CONSTITUTIONALIZING LOCAL COMMUNITIES IN INTERNATIONAL INVESTMENT LAW

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ABSTRACT

Nowadays the role of local, tribal and indigenous communities in international law is of increasing interest in the academic literature. In the field of international investments, protecting local communities towards the economic colonialism would seem to be of primary importance. This article seeks to investigate the role of these communities within the international constitutional framework by identifying what international law instruments are available. Especially in the area of energy investments, a wide movement towards constitutionalizing indigenous communities in the international investment regime seems to emerge**.**

INTRODUCTION: WHY CONSTITUTIONALIZE LOCAL COMMUNITIES IN INTERNATIONAL INVESTMENT LAW?

In International Investment Law the role of citizens, local communities and indigenous people has been kept away far too long from a deeper democratic participation with the result of the compression of their rights and their position in the international constitutional scenario. The constitutional aspects of international investment law are demonstrated by the commitments of more and more countries to bilateral investment treaties, international and regional investment agreements and by transnational investor-state arbitration making national and international guarantees of investor rights and property rights enforceable[i]. The importance of constitutionalizing the role played by local communities in the investment law regime goes through the recognition of existing rights and the identification of new obligations on the

investment law actors in order to safeguard local communities and their interests at stake. As a matter of fact, foreign companies, states and all arbitral tribunals shall contribute to the consolidation of the position of local communities as relevant players in the international investment law scenario with the general duty for investing companies and host-states to comply with their obligations and for arbitral tribunals to attempt making those enforceable in respect of international law of human rights. A counterargument to this assumption might be represented by the fact that foreign firms do not have any obligation enshrined in international law towards local communities and the public interests they do represent; not even arbitral tribunals hold the duty to interpret BITs and, generally, IIAs by considering those public issues. Arbitral tribunals are basically called to interpret IIAs, especially BITs, and to rule over private and commercial legal issues between the host-state and the foreign investor. Therefore, local communities are not considered as legal entities belonging to the international treaties and therefore, they do not reflect rights and duties in arbitral decisions. However, this paper will attempt to prove how the international developments in the investment law regime, especially in the field of the extractive industries, are moving towards the recognition of local communities as a proper legal entity with which it is possible to interact and to legally bound. Local communities as a legal entity constitute a social truth and "*the self-confirming development of a social reality through the categories of customary international law (general practice and opinion juris) is one of the discursive gimmicks that is sought for its admission in the legal regime"*[ii]. In fact, the basis of customary international law is a social reality captured by practice and *opinion juris* of states and, as the international literature has proven, other non-state actors[iii]. As non-state actors, local communities and foreign investors might contribute to the formation of a customary international law in which the role of the civil society is finally recognised and legally relevant. In International Investment Law many steps have been achieved and many are still in progress. The aim is to reinforce the importance of local communities in the constitutional framework of international investment law.

CORPORATE SOCIAL RESPONSIBILITY AND LOCAL COMMUNITIES' RIGHTS

International investment law is a regime created for protecting corporations from host-states breaches of IIAs and host-states from an adverse impact of foreign investments. But it is also

a place where international investors and local citizens compete for local resources. The foreign investments regime is about more than foreign investor rights and state regulatory authority. The right to participate, municipal property rights, and community values are also at stake[iv]. International investments governance cannot avoid anymore the function and the position of local communities in shaping the outcome of investment projects decisions and their final completion. Host States shall have a national legal framework in compliance with Article 15 of the Convention (No 169) on Indigenous and Tribal Groups In Independent Countries (ILO Convention 169)[v] according to which local populations must be extensively consulted in the decision-making process, especially in the extractive industries for the approval of the Environmental and Social Impact Assessment. On the other hand, international businesses must comply with the requirement to acquire a social license to operate (SLO), which requests not only securing the initial permission from local communities for the launch of the extractive project, but also managing to maintain the social license for the overall duration of the project, including its closure. Apart from strengthening their right to participate in the decision-making process, which requires the intervention of the states in updating their regulatory frameworks, local communities should be able to negotiate the terms and conditions of the investment and its impact on the environment and their ecosystem. When this does not happen, foreign companies and host-sates start to negotiate and make decisions without giving importance to local communities and their aspirations. The expected consequence will be several protests and marches against the economic colonization. As a matter of fact, the concept of social licence to operate explains this new relation that investors and civil society must entertain. A SLO is not defined as a legal requirement but it is acquiring more and more relevance in designing investment governance. Especially in the extractive field, corporations must gain and maintain the social acceptance of the projects proving that the investment will benefit the economic growth of the country and that the rights of locals will not be compressed. Community Development Agreements (CDAs) constitute a major example of how companies and communities, in some cases, manage to negotiate different aspects of the investment and how its benefits will be fairly distributed among the host community with an improvement of the natural resources management[vi]. Moreover, it has been widely proven how the CDAs, rather than being much more expensive and time-consuming, avoid continuous stoppage of work, widespread tension in the community and reputational threats to investors, developers, host governments, and to the entire resource sector[vii].What is still not clear is whether there is a

