013) 6.

Tanzania's draft local content policy made explicit reference to SLO as a 'primary business reason for developing [l]ocal local content'.[84]

While Indigenous peoples — as understood in international law — do not exist everywhere, the type of solutions needed to address their problems may be similar to those needed to address the problems of many local communities across the world that are victims of various forms of marginalisation and dispossession. Moreover, the nature of the rights encapsulated in the FPIC doctrine does not give room to any assumption that they are exclusively suited to Indigenous peoples and cannot be adapted to other groups, such as local communities, that face problems similar to those faced by Indigenous peoples in the countries where they live. It has been suggested, for instance, that the situation in which the people of the oil producing Niger Delta region of Nigeria find themselves is similar to the situation in which many Indigenous peoples are in their countries.[85] It is presumably in recognition of this fact that the *ECOWAS Directive* earlier mentioned enjoins ECOWAS member States to require mining companies to obtain the FPIC of their host local communities before commencing mining operations. In fact, the severe criticism against the legal institutionalisation of SLO is quite curious, given the lack of opposition — or at most only mild opposition — from commentators to the adoption of FPIC in 2007 under the UNDRIP despite the fact that States like Australia,[86] Canada,[87] New Zealand and the United States, which have

[84] United Republic of Tanzania, *Local Content Policy of Tanzania for the Oil and Gas Industry* (Dar es Salaam, 2014) 19. However, in the version of the local content law that was finally passed by the Tanzanian Parliament, the idea of 'local local content' was abandoned.

[85] Nwapi, *The Primacy of People in Development*, above n 81, 158-9.

[86] Australia endorsed the Declaration on 3 April 2009: See *Australian Government Announcement on the UN Declaration on the Rights of Indigenous Peoples* (Parliament House, Canberra, 3 April 2009).

[87] Canada accepted the Declaration three years later with qualifications as an 'aspirational document' and only on 10 May 2016 announced its adoption without qualification: See Bruce Cheadle, 'Canada Now Full Supporter of UN Declaration on Rights of Indigenous Peoples, Bennet Says', *The Canadian Press* (online), 12 May 2016 <https://www.thestar.com/news/canada/2016/05/12/canada-now-full-supporter-of-un-declaration-on-rights-of-indigenous-peoples-bennett-says.html>.

significant numbers of Indigenous peoples, vehemently opposed the adoption of the Declaration due mainly to concerns about the ability it would give Indigenous peoples to delay or stop projects.

SLO need not be obtained in a direct manner. It can be obtained indirectly through the negotiation and signing of CDAs or similar agreements (such as impact benefit agreements) between a mining company and its host community. Such an agreement could be regarded as an implied consent or licence on the part of the community concerned. To the argument that SLO should not be institutionalised because of the difficulty of measuring public support, such an agreement can constitute an approximate measure of public support for a project. The achievement of certainty is not always the objective of the law.

That is not to say, however, that once such an agreement has been signed, a project is guaranteed to proceed to conclusion without interruptions, even when the terms of the agreement are strictly followed. Issues may arise in the course of a project that a particular CDA did not contemplate. How the company addresses those issues may determine whether it will retain or lose its social licence.[88]

In addition, generational change may cause even well-crafted agreements to become outdated over the course of time. This is because mineral conflicts are not only between local people and the government and/or mineral companies; many are between or among the various clans within communities. Furthermore, mineral operations often create problems that local communities are hardly able to anticipate correctly, such as transformation in landscape and impact on cultural and spiritual values, especially if the area is poor and marginalised.[89] Generational change can bring about withdrawal of support (or licence) for a project that was originally welcome to

[88] Owen and Kemp, above n 9, 33 noting, however, that '[w]hile agreements are imperfect devices for ensuring compliance on agreed courses of action, they nonetheless do articulate a set of expectations held by stakeholders'.

[89] Michael Ross, 'Mineral Wealth and Equitable Development' (Background report for the World Development Report, 2006) 23.

the community. It has been observed, for instance, that in West Papua, Indonesia, mining giant Freeport McMoran signed an agreement with the Indigenous Amungme peoples in 1974 that provided social infrastructure, such as schools, clinics and markets in exchange for mining rights. Despite signing the agreement, however, community support for the project declined years later and violent confrontation ensued.[90] Similarly, in Papua New Guinea, a copper mine owned jointly by Bougainville Copper Limited, Rio Tinto and the Papuan government brought major negative socio-economic and environmental impacts on the lives of the people of Bougainville, a locality known for its pronounced poverty. Although the operators of the mine made substantial efforts to contribute to the lives of the people, community support declined over the course of time when the terms of the original agreement which was entered into in 1967 became outdated. A new generation of Bougainvilleans saw the agreement as unfair to their generation, as only primary landholders received compensation from the mine owners while subsidiary landholders received little or nothing, and the compensations went to family heads, leaving their children who had now grown with little or no access to the funds. A small group of this new generation of Bougainvilleans formed a revolutionary army in 1988 that launched a violent attack that forced the mine to close.[91]

