

University of Dundee

The Emergence of the ‘Social Licence to Operate’ in the Extractive Industries?

Heffron, Raphael; Downes, Lauren; Ramirez Rodriguez, Oscar M.; McCauley, Darren

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Abstract

The ‘social licence to operate’ (SLO) is a construct that has potential to transform the mining sector internationally. The SLO is increasing in importance because it can reduce all risks during the energy project life-cycle that are detrimental to the success of energy projects. This paper analyses how SLO’s are at first perceived by interdisciplinary energy scholars before examining the legal nature of an SLO and looking at the effectiveness of such an agreement from the perspectives of both the energy company and the local community. In essence, this research seeks to address what is the legal basis of an SLO. Further, an original case study on Columbia is presented which highlights the SLO in action and its transformative effect. The paper also engages in new debates around the relationship of SLOs to related energy concepts such as the energy justice and environmental impact statements, which are also vital to energy infrastructure development.

Keywords: Social-Licence-to-Operate; SLO; energy justice; energy life-cycle; extractive industries; Columbia

1: Introduction

At its simplest the ‘social licence to operate’ (SLO) refers to an energy company’s obligations to achieve societal acceptance of their activities.¹ The SLO is an unwritten agreement between the company and communities (or stakeholders) in which societal support is required to enable the company’s legally-granted operations. The SLO is in addition to the legal and/or environmental permit or licence granted to the energy company by the mineral or landholder.²

While not exclusive to the natural resources sector,³ the SLO is most commonly associated with the extractive industries – the latter we define as including all energy resources, i.e. including natural resources, and oil, gas, coal.⁴ This association has been attributed to this industry sector due to the exploitative, and environmentally and socially damaging nature of natural resource exploration.⁵

The SLO is often associated with the sites of activity and infrastructure location of energy projects.⁶ In this paper, “energy projects” and “resources projects” are projects within the energy life cycle – from natural resource extraction to decommissioning, and include fossil fuels and low carbon energy sources.⁷ However, SLO has also been used in terms of enabling entire industries to operate. For example, the Australian Prime Minister recently stated, “*The gas companies – I have no doubt – are very well aware they operate with the benefit of a social licence from the Australian people...And they cannot expect to maintain that if while billions of dollars of gas are being exported, Australians are left short.*”⁸ This statement was made with regard to Australia’s liquefied natural gas (LNG) exporters choosing to export Australian gas rather than supply it to the domestic market.

Failure to obtain the SLO can present operational risks that are detrimental to the success of energy projects. Public opposition to resources projects has been linked to project

¹ The term SLO is not restricted to the energy sector. In this article, we use the term ‘energy companies’ to include upstream (resource extraction and exploitation including project development) and downstream (energy delivery).

² Jason Prno, ‘An analysis of factors leading to the establishment of a social licence to operate in the mining industry’ (2013) 38 Resources Policy 577; Emma Wilson, ‘What is the social licence to operate? Local perceptions of oil and gas projects in Russia’s Komi Republic and Sakhalin Island’ (2016) 3(1) The Extractive Industries and Society 73.

³ Geert Demuijnck and Bjorn Fasterling, ‘The Social Licence to Operate’ (2016) 136 Journal of Business Ethics 675; Richard Parsons, Justine Lacey & Kieren Moffat, ‘Maintaining legitimacy of a contested practice: How the minerals industry understands its ‘social licence to operate’ (2014) 41 Resources Policy 83.

⁴ Kieren Moffat et al., ‘The social licence to operate: a critical review’ (2016) 89(5) Forestry 477; *Ibid*, Demuijnck and Fasterling, 2016, 675

⁵ *Ibid*, Moffat et al. 2016, 477

⁶ See e.g., Rolf Wüstenhagen, Maarten Wolsink, Mary Jean Burer. ‘Social acceptance of renewable energy innovation: An introduction to the concept’ (2007) 35(5) Energy Policy 2683; John Colton, et al., ‘Energy Projects, Social Licence, Public Acceptance and Regulatory Systems in Canada: A White Paper’ (2016) University of Calgary, The School of Public Policy, 9(20) SPP Research Papers, 34; Dan van der Horst, ‘NIMBY or not? Exploring the relevance of location and the politics of voiced opinions in renewable energy siting controversies’ 35(5) Energy Policy 2705.

⁷ See e.g., *Ibid*, Colton, et al, 2016, 34.

⁸ Paul Karp, ‘Gas companies risk ‘social licence’ by failing to supply domestic market, Turnbull says’ (14 March 2017) *ABC News* <www.theguardian.com/australia-news/2017/mar/15/gas-companies-risk-social-licence-by-failing-to-supply-domestic-market-turnbull-says> accessed 17 May 2017.

cancellations,⁹ resulting in significant financial consequences (as will be highlighted in the case study of Columbia later). A brief example, is the cancellation of a coal seam gas project in Queensland, Australia, (attributed to public opposition) resulted in a pre-tax write down of \$600 million.¹⁰ Given the magnitude of the consequences arising from a company's failure to obtain the SLO, it is not surprising that the SLO is beginning to be considered as the key risk in the mining sector. EY (the global accounting firm) ranks the SLO has number 4 in its 2016–2017 list of the top ten risks in the mining and minerals sector (it was ranked number 5 in the previous year).¹¹

In the context of the energy sector from a holistic perspective, the SLO may be needed for any type of energy activity across the energy life-cycle; for the mining sector, it includes the mining life-cycle which includes, prospectors license, mining claim, lease of mine, advanced exploration, mineral production, rehabilitation of mine, closure plan and financial assurance. It will increase the practice of justice in the energy sector and increases the practice of distributional, procedural, recognition and restorative justice. In essence the SLO can play a significant role in ensuring energy justice exists and is applied for a given energy activity – energy justice can be defined simply as the application of human rights across the energy life-cycle.¹² As identified in the literature, the SLO will mainly operate and exist when the energy activity or infrastructure is in operation and when it is then decommissioned.¹³

While in some of the social science literature, the SLO is viewed as external to the legal system, this notion is not entirely true, and it is fast emerging as a key legal contract (in a variety of forms) in order to begin operations for an energy company. Section 2 of this paper provides a brief introduction to the SLO construct. Section 3 examines the legal context of the SLO. Then a case study on the SLO and Columbia is presented and this provides significant originality in the exploration of this underexplored concept within energy literature. Columbia was chosen for three main reasons: (1) it represents a country from the Global South that has received limited attention in energy research; (2) it has significant mining resources and activities; and (3) there are unique but potentially far-reaching activities in relation to the SLO. Finally, the paper concludes and highlights the next steps forward for the SLO in the energy sector and links back to how it is now becoming a key tool in increasing the practice and application of energy justice in the energy sector.

⁹ See e.g., Financial Post Staff, 'Arrested Development: A searchable database of billions of dollars in stalled or cancelled resource projects' *Financial Times* (8 December 2016) <<http://business.financialpost.com/news/energy/arrested-development-a-searchable-database-of-billions-worth-of-stalled-blocked-and-cancelled-resource-projects>> accessed 17 May 2017; _____, 'Coal seam gas licences cancelled after AGL reaches buyback deal with NSW Government' (6 July 2016) *ABC News* <www.abc.net.au/news/2015-07-06/agl-csg-licences-bought-back-hunter-sydney-illawarra/6597714> accessed 17 May 2017; Bart W. Terwel, Emma ter Mors, Dancker D.L. Daamen, 'It's not only about safety: Beliefs and attitudes of 811 local residents regarding a CCS project in Barendrecht' (2012) 9 *International Journal of Greenhouse Gas Control* 41.

¹⁰ Peter Hannam, 'AGL ditches Sydney CSG permit, but sticks with Gloucester project' (6 July 2015) *Sydney Morning Herald* <www.smh.com.au/environment/agl-ditches-sydney-csg-permit-but-sticks-with-gloucester-project-20150705-gi5s2c.html> accessed 17 May 2017.

¹¹ EY, 'Top 10 business risks facing mining and metals, 2016–2017' (2016) <www.ey.com/Publication/vwLUAssets/EY-business-risks-in-mining-and-metals-2016-2017/%24FILE/EY-business-risks-in-mining-and-metals-2016-2017.pdf>.

¹² Heffron, R. J. and Talus. K. 2016. The Evolution of Energy Law and Energy Jurisprudence: Insights for Energy Analysts and Researchers. *Energy Research and Social Science*, 19, 1-10.

¹³ Raphael J. Heffron and Darren McCauley, "The Concept of Energy Justice across the Disciplines," *Energy Policy* 105 (2017). 658-667

The energy sector is increasingly aware of the need to ensure that practices are sustainable for the long term. This paper argues that SLO is the main mechanism for improving the sustainability of the extraction industries.¹⁴ Over 80% of the world's energy sources come from fossil fuels that require sustainable extraction activities.¹⁵ The emergence of modern renewable energy is also closely associated with a high demand in extracted materials for the construction of wind turbines for solar panels.¹⁶ The effective application of energy justice principles in the extractive industries offers a major opportunity to ensure social acceptability and long-term environmental protection.