general duty on international investors to cooperate when it comes to respecting and making decisions in accordance with the expectations and aspirations of the local community. If there is a duty for host states to guarantee compliance with international human rights law protecting civil society and its rights, especially from harmful economic colonization, there is no such responsibility for foreign corporations. Nevertheless, the emergence of the concept of corporate social responsibility (CSR) has paved the way for the establishment of environmental and social sustainability standards for international investments, concerning the engagement with local communities. Those principles such as the Equator Principles[viii] and the International Finance Corporation ("IFC") Performance Standards on Environmental and Social Sustainability[ix] also contributed to solving public concerns relating to the protection of the environment and the social acceptance of investment projects. As already pointed out, the major investments take place in the energy sector and when natural resources are at stake, the local communities pretend to be involved in the decision-making process and to negotiate terms and conditions and to assess the impact of the project on their economy and its repercussion on their lifestyle, social and cultural heritage. The Equator Principles and the IFC standards represent an example of how international investors, along with all other investment sponsors or funders, need to consider the risks and the effect on the environment and social outcomes complying with the United Nations Sustainable Development Goals (SDGs) and the Paris Agreement. These principles have strongly contributed to establishing the framework for the concept of CSR that would not only help to define the correct conduct that international companies must comply with in approaching large industrial projects, but also to implement a three-way paradigm in international investment law where local communities constitute an emerging legal entity in the investment's negotiation together with the foreign firms and the host-states.

LOCAL COMMUNITIES AND HUMAN RIGHTS IN THE INVESTMENT ARBITRATION: THE BEAR CREEK CASE

Arbitral tribunals are called to rule over private and commercial law issues with little space for designing investor's liabilities for the violation of community's rights. But in a few investor-state disputes, the arbitral tribunals found the opportunity to interpret their jurisdiction, the relevant law, and the 'corporate social obligations' of foreign investors under the light of the

international law of human rights. In this regard, the Bear Creek case[x] represents the first example in which an arbitral award has explicitly cited the concept of social licence and corporate social responsibility underlining the importance of engaging with indigenous people and gaining their social acceptance upon the mining exploration, especially when the project is bound to impact on the health, environment and ecosystem of a community. Although it was recognized the importance of gaining a social license, this did not preclude the tribunal from acknowledging that the Peruvian government violated the terms of the Canada-Peru Free Trade Agreement[xi] (Canada-Peru FTA). The government was found guilty for having revoked the mining licence to the Canadian company after having approved the Environmental Impact Assessment (EIA) and after that the project had already begun to operate. In other words, the arbitral tribunal stated that the Peruvian government had committed an indirect expropriation of the foreign firm project 'asset and the fact that local communities have begun to complain about this project with public protests and manifestations, it didn't call for the public security exception. Although the government justified the revocation of the licence with the public security concern, the arbitral tribunal did not support this claim because the government was aware of the investment's problems within local populations long before issuing the mining exploration permit. As a matter of fact, the government should have considered this matter before granting the permit and not when the protests escalated to such an extent that they were unmanageable. Therefore, the tribunal found its way to rule in favour of the Canadian company allocating the relative compensation. But despite the government's breaches of the BIT, the award and its dissenting opinion highlights the relevance of the social licence and its two separate meanings. On one hand, the majority of the Tribunal stressed the duty of the State to closely monitor the investor's attempts to secure the approval from indigenous communities and to communicate its concerns during the negotiation and consultation process. On the other, Professor Philippe Sands' Partial Dissenting Opinion[xii], indicated that it is the investor responsibility to secure a social license and that the inability to acquire this "license" should have been taken into account by the tribunal. These divergent views demonstrate the two sides of the 'social license' to operate: the duty of the foreign investor to earn host community's trust and the role of the State in controlling the mechanism by which such consultation and consent take place. It may be the responsibility of a State or its central government to have a system of domestic law able to ensure that the consultation process and results are compatible with Article 15 of ILO Convention 169(Indigenous and Tribal Peoples Convention), but it is not

their function to hold the investor's hand towards the social acceptance of the project by the indigenous populations[xiii]. It is the investor obligation to win the "social license" and in the Bear Creek case, it was mostly unable to do so because of its own shortcomings[xiv].The Canada-Peru FTA, as all the BITs and IIAs, should have addressed the general obligation upon the investors to secure the host community's trust before the commencement of the mining activities.