Rather than jettison the idea of integrating SLO into the formal legal system due to problems that may arise as a result of generational change, it would be better to focus attention on how to respond to the generational change problem itself instead of surrendering to it. The problem can be dealt with through the creation of mechanisms that ensure that dialogue is ongoing throughout the life of a project and does not end with the signing of a single agreement. As Irene Sosa has argued, 'consent should be conceived as an iterative, multi-layered, ongoing process of consultation, rather than a one-time seal of approval'.[92] To facilitate ongoing dialogue, agreements should have a defined lifespan to

[90] Ibid 23-4.
[91] Ibid 24-5.
[92] Irene Sosa, *Licence to Operate: Indigenous Relations and Free Prior and Informed Consent in the Mining Industry* (Sustainalytics, 2011) 2.

allow for renegotiation. To ensure that things do not deteriorate too much before it is time for another agreement, the lifespan of an agreement ought not to be too long. Most CDA laws specify five years as the life span of an existing CDA. Although it is difficult to say the precise amount of time that would be adequate, five years seems reasonable in that it allows the parties time to experience the implementation of the CDA, harvest some of the fruits of the CDA and to test the usefulness of some of the community development projects enshrined in the CDA to the general welfare of the community.

Questions may arise regarding the extent to which those participating in the negotiation of CDAs on behalf of communities can be said to be truly 'representative' of the community they claim to represent. However, the issue of representativity should not be treated as though it were a problem unique to CDAs and similar agreements. It is a problem that also surfaces very strongly in public participation processes related to environmental and other impact assessments for mining and oil and gas projects and the problem stems mainly from the multiplicity of interests involved — the existence of groups within communities seeking a voice within the larger community. Representativity does not pose any more difficulties in CDAs than may be seen in public participation processes during impact assessments since it would normally be the same community whose participation is required in impact assessments that a company would be required to negotiate a CDA with. That said, the issue of representativity is 'particularly controversial because either too little or too much equity may result in creating or escalating conflicts'.[93] As justice research in social psychology shows, however, the fairness of the process of selecting groups' representatives has a strong influence on the outcome of the process.[94] Fairness may be achieved through a power-sharing arrangement among intra-community groups, selection through

[93] R Plummer and J Fitzgibbon, 'Co-Management of Natural Resources: A Proposed Framework' (2004) 33(6) *Environmental Management* 881.

[94] See, eg, A E Azzi and J T Jost, 'Votes Without Power: Procedural Justice as Mutual Control in Majority-Minority Relations' (1997) 27(2) *Journal of Applied Social Psychology* 124.

periodic elections, and the putting in place of mechanisms for settling disputes as they arise.[95]

Owen and Kemp criticise the effects of CDAs on sustainable development:

> The nature of agreements also tends to 'compartmentalise' through the demarcation of boundaries between peoples, localities and regions. … The compartmentalisation that occurs through agreements can reduce incentives for establishing linkages between parties to the agreement and other development actors, in turn inhibiting an integrated and holistic approach to development.[96]

It is not clear how CDAs can hamper the ability of companies to establish flexible linkages with communities and other development actors. The compartmentalisation that occurs through such agreements would actually facilitate such linkages since it enables the identification of project stakeholders. Moreover, CDAs do not cause the death of other political or informal processes of engagement or deny or even undermine their usefulness. They rest on a view that legally sanctioned commitments to local communities are valuable (if not essential) for securing local support for projects and that such support is essential for sustainable development. That the existence of CDAs does not *guarantee* social licence to a company is no reason to jettison them. As Bankes has argued, '[w]e need a regulatory system that allows us to assess that societally we are better off with these projects than without'.[97] CDAs are a potentially valuable aspect of such an integrated regulatory system. While voluntary initiatives are useful, perhaps even indispensable, in promoting sustainable development, they are weak and slow in achieving it due to the need for accountability especially in the context of mineral development.

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[95] For a detailed discussion of how to deal with the issue of representativity in community participation arrangements to address within-group concerns, see Chilenye Nwapi, 'Governance Considerations Relating to Social Impact Assessments for Mining Development in African Communities' (2015) 17(2) *Journal of Environmental Assessment Policy and Management*.

[96] Owen and Kemp, above n 9, 34.

[97] Bankes, above n 13, 6.

V CONCLUSION

There is no need for stoking fear on the likely implications of institutionalising SLO into the formal legal system. Those advising companies and policy makers to discard the idea of SLO are not doing the companies or society any good. They under-appreciate the limits of informal initiatives in promoting responsible resource development. Efforts should be channeled towards identifying multiple means of enhancing the ability of companies to acquire community support (ie SLO) for their projects and the willingness of communities to grant it. Allowing companies to use informal means to do so is one avenue but certainly not the only one. Legally sanctioned mechanisms that recognise the flexible nature of community support and the impact of generational change on its acquisition and retention also have an important role to play. While the already existing impact assessment processes can help, they are limited by their lack of adequate flexibility and the little room they provide for compromise or concession. CDAs provide a more flexible mechanism for securing and maintaining community support for a project despite their imperfect nature. The fact that SLO is difficult to define does not provide justification for its rejection as the law is replete with hard-to-define terms. Rather than jettison the idea of institutionalisation of SLO, it is better to channel our energies on how to deal with the difficulties associated with it rather than surrendering to them. Those problems include the difficulty of knowing when SLO has been obtained, the impact of generational change and the difficulty of identifying impacted communities.