SLO is undeniably emerging as a key mechanism for achieving the successful application of energy justice. The energy justice framework encourages companies to consider the impact of their activities from a whole systems perspective.¹⁷ It is not designed to reject or oppose ongoing activities such as the extractive industries. Its primary objective is to encourage existing activities such as extraction to be more socially and environmentally aware. This is achieved through the application of distributional, procedural, recognition and restorative principles. Energy companies and governments must work together to enforce these principles throughout energy systems. The extractive industries are often overlooked or underemphasized, in contrast to production oriented activities which often take place in more developed countries.¹⁸ The SLO is the framework for delivering a more systematic compliance with these principles.

The crux of this paper is the investigation of the ways in which SLO can be used as a legal framework for the application of energy justice and long-term sustainability. The distributive dimension asks energy companies to consider the inequalities associated with the development of their extractive activities. While, legal scholarship has reinforced the need for explicit reflection on procedural dimensions when extractive industries approach communities who are hosting their operations.¹⁹ Whilst there is evidence of improvements in this area, the case study on Columbia shows how companies could further improve their work in this area.

Recognition justice challenges companies to consider the broader framework of human rights. This goes beyond simply ensuring that the correct processes of engagement with the community is enacted. The application of human rights is considered in detail with regards to the case study on Columbia below. And lastly, the extractive industries are increasingly cognizant of the need to actively involve themselves in restorative processes. Focus in the literature tends to be on the environment.²⁰ The SLO reminds us that restoration is equally needed for the affected societies. These dimensions are assessed in relation to the case study on Columbia, starting with a more detailed consideration of the current understanding of SLO in existing literature.

¹⁴ Sara Bice and Kieren Moffat, "Social Licence to Operate and Impact Assessment," *Impact Assessment & Project Appraisal* 32, no. 4 (2014).

¹⁵ IEA, "World Energy Statistics 2016," (Paris 2016).

¹⁶ IRENA, "Remap: A Roadmap for a Renewable Energy Future," (Abu Dhabi 2016).

¹⁷ Raphael J. Heffron and Darren McCauley, "Achieving Sustainable Supply Chains through Energy Justice," *Applied Energy* 123 (2014)

¹⁸ BK Sovacool, "Countering a Corrupt Oil Boom: Energy Justice, Natural Resource Funds, and Sao Tome E Principe's Oil Revenue Management Law," *Environmental Science & Policy* 55 (2016).

¹⁹ Raphael Heffron and Gavin Little, eds., *Delivering Energy Law and Policy in the EU and US* (Edinburgh: Edinburgh University Press, 2016).

²⁰ M. Hamilton, "Restorative Justice Activity Orders: Furthering Restorative Justice Intervention in an Environmental and Planning Law Context?," *Environmental and Planning Law Journal* 32, no. 6 (2015).

2: What is the SLO?

2.1: SLO in the Literature

SLO describes the relationship between corporations and the communities and societies in which they operate.²¹ The literature distinguishes SLO as a *societal* licence from that of a *legal* licence granted under the law. As a societal licence, the SLO is viewed as being external to the legal permits and licences to conduct energy operations, in which the right to conduct operations are not granted by the state but rather are approved by the local community.²² According to this view, SLO is not a legal construct. Instead, SLO is an unwritten obligation by an energy company to communities and society that exists without written legal authority.²³ This reflects the literature on SLO to-date. It is only recently that legal scholars have turned their attention to this concept as there has been the realisation that it contributes to increased energy justice and also since it is taking the form of a legal contract.

The SLO could trace its roots philosophically from Rousseau and Locke who both wrote on the ‘social licence’, i.e. the concept of the social contract is where society supports ruling government activities when societal needs are met.²⁴ In theory in the past scholars have viewed the social contract as sitting alongside the legal agreement/licence for exploration and exploitation activities. However, the SLO concept and its practice has suffered from not being well-defined.

One scholar has attributed the term ‘SLO’ to Jim Cooney, a Canadian mining company executive, who first used it in 1997.²⁵ Although the initial use of the phrase was metaphorical, it was subsequently adopted by the mining industry.²⁶ And now while it has been in use over the past 20 years, a standardised definition of SLO has yet to emerge.²⁷ An example of some definitions of SLO include:

- “the demands on and expectations for a business enterprise that emerge from neighborhoods, environmental groups, community members, and other elements of the surrounding civil society”²⁸,
- “a community’s acceptance or approval of a project or the project operator’s ongoing presence in the community”²⁹;
- “exist[ing] when a mining project is seen as having the broad, ongoing approval and acceptance of society to conduct its activities”³⁰.

²¹ Parsons, Lacey & Moffat. 2014, 83

²² *Ibid*, Wilson, 2016, 73

²³ *Ibid*, Wilson, 2016, 73; *Ibid*, Parsons, Lacey & Moffat. 2014, 83

²⁴ This idea is noted in *Ibid*, Wilson, 2016, 73– who cites: John Morrison, *The Social License : How to Keep Your Organization Legitimate* (2014, Palgrave Macmillan UK).

²⁵ See Chilenye Nwapi, ‘Can the Concept of Social Licence to Operate Find its Way into the Formal Legal System?’ (2016) 18 *Flinders Law Journal* 349, 350; *Ibid*, Prno, 2013, 577.

²⁶ Robert G Boutilier, ‘Frequently asked questions about the social licence to operate’ (2014) 32(4) *Impact Assessment and Project Appraisal* 263, 263.

²⁷ *Ibid*, Nwapi, 2016, 349, 355

²⁸ Neil Gunningham, Robert A Kagan and Dorothy Thornton, ‘Social Licence and Environmental Protection: Why Businesses go Beyond Compliance’ (2004) 29(2) *Law and Social Inquiry* 307, 308.

²⁹ *Ibid*, Nwapi, 2016, 349, 355

³⁰ *Ibid*, Prno, 2013, 577

One can see that these three definitions all have a particular bias, with a focus in essence on a particular community. This article upon its review of the literature, the development of the energy sector and the provision of a case study will present a definition of the SLO.

2.2: SLO and its Relationship with Similar Constructs

A reason for the lack of an agreed conceptual definition of the SLO is because of its association with similar concepts related to the energy sector. SLO is commonly associated with notions such as corporate social responsibility (CSR),³¹ social impact assessment,³² legitimacy,³³ stakeholder engagement,³⁴ social contract theory³⁵ and sustainability (or sustainable development)³⁶ and energy justice (more recently so).³⁷ It is from this point that it can be determined that perhaps its meaning for the energy sector is not clear because scholars in the energy sector have not taken ownership over the term and how it applies in the energy sector and its importance.

In terms of the latter associations, the SLO could be viewed as the outcome of these concepts and activities which could explain SLO's close link with these terms. However, this is to ignore the 'activity' of the SLO itself and its impact. For example, one perspective states that the SLO is the result of a company undertaking CSR, i.e. that is, where a company engages in CSR, the community may grant the SLO.³⁸ The close association of these concepts are also observed in the New Zealand Sustainable Business Council's observation of actions that support the SLO: "*Having an easily communicable sustainability strategy and transparent, credible reporting can assist businesses to build trust, improve brand and reputation, realise opportunities and lower risk [to gain or maintain SLO]*".³⁹

However, it is through the concept of energy justice that the importance of the SLO concept to the energy sector is emerging.⁴⁰ As stated earlier, the practice of the SLO has a close association with the core tenets of energy justice, i.e. procedural, distribution and recognition justice. The energy justice framework places the SLO in the development of energy infrastructure chain as per below in Figure X. New energy infrastructure can be built across the energy life-cycle (i.e. from extraction, to production, top operation, to supply and to waste management – from cradle to grave) and for each activity a SLO will be needed. As the case study of Colombia will show, even the poorest communities will no longer accept the

³¹ *Ibid*, Wilson, 2016, 73; Jason Prno & D Scott Slocombe, 'A Systems-Based Conceptual Framework for Assessing the Determinants of a Social License to Operate in the Mining Industry'(2014) 53 *Environmental Management* 672; *Ibid*, Parsons, Lacey, Moffat, 2014, 83

³² Airong Zhang and Kieren Moffat, 'A balancing act: The role of benefits, impacts and confidence in governance in predicting acceptance of mining in Australia' (2015) 44 *Resources Policy* 25; *Ibid*, Demuijnck and Fasterling, 2016, 675

³³ *Ibid*, Demuijnck and Fasterling, 2016, 675

³⁴ *Ibid*, Parsons, Lacey, Moffat, 2014, 83; *Ibid*, Demuijnck and Fasterling, 2016, 675

³⁵ *Ibid*, Demuijnck and Fasterling, 2016, 675

³⁶ John R Owen and Deanna Kemp, 'Social licence and mining: A critical perspective' (2013) 38 *Resources Policy* 29.

³⁷ *Ibid*, Heffron and McCauley, 2017.

³⁸ Robert Boutilier, 'Untangling CSR and Similar Concepts' (n.d.) Australian Centre for Corporate Social Responsibility (ACCSR) <<http://accsr.com.au/untangling-csr-and-similar-concepts/>> accessed 10 June 2017.