CORPORATE SOCIAL RESPONSIBILITY AS CUSTOMARY LAW

As pointed out above, the duty upon foreign investors to comply with the right of local communities to live in a healthy environment, to economically grow and to protect their traditions and identity emerges from international law and from the above cited arbitral decision. This new role designed for international firms would be supported and implemented by a new international law doctrine which suggests that corporations may be lawmakers and that international public law does not prohibit them from directly contributing to the establishment of international norms, even in the narrow sense of investment agreements where there is an existing bilateral investment treaty[xv].In fact, through bilateral investments agreements it can be deduced the intentions of states parties, the contracting state and the state in which the contracting company is domiciled[xvi].The elevated internationalized status of these agreements which manifest the general intentions and practices of states parties, with the support of arbitral tribunals in their enforcement and implementation, should be appropriate to frame corporate social responsibility as customary international law. Moreover, the attitude of tribunals for arbitral cases under the auspices of the ICSID to prioritize these internationalized contracts over domestic regulation as applicable law, will generate an umbrella of protection from risks upon public health, environment and human rights. Considering this, the incorporation of corporate social responsibility in BITs between states parties will bind investors from the contracting state to address all the risks and effects on local population and the arbitral tribunals to consider the protection for public health, human rights, and the environment in investor-state disputes, realising this destructive potential in internationalized investment treaties. This concept of corporate customary international law will hold companies responsible for abuses on human rights and on the environment making binding for them showing to host communities how the investment will not impact on the ecosystem, how the

local expectations will be met and how the investment will support the economic growth of the area. On the other side corporate customary law will encourage host-countries to update their domestic regulatory frameworks with the right of host communities to be part of the decision-making process regarding the investment and the Environmental and Social Impact Assessment. Corporate customary international law might be one of the means for the purpose of framing local communities in the constitutional regime of international investment law.

ACCESS TO JUSTICE, PROCEDURAL RIGHTS AND AMICUS CURIAE

One of the main challenges in the process of identification of local communities as a proper public actor with its own rights in the investments practice is the recognition of procedural rights, how local communities can have access to judicial remedies and ensure that the public interests they represent are listened to. Even though in several cases foreign investments are deeply related with public concerns in the host state such as the environmental protection, public health, cultural and social heritage, the investor state dispute settlement regime addresses just private issues concerning the infringement of IIAs by the host-states and the consequent claim by the foreign company under investment tribunals. So, arbitration tribunals are called to interpret the IIAs and to rule over the private interests at stake. But, as a matter of fact, the evolving and rising role of local communities in international investment law has brought the investment dispute resolution tribunals to open their proceedings to the discussion of public issues through the recognition of participation rights as an expression of a wider involvement of civil society. International investment arbitration has opened its ranks to the procedural instrument of "*amicus curiae*", according to which communities and individuals "*although not a party to the dispute, [are] permitted to make submissions or otherwise take part in the proceedings*"[xvii]. With this new procedural instrument civil society has been able to have access to the decision-making process and to determine the effect of arbitration awards on the protection of public interests. If on one hand civil society has found a valid instrument for admitting public concerns to the arbitration award, on the other it is undeniable how the amicus curiae concept has led over the past few years, the investor-state dispute settlement structure to a profound evolution. From a confidentiality-based model to one more open to the civil society involvement. This momentous shift in investment arbitration theory and structure,

spearheaded by ground-breaking arbitral rulings, has been duly accepted and adopted by states in their foreign investment agreements[xviii].