³⁹ New Zealand Sustainable Business Council, *Social Licence to Operate Paper* (2013) 2 <https://www.sbc.org.nz/_data/assets/pdf_file/0005/99437/Social-Licence-to-Operate-Paper.pdf>.

⁴⁰ As highlighted by Heffron and McCauley, 2017.

behaviour of the past from energy companies, they want energy justice and they want it supported by the law (a legal “social contract” i.e. a written SLO).

3: Developing the Legal Nature of the SLO

3.1: Introduction

In essence the main reason to develop the legal nature of the SLO is to ensure it can be enforced. Too often energy companies (particularly, Multinational Companies (MNCs)) have not delivered in the past and there are numerous examples. The SLO needs to be binding, and the energy companies need to be accountable and also stakeholders need to be able to hold energy companies accountable. However, the incorporation of SLO into the legal regime is challenging.

The lack of standard definition and the fact SLO is not yet a legal construct brings to question issues of regulation and enforcement of an abstract notion. The legal foundation and legal treatment of factors that contribute to SLO are explored in this section. It has been highlighted already in academic literature that the ‘SLO’ has not been explored extensively in research.⁴¹ It has been suggested that SLO’s similarity to other concepts, such as social contract theory (and those listed in earlier in Section 2), contributes to this lack of research on the concept. In essence, to some degree, the SLO concept as has been researched, but under the auspices of other concepts.⁴²

Significantly it has been held that mere compliance with the legal licence and supporting laws – such as abiding by environmental laws or conducting environmental or social impact assessments – can be insufficient to establish a SLO.⁴³ That is, a legal licence is not enough to guarantee the conduct of operations – a social licence, granted by the community, is now also required. The extra-judicial nature of SLO has led to criticism of the concept, with the assertion that it actually conflicts with the rule of law.⁴⁴ In essence, does an SLO ask too much of an energy company? A Canadian think tank, has argued that SLO could be inconsistent with the notion of legal order:

“Thinking of social licence to operate as a new quasi-legal requirement on companies, though, carries with it some extremely dangerous underlying assumptions. These become apparent as soon as one thinks again of what it measures: the risks of legal changes adverse to a business’s operations and of extra-legal disruptions of business activities. To say that businesses operating in Canada should be subjected to a shifting social licence to operate is to say that businesses should face risks of legal changes that damage their business interests and of extra-legal disruption of their business activities by those opposed to them. To put it bluntly, any overly enthusiastic embrace of social licence to operate in its mistakenly transformed senses is actually a rejection of the rule of law and a suggestion that Canada should become a less well-ordered society.”⁴⁵

⁴¹ *Ibid*, Demuijnck and FASTERLING, 2016, 675

⁴² *Ibid*, Demuijnck and FASTERLING, 2016, 675

⁴³ *Ibid*, Prno and Slocombe, 2014, 672

⁴⁴ *Ibid*, Nwapi, 2016, 349

⁴⁵ Dwight Newman, Macdonald-Laurier Institute, ‘Commentary: Be Careful What You Wish For: Why Some Versions of “Social Licence” are Unlicensed and May be Anti-Social’ (November 2014) 3.

A similar view was expressed by the Business Council of British Columbia:

“If an aggressive social campaign questions the legitimacy of a formal review process, then we have remedies, political and legal, to improve the review process. We should not discard the formal process on the belief that direct civil action by public interest groups somehow represents a more democratically sound approach.”⁴⁶

However, the view that SLO is entirely separate to the law is not correct, it may have originated that way but it is fast becoming necessary and the views expressed above clearly have a corporate bias. Hence, although the SLO may be external to the legal licence for energy projects, the law, in fact, may give effect to the SLO particularly when one considers the increasing success and application of energy justice, and some related issues are explored below.

3.2: Legal Regulation of SLO Factors

The social science literature has identified a number of factors that enable an SLO.⁴⁷ While standardised criteria are lacking, inferences can be made of minimum standards that support establishment and maintenance of an SLO.⁴⁸ Here, several of these minimum standards that can be observed in legal governance of natural resource exploration and exploitation, and which support and maintain the SLO are explored:

- Procedural Justice;
- Mitigation of environmental and social harms/ Impact Assessments;
- Recognition Justice; and
- Enforcement/Perceived effectiveness of regulation and governance of resource activities.

3.2.1: Procedural Justice

Procedural justice is a common principle in the legal governance of energy development. Procedural fairness in the process of community engagement in decision-making touches upon the democratic ideal of procedural due process (notice and the right to be heard).⁴⁹ From a US jurisprudence perspective in the context of the natural resources industry, procedural due process protects citizens from government acting arbitrarily, in secrecy, or without the participation of affected citizens.⁵⁰ The idea of due process and public participation is also prominent in environmental law, which is essential to energy projects.

⁴⁶ Business Council of British Columbia, ‘Rethinking Social Licence to Operate – A Concept in Search of Definition and Boundaries’ (May 2015) 7(2) Environment and Energy Bulletin 1, 3.

⁴⁷ David Jijelava & Frank Vanclay, ‘Legitimacy, credibility and trust as the key components of a social licence to operate: An analysis of BP’s projects in Georgia’ (2017) 140 Journal of Cleaner Production 1077, 1078; 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; *Ibid*, Zhang and Moffat, 2015, 25; Justine Lacey et al., ‘The art and science of community relations: Procedural fairness at Newmont’s Waihi Gold operations, New Zealand’ (2017) 52 Resources Policy 245.

⁴⁸ *Ibid*, Jijelava and Vanclay, 2017, 1077, 1078

⁴⁹ Barry Barton, ‘Underlying Concepts and Theoretical Issues in Public Participation in Resources Development’ chapter 2 in Donald N Zillman, Alastair R Lucas and George (Rock) Pring, *Human Rights in Natural Resource Development* (2002 OUP).

⁵⁰ Robin Kundis Craig, ‘Due Process Challenges in Environmental and Natural Resources Law’ (2013) FSU College of Law, Public Law Research Paper, No. 453, 3.

Such due process was first proposed in 1987 in *Our Common Future - Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts Group on Environmental Law* (viewed as the document that set the foundation for the Rio Convention – Declaration on Environment and Development) (hereinafter referred to as *Our Common Future*).⁵¹ Due process is among the suggested environmental principles: “*States shall inform in a timely manner all persons likely to be significantly affected by a planned activity and to grant them equal access and due process in administrative and judicial proceedings*” (emphasis added).⁵²

Community engagement is part of that ‘due process’, i.e. procedural justice. It has even been advanced that the requirement for community engagement in project decision making “*may have attained the status of customary international law*”⁵³ due to its prominence. For instance, access to justice – the right to challenge decisions and seek and obtain redress for harm – is provided in a number of international legal instruments that require access to remedies in the event of environmental harm.⁵⁴ One such example is the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*. This treaty has been incorporated into EU and Member State law through Directive 2003/4/EC and Regulation EC 1367/2006, which set out means to enable procedural and substantive justice in environmental decision making.⁵⁵ Further the Aarhus Convention has been signed and ratified by 39 countries to-date.⁵⁶

The Aarhus Convention has three key pillars that support procedural justice directly and indirectly facilitate the development of SLO: (1) information access; (2) public participation in decision-making processes; and (3) access to justice in environmental matters.⁵⁷ Access to information can empower the public to participate in decision making process and voice concerns about legal licences and community impacts,⁵⁸ i.e. the legal licence requirements influence SLO outcomes.⁵⁹

The concept of public engagement in major energy projects can also be found in the permitting processes for energy projects of common interest (PCIs) under the EU’s Trans-

⁵¹*Ibid*, Barton, 2002; *see also* United Nations, World Commission on Environment and Development, *Our Common Future* (1987) <www.un-documents.net/our-common-future.pdf>

⁵² United Nations, World Commission on Environment and Development, *Our Common Future* (1987) article 6.

⁵³ *Ibid*, Nwapi, 2016, 349, 365

⁵⁴ George (Rock) Pring and Susan Y. Noé, ‘The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development’ 11 in Donald N Zillman, Alastair R Lucas and George (Rock) Pring, *Human Rights in Natural Resource Development* (2002 OUP).

⁵⁵ European Commission, ‘The Aarhus Convention: The EU & the Aarhus Convention: in the EU Member States, in the Community Institutions and Bodies’ (last updated 12 May 2017) <http://ec.europa.eu/environment/aarhus/legislation.htm>; *see also* European Commission, *Access to Justice in Environmental Matters* (2017) <<http://ec.europa.eu/environment/pubs/pdf/factsheets/accesstojustice/en.pdf>>.

⁵⁶ United Nations Treaty Collection, ‘Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters’ <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en#1 > accessed 9 October 2017.

⁵⁷*Ibid*, European Commission, ‘The Aarhus Convention: The EU & the Aarhus Convention: in the EU Member States, in the Community Institutions and Bodies’

⁵⁸ Neil Gunningham, Robert A Kagan and Dorothy Thornton, ‘Social Licence and Environmental Protection: Why Businesses go Beyond Compliance’ (2004) 29(2) *Law and Social Inquiry* 307, 329.

⁵⁹ *Ibid*, Gunningham, Kagan and Thornton, 2004, 307, 329

European Energy Infrastructure Regulation (TEN-E Regulation).⁶⁰ This regulation provides a framework for development of energy infrastructure interconnectivity in Europe, such as electricity interconnectors and transboundary natural gas pipeline networks. Annex VI of the TEN-E Regulation establishes *Guidelines for Transparency and Public Participation*. As explained by the European Commission, the TEN-E Regulation, “recognises that transparency and early and effective involvement of the public is essential for complex infrastructure projects to be approved quickly and effectively”.⁶¹ A current example of the public engagement process under the TEN-E Regulation can be observed for carbon dioxide (CO₂) transport projects, in which the European Commission commenced a public consultation on 24 May 2017.⁶²

A further issue in relation to procedural justice concerns land access. This issue concerns the terms upon which the energy/resource company enters the land of the private landholder to undertake licenced exploration/exploitation activities – this issue is explored in more detail in relation to a case study on Columbia in section five. The concept of fairness/due process is found in legislatively prescribed engagements between the natural resource company and community in land access legislation for energy projects, including the imposition of good faith negotiation standards. For example, the Australian state of Queensland’s *Land Access Code* sets out as a general principle that both the landowner and resource company are to “liaise...in good faith” in the negotiation of land access terms.⁶³ The requirement to negotiate in good faith is also found in Australia’s *Native Title Act 1993 (Cth)*, which governs access to Indigenous land.⁶⁴ For example, section 31 of the *Native Title Act* addresses the negotiation procedure and provides that the “negotiation parties must negotiate in good faith...”⁶⁵

3.2.2: Impact Assessments

Procedural fairness and public participation in decision making are also included in the legislative processes for impact assessments (IAs) of major projects – both environmental (EIA) and social (SIA). Through IAs, significant effects of projects are evaluated before government consent is issued so that strategies can be developed to minimise negative social and environmental impacts and maximise benefits.⁶⁶ Two examples are considered below but

⁶⁰ Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (TEN-E Regulation).

⁶¹ European Commission, *Guidance Document: Streamlining environmental assessment procedures for energy infrastructure Projects of Common Interest (PCIs)* (24 July 2013) <http://ec.europa.eu/environment/eia/pdf/PCI_guidance.pdf>

⁶² European Commission, Energy, ‘Give your views on plans to build CO₂ pipelines and reduce emissions’ (24 May 2017) <<https://ec.europa.eu/energy/en/news/give-your-views-plans-build-co2-pipelines-and-reduce-emissions>>.

⁶³ Queensland Government, Department of Natural Resources and Mines, ‘Land Access Code’ (September 2016) Version 2 <www.dnrm.qld.gov.au/__data/assets/pdf_file/0004/442633/land-access-code-2016.pdf>. The Code is promulgated under authority of section 36 of the Mineral and Energy Resources (Common Provisions) Act 2014 (QLD) 3.

⁶⁴ Australia *Native Title Act 1993 (Cth)* section 31; see also State of Queensland, Department of Natural Resources and Mines, ‘Guide to the Native Title Process’ (2015) <www.dnrm.qld.gov.au/__data/assets/pdf_file/0007/362698/native-title-process-guideline.pdf>.

⁶⁵ *Ibid*, Australia *Native Title Act 1993 (Cth)* section 31(1)(b).

⁶⁶ *Ibid*, Zhang and Moffatt, 2015, 25

it should be remembered that EIAs are now in operation in over 100 countries worldwide⁶⁷ and are now necessary to ensure finance for an energy project from the majority of lending institutions.

The EU

The European Union issued the EIA Directive in 2014, which requires Member States to “adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects”.⁶⁸ Major projects subject to the EIA Directive include certain energy and natural resources works.⁶⁹ Legislative mandate for public engagement in the EIA process can be found at the Member State level, such as in the UK’s Town and Country Planning (Environmental Impact Assessment) Regulations 2017, UK legislation that governs EIAs, with application to natural resource developments.⁷⁰ As explained by the UK government: “The aim of Environmental Impact Assessment is also to ensure that the public are given early and effective opportunities to participate in the decision making procedures”.⁷¹

SIAs are now part of the EIA process, hence it is clear that a ‘social’ element or agreement is already legislated for. An example of this is in the legislation of the Australian state of Queensland. SIAs must be undertaken when environmental impact statements are required, and this includes resource projects.⁷² Five social issues related to natural resource projects are covered by the Queensland SIA process: 1) engagement with community and stakeholders; 2) workforce management; housing and accommodation; 3) local content; 4) health; and 5) community wellbeing.⁷³

The SIA is the foundation for the required social impact management plan, which formalises the actions for managing negative social impacts and maximising community benefits and contributes to creation of SLO.⁷⁴ As explained by the Queensland government, “In Australian jurisdictions, there is strong industry support for the role of a ‘social licence to operate’ as a complement to the regulatory licence issued by government”,⁷⁵ and was described as “represent[ing] world best practice”.⁷⁶

⁶⁷ International Institute for Sustainable Development, ‘Environmental Impact Assessment Training Manual’ (2016) <<http://www.iisd.org/learning/eia/wp-content/uploads/2016/06/EIA-Manual.pdf>> 2 ; Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (2008), 23 ;

⁶⁸ Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 on the assessment of the effects of certain public and private projects on the environment, Article 2(1) (EIA Directive).

⁶⁹ EIA Directive, Annex II.

⁷⁰ UK Department for Communities and Local Government, ‘Guidance: Minerals’ (17 October 2014) <www.gov.uk/guidance/minerals>.

⁷¹ UK Government, ‘Guidance: Environmental Impact Assessment’ (6 March 2014) <www.gov.uk/guidance/environmental-impact-assessment>.

⁷² State of Queensland, Department State Development, Infrastructure and Planning, ‘Social Impact Assessment Guideline’ (July 2013) <<http://statedevelopment.qld.gov.au/resources/guideline/social-impact-assessment-guideline.pdf>>; State Development and Public Works Organisation Act 1971 (Qld); Environmental Protection Act 1994 (Qld).

⁷³ *Ibid.*, State of Queensland, ‘Social Impact Assessment Guideline’, 2013

⁷⁴ State of Queensland, Department of Infrastructure and Planning, ‘Social impact assessment: Guideline to preparing a social impact management plan’ (September 2010) <www.statedevelopment.qld.gov.au/resources/guideline/simp-guideline.pdf>.

⁷⁵ *Ibid.*, State of Queensland, Department of Infrastructure and Planning, 2010

⁷⁶ *Ibid.*, State of Queensland, Department of Infrastructure and Planning, 2010

Not only is the process of engagement provided by IA legislation important, but also the robustness of IA governance is essential in establishing the SLO. Research of the role of IAs in social acceptance of mining in Australia found that that public confidence in the governance of legislatively mandated IA processes (including compliance enforcement) was essential for the SLO of mining activities.⁷⁷ Confidence in the IA legal regime established a belief that industry would be held accountable for negative social and environmental impacts of their projects, which facilitated public support of projects.

Conversely, it has been asserted that the formalistic nature of the IA process is one that is inflexible and controlled by stakeholders external to the local community, which may hinder the establishment of the SLO.⁷⁸ This inflexibility could mean that even though the community may object to the project, approval is granted because compliance with the assessment process is achieved.⁷⁹ The formalistic nature may also reduce trust and engagement between the parties.⁸⁰ Thus, while IAs may contribute to the SLO, the formal IA process set out in law may undermine the establishment of the SLO. However, contrary views highlight the importance of concerns of the local communities being addressed through formal IA processes for example,; *“Citizens expect that the legislative and regulatory processes that are in place to protect the environment reflect their interests and values alongside the need to develop mineral and energy endowments for economic interest”* (emphasis added).⁸¹ The failure of legal processes to support these citizen expectations could therefore hinder the development of a SLO.

3.2.3: Recognition Justice: Human Rights

Recognition justice in this context is about the recognition of disaffected communities who own the property rights of land that will be affected by energy development. In many cases (but not always) there is a particular issue concerning indigenous communities who have a different relationship with the land owing to a way of life. Nevertheless, there are many human rights issues here and these also a factor in resource companies establishing and maintaining a SLO. Human rights, in the context of a SLO and energy projects, are addressed in the law. Two ways in which human rights are addressed in the energy sector are through the legal concept of Free Prior Informed Consent (FPIC) and industry self-regulation efforts through the Voluntary Principles on Security and Human Rights.

Human rights as a foundation of SLO has been associated with the legal concept of FPIC. FPIC seeks to address Indigenous people’s concerns about project impacts on their land, by empowering Indigenous landholders with the right to consent (or not) to the project activities.⁸² Such consent must be given freely and prior to project commencement.

In exercising this right, indigenous groups have been encouraged to formally document their consent, for example,; *“Indigenous peoples should express their consent in a formal, written agreement with the company or other formal documentation; [a]fter an indigenous*

⁷⁷ *Ibid*, Zhang and Moffatt, 2015, 25

⁷⁸ *Ibid*, Nwapi, 2016, 349, 363

⁷⁹ *Ibid*, Nwapi, 2016, 349, 363

⁸⁰ *Ibid*, Bice and Moffat, 2014, 257; Justine Lacey, ‘Can you legislate a social licence to operate?’(26 February 2016) The Conversation <<http://theconversation.com/can-you-legislate-a-social-licence-to-operate-10948>>.