AMICUS CURIAE BETWEEN UNCITRAL AND ICSID

Broadly speaking, no arbitration rules embedded any specific provision concerning submissions by non-dispute parties. The first attempts to introduce those procedural rights for communities came from disputes under the NAFTA agreement[xix] conducted through the UNCITRAL arbitration rules. In both cases *Methanex Corp. v. United States*[xx]and *United Parcel Service of America Inc. v. Canada*[xxi], the arbitral tribunals have admitted submissions from third parties despite neither the NAFTA nor the UNCITRAL provisions did not include this possibility. These first arbitral decisions paved the way for further development of the UNCITRAL rules with the adoption by the United Nation of the *Convention on Transparency in Treaty-based Investor-State Arbitration*[xxii] for the application of the UNCITRAL rules on Transparency as a strong illustration of how well amicus curiae filings have been welcomed as a modern legal instrument relating to investment arbitration. Along the same line of the UNCITRAL developments also the ICSID rules have been updated following the consolidation of the amicus curiae as an important procedural instrument not only for the incorporation of public concerns into arbitral awards but also for strengthening transparency. In fact, from the *Suez/Vivendi v. Argentina* case[xxiii] under the ICSID rules, the arbitral tribunal started to admit the involvement of local communities and their possibility to submit files and information regarding the case despite the absence of any specific provision. The tribunal stated that the power to permit the amicus curiae into the proceeding came from Article 44 of the ICSID Convention[xxiv] which gives the arbitral tribunal authority to decide on procedural issues not protected by the laws of the ICSID Convention. The tribunal found that the case in question was probably concerned with public interest matters since the water delivery and waste disposal systems of a major metropolitan area were implicated. Moreover, the arbitral tribunal argued that the approval of amicus submissions should be based on three fundamental criteria: the suitability of the subject-matter of the case; the suitability of the non-party in that case to serve as amicus curiae; and the process by which the amicus submission is submitted and considered[xxv]. As a matter of fact, amicus curiae and the right to submit queries and public concerns from local communities to arbitral tribunals have been formally introduced in the

jurisprudence of investment arbitration by inducing even the ICSID to edit its rules and by introducing the right for inquiries and submissions by non-dispute parties among the arbitration rules (the new paragraph 2 of Rule 37 came into effect on 10 April 2006).The amicus curiae and its evolution as a procedural right inside the jurisprudence of investment arbitration has had the unquestionable merit of having enabled the emergence of the concept of local population as an important player in the settlement of investment conflicts in international law[xxvi]. Such participation is independent from both the interests of the investor and in theory, of the State in dispute and it is capable of giving a voice to the interests of specific groups or communities which are particularly affected by the investment or on the contrary, to the general interests of the international community[xxvii].Thanks to the amicus curiae procedural instrument, local communities are starting to be invoked in international arbitrations dealing with international investments. Although it just represents a partial instrument of participation, local communities seem to be getting closer and closer to being recognised as a legal entity with the legitimacy to assert their rights in the international investment landscape.

CONCLUSION

Human rights and democratic governance are founded on the premise that people should be able to judge and engage in governance decisions in order to preserve their constitutional rights if government agents fail to protect and promote the mutual public interests of citizens[xxviii]. If we pay attention to the foreign investments scenario, especially in the energy industries, local communities seem to be absent players. Although they have a lot at stake, the international investment regime has remained almost opaque to them. But it is important to outline how the academic literature has strongly pointed out that international investment law has a relational nature. There is a relational foreign investment law[xxix] . The relationship between the actors involved in and affected by foreign investment projects is characterized and governed by how we define and include them giving constitutional relevance. And the progressive steps made in recognizing local communities as a proper legal entity in an international scenario that safely protects their rights and interests, shows us how the process of constitutionalizing those actors exist and is in progress. From the democratization of the investment decisions to the rising obligations upon investors and the important role played by investment arbitration, local communities are shaping their role as an institutionalizing actor in the investment paradigm.

Moreover, the doctrine of corporate customary law might lay the basis for the rising of corporation's commitments to assess the impact on the environment of their project and to generally respect indigenous rights. At the same time corporate customary law will require states to introduce these commitments into the domestic law and to make them binding. International investments are complex economic transactions deeply affecting the country culture, identity and social heritage. In order to overcome these problems, it is important to increase trust in foreign investments and to understand that only a more inclusive form of governance based on cooperation and participation can solve this challenge. The reform process would be difficult to achieve but the rewards will be proportional to the initiative.

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[v] C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) Convention No.169, which deals explicitly with the rights of indigenous and tribal peoples, is a legally binding international instrument subject to ratification. Today, 20 countries have ratified it. The provisions of Convention No. 169 are consistent with the provisions of the Declaration of the Rights of Indigenous Peoples of the United Nations, and the acceptance of the Declaration illustrates that the principles of Convention No. 169 are more generally recognized, even beyond the number of ratifications.

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[vii] Ibid.

[viii] The Equator Principles July 2020, A financial industry benchmark for determining, assessing and managing environmental and social risk in projects' (Equator-principlescom, 2020) <https://equator-principles.com/wp-content/uploads/2020/05/The-Equator-Principles-July-2020-v2.pdf> accessed 23 December 2020. Equato Principles Financial Institutions agree that the implementation of the Equator Principles will lead to the achievement of the United Nations Sustainable Development Goals (SDGs). In particular, they agree that, where possible, detrimental impacts should be avoided on project-affected habitats, populations, and the environment. If these effects are inevitable, they should be reduced and mitigated. Clients should have redress for human rights impacts or compensate for environmental impacts as necessary, and where residual impacts remain.

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