⁸¹ *Ibid*, Zhang and Moffatt, 2015, 25, 32

⁸² *Ibid*, Nwapi, 2016, 349, 354

community formally provides its consent, a company must continue to engage with the community in order to maintain that consent -- and, thus, the company's social license to operate".⁸³ This notion is also found in Australia, in which agreements are delivered under the *Native Title Act*, including Indigenous Land Use Agreements.⁸⁴

FPIC can also be found in international documents, such as the International Labour Organisation's Indigenous and Tribal Peoples Convention 1989,⁸⁵ and in the UN Declaration on the Rights of Indigenous Peoples (2007).⁸⁶ Further, FPIC is observed in self-regulatory efforts as well, such as in CSR efforts, in which companies voluntarily incorporate human rights in their CSR frameworks.⁸⁷ FPIC has also been described as more clearly defined and easily understandable than SLO,⁸⁸ and is "*ensconced in international law*".⁸⁹

However, FPIC is also more narrow than SLO. First, FPIC is described as an acute or distinct action (one-off), whereas SLO requires continued community support that spans the life of an energy project⁹⁰ when in operation and the decommissioning phase. Second FPIC typically applies to engagements with indigenous peoples – being an indigenous right –⁹¹ rather than a right that applies to other groups as is the case with SLO.⁹² However, it should be noted that, FPIC has been extended beyond the context of rights of Indigenous people.⁹³ For example, the Economic Community of African States (ECOWAS) incorporated the FPIC principle in its 2009 *Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector*. There FPIC is a state obligation (extended to private entities acting for the state), whereas SLO extends to private enterprises.⁹⁴

Finally, distinction is also made between the FPIC principle and legal consent. While energy projects are authorised under a legal licence or permit, societal endorsement or approval – that is, consent of the public – is also required for operations to occur.⁹⁵ However, "[i]t 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'".⁹⁶

⁸³ Amy K. Lehr & Gare A. Smith, Foley Hoag LLP, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges* (July 2010, Foley Hoag eBook) 9 <http://solutions-network.org/site-ftp/files/2012/09/Implementing-a-Corporate-Free-Prior-Informed-Consent-Foley-Hoag.pdf>.

⁸⁴ See e.g., Australia Government, 'Indigenous Land Use Agreements' <www.austrade.gov.au/land-tenure/Native-title/indigenous-land-use-agreements> accessed 31 May 2017.

⁸⁵ International Labour Organisation, Indigenous and Tribal Peoples Convention 1989, Article 16; see also Toyah Rodhouse & Frank Vanclay, 'Is free, prior and informed consent a form of corporate social responsibility?' (2016) 131 *Journal of Cleaner Production* 785.

⁸⁶ See also Philippe Hanna & Frank Vanclay, 'Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent' (2013) 31(2) *Impact Assessment and Project Appraisal* 146, 147; *Ibid*, Nwapi, 2016, 349

⁸⁷ *Ibid*, Hanna and Vanclay, 2013, 785

⁸⁸ *Ibid*, Nwapi, 2016, 349

⁸⁹ Sara Bice, 'What Gives You a Social Licence? An Exploration of the Social Licence to Operate in the Australian Mining Industry' (2014) 3 *Resources* 62, 74.

⁹⁰ *Ibid*, Hanna and Vanclay, 2013, 785, 789

⁹¹ *Ibid*, Lehr and Smith, 2010, 9

⁹² Business Council of British Columbia, 'Rethinking Social Licence to Operate – A Concept in Search of Definition and Boundaries' (May 2015) 7(2) *Environment and Energy Bulletin* 1, 3 <www.bcbc.com/content/1708/EEBv7n2.pdf>.

⁹³ *Ibid*, Nwapi, 2016, 349, 366.

⁹⁴ *Ibid*, Business Council of British Columbia, 3; *Ibid*, Nwapi, 2016, 349,

⁹⁵ *Ibid*, Nwapi, 2016, 349, 357

⁹⁶ *Ibid*, Nwapi, 2016, 349, 357

Another mechanism that addresses human rights in energy project activities is the Voluntary Principles on Security and Human Rights.⁹⁷ The Voluntary Principles on Security and Human Rights are described as “the only human rights guidelines designed specifically for extractive sector companies”.⁹⁸ The Voluntary Principles, established by a consortium of governments, corporations and nongovernmental organisations, promote human rights standards to be used by security forces in the natural resources sector.⁹⁹ Companies then incorporate these principles into their operating standards, which provides a means of industry self-regulation (an idea which is explored later in this paper).

3.2.4: Distributive Justice: Legal Agreements and SLO

While the SLO is not established through a formal agreement between communities and project developers,¹⁰⁰ contracts can be used to document the conditions for the resource company’s SLO, and thereby provide tangibility to the SLO construct.¹⁰¹ These agreements typically address key SLO themes such as human rights, environment and social concerns,¹⁰² and address compensation and distribution of benefits.¹⁰³ The execution of these contracts by communities is viewed as a measurement of community support for resource company activities, providing tangibility to the SLO concept.¹⁰⁴

The implementation of contracts for SLO in the natural resources sector has been described as an evolution in law. It is one in which contract law has expanded beyond protection of investor rights to include consideration of communities impacted by natural resource operations¹⁰⁵ as outlined below:

“This contemporary contractual landscape shows that the law of contract in the extractive industries context cannot in the twenty-first century continue to be based on legal theories developed in the nineteenth century according to which ‘any private actor who is good enough to open his property to the public by putting it into the lines of commerce should not be discouraged by imposing even the most limited of social duties on his conduct’.¹⁰⁶

According to this view, social order and the rights of groups are inherent aspects of international human rights law, emphasising the rights of groups and the collective rather than rights of individual.¹⁰⁷ Another view is that community contracts have evolved as a

⁹⁷ Australian Government, Department of Industry, Innovation and Science, *Resources* section 4.4 <<https://industry.gov.au/resource/Programs/LPSD/Community-engagement-and-development/Best-practice/Pages/Business-and-human-rights.aspx>> accessed 31 May 2017.

⁹⁸ Voluntary Principles on Human Rights at www.voluntaryprinciples.org/ accessed 31 May 2017.

⁹⁹ *Ibid*, Australian Government, Department of Industry, Innovation and Science, *Resources* section 4.4

¹⁰⁰ *Ibid*, Nwapi, 2016, 349, 356

¹⁰¹ *Ibid*, Owen and Kemp, 2013, 29

¹⁰² James Gathii and Ibiwonke T Odumosu-Ayanu, ‘The Turn to Contractual Responsibility in the Global Extractive Industry’ (2015) 1 *Business and Human Rights Journal* 69.

¹⁰³ *Ibid*, Owen and Kemp, 2013, 29

¹⁰⁴ *Ibid*, Nwapi, 2016, 349, 371; *Ibid*, Owen and Kemp, 2013, 29.

¹⁰⁵ *Ibid*, Gathii and Odumosu-Ayanu, 2015, 69, 71,

¹⁰⁶ *Ibid*, Gathii and Odumosu-Ayanu, 2015, 69, 71, quoting Ira Nerken, ‘A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory’ (1977) 12 *Harvard Civil Rights-Civil Liberties Law Review* 297, 332.

¹⁰⁷ *Ibid*, Gathii and Odumosu-Ayanu, 2015, 72

mechanism to overcome the challenge of defining and measuring compliance of SLO in the natural resources sector through legal regulation.¹⁰⁸

While CDAs provide a means of tangibility for the conditions giving rise to a SLO, mere contractual compliance alone is not in itself sufficient to deliver and maintain a SLO:

“Issues may arise, for example, that fall outside an agreement that cause angst, anger and concern to parties to the agreement. It is the organisation’s response to these additional issues that also determine whether or not their apparent ‘social licence’ is maintained. Conversely, breaches of agreement conditions may not necessarily diminish the so-called ‘social licence’ if a company responds appropriately. For instance, if a company inadvertently damages cultural heritage but responds by way of immediate and respectful notification to elders, accepts fault and provides an apology, compensation or other acceptable measures in alignment with the terms codified in the agreement”.¹⁰⁹

4: SLOs in the Law

4.1: Community Development Agreements

SLO contracts, while typically called Community Development Agreements (CDAs),¹¹⁰ are known by many names.¹¹¹ Table 1 presents commonly used names for CDAs.

Table 1: Community Development Agreements Nomenclature

• Benefits Sharing Agreements (Chile)	• Indigenous Land Use Agreements (Australia)
• Community Contracts	• Landowner Agreements
• Community Development Agreements	• Participation Agreements
• Community Development Initiatives	• Partnership or Partnering Agreements
• Community Joint Venture Agreements	• Protocol Agreements
• Empowerment Agreements	• Shared Responsibilities Agreements
• Exploration Agreements	• Social Trust Funds (Peru)
• Investment Agreements (Mongolia)	• Voluntary Agreements
• Impact Benefit Agreements (Canada)	

Source: Constructed by the Authors (2017).¹¹²

These agreements may be bilateral (between the investor and community) or tripartite (among the investor, state and community).¹¹³ Establishment of the community agreement

¹⁰⁸ *Ibid*, Owen and Kemp, 2013, 29, 33

¹⁰⁹ *Ibid*, Owen and Kemp, 2013, 29, 33

¹¹⁰ World Bank, *Mining Community Development Agreements: Source Book* (March 2012, The World Bank) <http://siteresources.worldbank.org/INTOGMC/Resources/mining_community.pdf>; *Ibid*, Gathii and Odumusu-Ayanu, 2015, 69, 72

¹¹¹ *Ibid*, World Bank, *Mining Community Development Agreements: Source Book*, 2012

¹¹² Constructed by author using Environmental Resources Management, ‘Mining Community Development Agreements – Practical Experiences and Field Studies: Report for The World Bank’ (June 2010) 16 <<http://www.sds.org/wp-content/uploads/2011/06/CDA-Report-FINAL.pdf>>; World Bank, *Mining Community Development Agreements: Source Book* (March 2012, The World Bank) 5 <http://siteresources.worldbank.org/INTOGMC/Resources/mining_community.pdf>; Laura Wright and Jerry P Wright, ‘Developing Oil and Gas Resources On or Near Indigenous Lands in Canada: An Overview of Laws, Treaties, Regulations and Agreements’ (August 2012) 3(2) *The International Indigenous Policy Journal* Art. 5, 10.

may be initiated voluntarily by the energy/resource company.¹¹⁴ Despite the fact that CDAs are becoming more common,¹¹⁵ many CDAs are confidential and therefore are not readily accessible. However, two examples of CDAs that may be reviewed online include: Argyle Diamond Mine Participation Agreement (Australia) and the Ahafo Social Responsibility Agreement (Ghana).¹¹⁶ While a standard model CDA is yet to be seen, some general practices can be found in the accessible examples that are applicable across jurisdictions and communities.¹¹⁷

Several benefits are associated with the negotiated SLO contracts, such as: increased transparency in distribution of benefits and clarity of stakeholder roles and expectations, increased engagement and communication between the parties, empowering communities, improving CSR and sustainability outcomes.¹¹⁸ However, the agreement itself is not sufficient to maintain SLO—implementation and management of the contract also have important roles in continuance of the SLO.¹¹⁹

While resource companies may be required by law to put CDAs in place, the regulation may not extend to the specific contents of the CDA.¹²⁰ In addition (and as noted above), the agreement's provisions may be confidential. This lack of transparency may give the resource company an advantage in negotiation of future CDAs opposite community counterparties.¹²¹ CDAs set out rights and obligations of the parties, including dispute resolution procedures. Breach of the agreement would give rise to a claim by one of the contracting parties. Interestingly, the MMDA,¹²² proposes that material breach of a CDA should be linked to the mineral licence awarded by the government to the resource company.¹²³ This would enable a tripartite engagement, resulting in government intervention in CDA disputes, and linking the SLO as embodied in the CDA to the government licence.¹²⁴

¹¹³ *Ibid*, Gathii and Odumosu-Ayanu, 2015, 69

¹¹⁴ *Ibid*, World Bank, *Mining Community Development Agreements: Source Book*, 2012

¹¹⁵ Jennifer Loutit, Jacqueline Mandelbaum and Sam Szoke-Burke, *Emerging Practices in Community Development Agreements*, (February 2016, Columbia Center on Sustainable Investment) <<http://ccsi.columbia.edu/files/2016/02/Emerging-practices-in-CDAs-Feb-2016-sml.pdf>> 1

¹¹⁶ Argyle Diamond Mine Participation Agreement, <www.atns.net.au/objects/Agreements/Argyle%20MP.pdf>; Ahafo Social Responsibility Agreement (2011) <<http://www.sdsg.org/wp-content/uploads/2011/06/Ahafo-Social-Responsibility-Agreement.pdf>>; see also *Ibid*, Gathii and Odumosu-Ayanu, 2015, 69, 87; Peter D Cameron and Ernesto Correa, 'Towards the Contractual Management of Public-Participation Issues: A Review of Corporate Initiatives' in Donald N Zillman, Alastair R Lucas and George (Rock) Pring (eds), *Human Rights in Natural Resource Development* (2002 OUP).

¹¹⁷ Loutit, Mandelbaum and Szoke-Burke, 14

¹¹⁸ *Ibid*, World Bank, *Mining Community Development Agreements: Source Book*, 2012

¹¹⁹ *Ibid*, Nwapi, 2016, 349; World Bank, *Mining Community Development Agreements: Source Book* (March 2012, The World Bank) <http://siteresources.worldbank.org/INTOGMC/Resources/mining_community.pdf>; see also Skylar Zilliox and Jessica M Smith, 'Memorandums of understanding and public trust in local government for Colorado's unconventional energy industry' (2017) 107 *Energy Policy* 72, 75, noting importance of agreement implementation not just establishment of the agreement itself.

¹²⁰ Laura Wright and Jerry P Wright, 'Developing Oil and Gas Resources On or Near Indigenous Lands in Canada: An Overview of Laws, Treaties, Regulations and Agreements' (August 2012) 3(2) *The International Indigenous Policy Journal* Art. 5, 10.

¹²¹ *Ibid*, Wright, 2012, Art 5, 10

¹²² International Bar Association, *Model Mining Development Agreement v 1.0* (4 April 2011) Art. 22.2 <http://www.mmdaproject.org/presentations/MMDA1_0_110404Bookletv3.pdf>.

¹²³ *Ibid*, Gathii and Odumosu-Ayanu, 2015, 69, 90

¹²⁴ *Ibid*, Gathii and Odumosu-Ayanu, 2015, 69, 90

4.2: CDAs in Primary Law

Recognition of the importance of societal and community considerations in the development of major resource projects can be found in the law. In many cases, the requirements for CDAs are established in legislation, and can be found in jurisdictions such as Canada and Australia (regarding indigenous peoples) and a number of African nations (such as Nigeria, Kenya and Mozambique).¹²⁵

The International Bar Association initiated the Model Mining Development Agreement (MMDA) project in 2009 to establish a standardised mining agreement.¹²⁶ The MMDA is intended for use between mining companies and host governments, particularly of developing nations where mining laws are not well established or well implemented.¹²⁷ As explained on the MMDA's website, the mining contract extends beyond the requirements of the two contracting parties.

“While the project clearly recognizes that a mining development must be commercially viable to proceed, it also recognizes this is no longer the only issue around which contract negotiations should proceed. Rather, all parties to a negotiation should take a broader, and integrated, look at the relationship between the proposed project, the state and the local communities. The natural, social and economic environments around mining projects are also essential considerations today... it seeks to provide an agenda for negotiations based on a sustainable development objective that is common to all parties. Its public nature will also allow local communities and civil society groups to contribute in a sound manner to negotiation processes. By setting out a comprehensive and common template, it is hoped the project will enable and assist better structured negotiations, and better lasting results in mining projects”.¹²⁸

The model agreement contains provisions that address CDAs. Under the MMDA, the proposed scope of CDAs includes: distribution of benefits from project, mitigation of adverse impacts, how local development spend will be made, addressing environmental, social, and economic conditions both during and after project operations.¹²⁹

4.3: Agreements between Local Governments and Mining Companies

A recent development has occurred in the U.S. state of Colorado that could be viewed as a type of CDA—Memoranda of Understanding (MOUs). Unconventional gas exploration and drilling is regulated at the state level in Colorado. However, such industry activity is not universally supported at the state level¹³⁰. The Colorado Supreme Court has confirmed that state law pre-empts local regulation of unconventional gas.¹³¹ However, in an effort to have

¹²⁵ *Ibid*, Nwapi, 2016, 349, 361

¹²⁶ Mining Law Committee of the International Bar Association, ‘Model Mining Development Agreement Project’ (n.d.) <www.mmdaproject.org/?page_id=1373> accessed 16 May 2017.

¹²⁷ *Ibid*, Mining Law Committee of the International Bar Association, ‘Model Mining Development Agreement Project’ (n.d.)

¹²⁸ *Ibid*, Mining Law Committee of the International Bar Association, ‘Model Mining Development Agreement Project’ (n.d.)

¹²⁹ *Ibid*, International Bar Association, Model Mining Development Agreement, 2011., Art. 22.1

¹³⁰ *Ibid*, Zilliox and Smith, 2017, 72

¹³¹ *City of Fort Collins v Colorado Oil and Gas Association*, Supreme Court of Colorado Case (No. 15SC668, 2016); *City of Longmont v Colorado Oil and Gas Association*, 216 CO 29 (2016).

some control over local level activities, local governments have entered into MOUs with unconventional gas companies. The MOU make operations subject to local regulations through a contractual mechanism when the local governments do not have jurisdiction to legislate. Companies that enter into MOUs benefit from streamlined permitting¹³².

These MOUs set out best management practices for unconventional gas development. One example is found in the MOU between the Town of Erie, Colorado and Anadarko Petroleum Corporation, dated 28 August 2012, which establishes six best management practices are set out for unconventional gas development within the city limits.¹³³ The best practices address: setback of operations from buildings, prior notice of activity to landowners within ½ mile of location of operations; mobilisation and demobilisation plans; traffic management, mitigation of noise, light and dust; reclamation plan; and certain technical requirements for drilling and operations.¹³⁴ The communities and the oil and gas companies view the MOUs as a means to address community concerns and improve relationships between the parties.¹³⁵ That is, they are a means of establishing an SLO.

Research on the effect of the MOU process revealed that the MOU improved the community's trust of the local government, and not of the oil and gas company. This is because 'procedural justice' was enhanced, with the MOU improving transparency and public engagement, as the local governance board "*explicitly welcomed even critical public comments, made themselves available to citizens for conversations, and provided more information on the town website*".¹³⁶ Interestingly, while these terms are established in the MOUs, tension still remains between the local communities and government and state governments. For example, it has been reported the state regulator has refused to include MOU best practices in the Colorado state permits. This has caused local governments and communities to question why the state would exclude points that are important to the local population.¹³⁷ This highlights the tension between local regulation/community expectations and the authority of the distantly removed state regulator.

Finally, MOUs have been used in Colombia, as well. Both as public-private partnerships to address extreme poverty¹³⁸ and as agreements between nations (Colombia as a coal producer and the Netherlands as the coal consumer).¹³⁹

¹³² *Ibid*, Zilliox and Smith, 2017, 72

¹³³ Memorandum of Understanding between the Town of Erie and Kerr-McGee Oil and Gas Onshore LP, Appendix A Best Management Practices for Locations Within Erie Town Limits (28 August 2013) <<https://dspace.library.colostate.edu/handle/11124/170241>>.

¹³⁴ *Ibid*, Memorandum of Understanding between the Town of Erie and Kerr-McGee Oil and Gas Onshore LP, 2013

¹³⁵ Tayvis Dunnahoe, 'Colorado communities collaborate with operators' (13 December 2013) *Oil and Gas Journal* <www.ogj.com/articles/uogr/print/volume-1/issue-4/colorado-communities-collaborate-with-operators.html> accessed 16 May 2016.

¹³⁶ *Ibid*, Zilliox and Smith, 2017, 72, 79

¹³⁷ Whitney Bryen, 'Erie questions validity of Encana agreement following state's cool response: Oil and gas commission refuses to back 11 of 18 agreement terms' (16 February 2016) *Daily Camera* <www.dailycamera.com/erie-news/ci_29525407/erie-questions-validity-encana-agreement-following-states-cool>.

¹³⁸ Oscar Ramirez, '*Mining and Hydrocarbons in Colombia: Is now the time to join efforts as one industry to overcome extreme poverty?*' (21 June 2017) Presentation, Energy Summer School, CCLS, Queen Mary University of London.

¹³⁹ Minminas, 'Governments of Colombia and the Netherlands sign memorandum of understanding on mining' (6 May 2015) <<https://www.minminas.gov.co/web/ingles/noticias?idNoticia=1191021>>.

4.4: Contract Duration Challenges

The lengthy lifespan of energy projects can present long term challenges for the SLO. Unanticipated issues may arise through the course of the contract and community values and priorities may change, which could lead to reduced support for the energy company's operations. A key example of an intergenerational challenge can be seen in the operations of a copper mine in Papua New Guinea, where the SLO was lost across the generations.¹⁴⁰ Although an agreement was established in 1967, subsequent generations in the local community were not supportive of the contract's terms, viewing the distribution of funds under the contract to be inequitable as they favoured primary, but not secondary, landowners and this resulted in the mine being attacked in protest in 1988 and forcing its closure.¹⁴¹ This illustrates the risks associated with formalised agreements, rigidity can "constrain thinking," which ultimately limits "the capacity of the parties to adapt to changing circumstances".¹⁴²

The issue of intergenerational SLO has been described as being best managed by ensuring continued support and consent throughout the contract's life, rather than assuming consent is a one-time event at the signing of the contract.¹⁴³ Therefore, CDAs should be accompanied by a monitoring program, which includes ongoing engagement with local communities and stakeholders to "promptly" identify and address any changes or concerns.¹⁴⁴ Or CDAs should have expiry dates, which would necessitate renegotiation, thus enabling problems and modern community concerns to be addressed.¹⁴⁵

4.5: SLO – Industry and Institutional Activities (Soft Law)

Voluntary efforts of industry and institutions, are another means of supporting SLO. These actions reveal another source of SLO governance through self-regulation– codes and standards that are not legally binding. These 'civil regulations' have been described as industry self-regulation,¹⁴⁶ which mitigates the need for government intervention and legally enforced regulation.¹⁴⁷

When government regulates or legislates company activity, a company's non-compliance or breach of law could cause adverse publicity. Non-compliance could lead to public rejection or rescission of the company's SLO.¹⁴⁸ Thus, the advantage of a self-regulated means of establishing a SLO is avoidance of regulatory compliance, enforcement and audits.¹⁴⁹ However, industry self-regulation has been criticised for failing to establish uniformity in regulatory standards and for lacking mechanisms for enforcement. This means not all

¹⁴⁰ *Ibid*, Nwapi, 2016, 349, 371

¹⁴¹ *Ibid*, Nwapi, 2016, 349, 372

¹⁴² EISourceBook, *Good Practice Note: Community Development Agreements* (2012) <http://www.eisourcebook.org/cms/files/csr_m_good_practice_notes_on_cdas_document_final_260911.pdf> Part A, 1

¹⁴³ *Ibid*, Nwapi, 2016, 349, 372

¹⁴⁴ *Ibid*, World Bank, *Mining Community Development Agreements: Source Book*, 2012, 20

¹⁴⁵ *Ibid*, Nwapi, 2016, 349, 372

¹⁴⁶ David Vogel, 'Private Global Business Regulation' (2008) 11 Annual Review of Political Science 261.

¹⁴⁷ *Ibid*, Gunningham, Kagan and Thornton, 2004, 307, 308

¹⁴⁸ *Ibid*, Gunningham, Kagan and Thornton, 2004, 307

¹⁴⁹ *Ibid*, Bice and Moffat, 2014, 257

companies will adopt the suggested standards, or they may be selective in the standards they adopt.¹⁵⁰

Self-regulation of energy industry activities that facilitate SLO, both through international collaboration and industry efforts, are briefly explored below in Tables 2 and 3; it should be noted that these examples and the below discussion are not exhaustive.

Table 2. Sample of International Initiatives

Entity/Instrument	SLO Aspect	Brief Description
Voluntary Principles	Human Rights	Governments, Companies and NGOs that have established international standards for safety and security in extractive industry operations.
Extractive Industries Transparency Initiative	Transparency	Global best practices standard for governance and transparency of the oil, gas and mineral resources sectors.
U.N. Global Compact	Human Rights	Ten principles for sustainable corporate practices. Addresses human rights, labour, environment and anti-corruption.
International Finance Corporation (World Bank) - <i>Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets</i>	Stakeholder Engagement	Best practices for stakeholder engagement.

Source: Constructed by the Authors (2017).¹⁵¹

Table 3 Sample of Industry and Sector Initiatives

Sector	Role	Description
Shale Gas		
Center for Responsible Shale Development (CRSD)	Standard Setting and Certification	Certify companies against established standards.
Equitable Origin (EO) ¹⁵²	Benchmark and measure	Assist companies in benchmarking performance against EO's proprietary standards for energy projects. <i>Not shale gas specific.</i>
Mining		
International Council on Mining and Metals – <i>10 Principles</i>	Mining Industry Body in Australia	Sustainable development principles that companies must agree to adopt as condition of MCA membership.

Source: Constructed by the Authors (2017).¹⁵³

¹⁵⁰ Rachel Perks, 'How can public-private partnerships contribute to security and human rights policy and practice in the extractive industries? A case study of The Democratic Republic of Congo (DRC)' (2012) 37 Resources Policy 251, 252.

¹⁵¹ Constructed by author using 'The Voluntary Principles On Security And Human Rights' <<http://www.voluntaryprinciples.org/>> accessed 9 October 2017; 'Extractive Industries Transparency Initiative' (*Eiti.org*) <<https://eiti.org/who-we-are>> accessed 9 October 2017.; 'The Ten Principles | UN Global Compact' <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> accessed 9 October 2017.; *Stakeholder Engagement: A Good Practice Handbook For Companies Doing Business In Emerging Markets* (International Finance Corporation (IFC) 2007) <https://www.ifc.org/wps/wcm/connect/938f1a0048855805beacfe6a6515bb18/IFC_StakeholderEngagement.pdf?MOD=AJPERES> accessed 9 October 2017.

¹⁵² Equitable Origin, < www.equitableorigin.org/> accessed 16 June 2017.

4.6: SLO and Self-Regulation – International Efforts

Public-private partnerships (PPPs) are one means of self-regulation for CSR, which could lead to realisation of the SLO. Through PPPs, private and public sector entities collaborate to address social risks associated with energy/mining operations.¹⁵⁴ Some international PPP examples include: the Voluntary Principles on Security and Human Rights, and the Extractive Industries Transparency Initiative (EITI).

The Voluntary Principles on Security and Human was mentioned previously in the context of human rights and SLO, which addresses security and safety in the conduct of operations in the extractive industry.

The EITI, sets a global best practices standard for governance and transparency of the oil, gas and mineral resources sectors¹⁵⁵; as noted previously, transparency is one key factor that facilitates the SLO.. The U.S. State Department in relation to the EITI has stated that (in 2014, the U.S. became the first G8 country to join the EITI): “... [*The EITI*] is a voluntary initiative through which countries commit to publish reports on how the government manages the oil, gas, and mining sectors. These reports include a reconciliation of revenues paid by extractive companies and revenues received by governments. The process is managed in each country by a multi-stakeholder group of government, civil society, and company representatives”.¹⁵⁶ Therefore it is clear that there is an international initiative being taken towards the promotion of transparency and accountability in the resource extraction industry to allow countries, particularly developing countries to benefit from the exploitation of their resources.¹⁵⁷

4.7: SLO and Self-Regulation – Industry Efforts

Self-regulatory initiatives have also been undertaken by industry bodies, which seek to influence the SLO for the extractive industry. Consider, for example, the Australian mining industry’s trade organisation – the Minerals Council of Australia (MCA) – position on SLO:

*“The Australian minerals industry strongly supports the role of a ‘social licence to operate’ as a complement to a regulatory licence issued by government. To the minerals industry ‘social licence to operate’ is about operating in a manner that is attuned to community expectations and which acknowledges that businesses have a shared responsibility with government, and more broadly society, to help facilitate the development of strong and sustainable communities”.*¹⁵⁸

¹⁵³ Constructed by author using *Center for Responsible Shale Development*, 'Our Approach - Center For Responsible Shale Development' <<http://www.responsibleshaledevelopment.org/what-we-do/>> accessed 9 October 2017; Equitable Origin, <www.equitableorigin.org/> accessed 16 June 2017; *International Council on Mining and Metals (ICMM)*, 'ICMM 10 Principles' <<https://www.icmm.com/en-gb/about-us/member-commitments/icmm-10-principles>> accessed 9 October 2017.

¹⁵⁴ *Ibid*, Perks, 2012, 251.

¹⁵⁵ EITI, (n.d.) <<https://eiti.org/>> accessed 10 June 2017.

¹⁵⁶ U.S. Department of State, Extractive Industries Transparency Initiative (EITI)' (n.d.) <www.state.gov/e/enr/c56887.htm> accessed 10 June 2017.

¹⁵⁷ Elizabeth Kasekende, Charles Abuka and Mare Sarr, 'Extractive industries and corruption: Investigating the effectiveness of EITI as a scrutiny mechanism' (2016) 48 Resources Policy 117,118

¹⁵⁸ Minerals Council of Australia, 'Enduring Value: The Australian Minerals Industry Framework for Sustainable Development: Guidance for Implementation' (July 2005)

The MCA, as a means of industry self-regulation, has established sustainable development principles to which the Council's members must abide for MCA membership.¹⁵⁹ Based on the International Council on Mining and Metals' *10 Principles*,¹⁶⁰ these principles of sustainable development can be observed to address factors associated with establishing and maintaining SLO, such as:

- as upholding human rights (Principle 3);
- continual improvement in environmental performance (Principle 6); and
- social impact management in local communities (Principle 9).¹⁶¹

The International Council on Mining and Metals' 10 Principles have been benchmarked against several international standards: These include: the Rio Declaration, the Global Reporting Initiative, the Global Compact, OECD Guidelines on Multinational Enterprises, World Bank Operational Guidelines, OECD Convention on Combating Bribery, ILO Conventions 98, 169, 176, and the Voluntary Principles on Security and Human Rights.¹⁶²

Several self-regulation efforts can also be observed in the U.S. shale gas industry, in which industry organisations establish best practices for shale gas operations.¹⁶³ However, these are not without their critics. One example of self-regulation in the U.S.'s shale gas sector can be observed in the Center for Responsible Shale Development (CRSD) (formerly known as the Centre for Sustainable Shale Development)- See Case Study in Box 1.¹⁶⁴ The CRSD establishes industry standards performance standards and certifies company compliance with these standards.¹⁶⁵ From this case study it is clear that self-regulation efforts have the potential to bring different stakeholders together and although the current aim of the Trump administration is to scale back on federal environmental regulations, we can see that companies continue to "feel the need to earn the social license to operate."¹⁶⁶

Box 1. Center for Responsible Shale Development – Case Study

The Centre for Responsible Shale Development (CSRSD) is a non-profit organisation based in Pittsburgh, Pennsylvania. It has established 15 technical performance standards for environmental protection in shale gas development and certifies organisations as meeting those standards. The

<www.minerals.org.au/file_upload/files/resources/enduring_value/EV_GuidanceForImplementation_July2005.pdf>.

¹⁵⁹ *Ibid*, Minerals Council of Australia, 2015

¹⁶⁰ *Ibid*, Minerals Council of Australia, 2015

¹⁶¹ *Ibid*, Minerals Council of Australia, 2015

¹⁶² International Council on Mining & Metals, (n.d.) <www.icmm.com/en-gb/about-us/member-commitments/icmm-10-principles> accessed 10 June 2017.

¹⁶³ Don C Smith and Jessica M Richards, 'Social Licence to Operate: Hydraulic Fracturing-Related Challenges Facing the Oil & Gas Industry' (January 2015) 1(2) Oil and Gas, Natural Resources, and Energy Journal 81, 105 - 111.

¹⁶⁴ Center for Responsible Shale Development, 'History' (n.d.) <www.responsibleshaledevelopment.org/who-we-are/history/> accessed 10 June 2017; Don C Smith and Jessica M Richards, 'Social Licence to Operate: Hydraulic Fracturing-Related Challenges Facing the Oil & Gas Industry' (January 2015) 1(2) Oil and Gas, Natural Resources, and Energy Journal 81, 105.

¹⁶⁵ Center for Responsible Shale Development, 'What We Do' <<http://www.responsibleshaledevelopment.org/what-we-do/>>

¹⁶⁶ Amanda Waltz 'Susan LeGros on holding energy companies to a higher standard' (24 January 2017) <<http://www.nextpittsburgh.com/environment/susan-legros-holds-energy-companies-to-a-higher-standard-with-the-center-for-responsible-shale-development/>> accessed 10 October 2017.

CSRSD describes itself as “an alliance of energy producers and environmental organizations working together to demonstrate responsible stewardship of the environment and its resources”.¹⁶⁷

Shale gas operators may apply for CSRSD certification, certifying they meet the 15 performance standards. Certified companies agree to be subjected to well site visits and ongoing reviews during the two-year certification period. Reports on reviews and evaluations are available online, as a means of promoting transparency. Shell and Chevron are among companies that have been received certification.

CSRSD evolved from the Shale Gas Roundtable group established in 2011. The group established the Institute for Gas Drilling Excellence in 2012 to determine best practices for shale gas development in the region. In 2013, the Institute adopted the name Center for Sustainable Shale Development (CSSD). The organisation was renamed the Center for Responsible Shale Development in 2016 in order to “better reflect its mission and enhanced stakeholder engagement”.¹⁶⁸

The CSRSD is not without controversy. It has been accused of being a greenwashing activity, and criticised for having too close ties to the shale gas industry.¹⁶⁹ And the organisation’s previous name was subject to critique – with the use of the word ‘Sustainable’ being questioned for appropriateness.¹⁷⁰ Conversely, the CSRSD has been lauded in the media as a promising self-regulatory effort that could “hasten the expansion of fracking by making drilling more acceptable to states and communities that feared the environmental consequences”.¹⁷¹

4.8: Government Intervention when Self-Regulation is Insufficient

Complete reliance on self-regulation with regards to the effective implementation of the SLO can be questioned, Governments may decide to intervene and aim to improve industry self-regulation efforts and to strengthen accountability. One example is observed in mandatory disclosure rules for the extractive industries, which are currently addressed in the EITI. Both the U.S. (Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) and subsequent SEC rule which was judicially vacated)¹⁷² and EU (Accounting Directive)¹⁷³,

¹⁶⁷ *Ibid*, Center for Responsible Shale Development, <www.responsibleshaledevelopment.org/> accessed 16 June 2017.

¹⁶⁸ *Ibid*, Center for Responsible Shale Development, ‘History’ <www.responsibleshaledevelopment.org/> accessed 16 June 2017.

¹⁶⁹ Public Accountability Initiative, ‘Report: Big Green Fracking Machine’ (June 2013) <<http://public-accountability.org/2013/06/big-green-fracking-machine/>> accessed 16 June 2017; Joyce Gannon, ‘Watchdog group faults center for links to oil and gas industry (6 August 2014) *Pittsburgh Post-Gazette* <<http://powersource.post-gazette.com/business/2014/08/06/Watchdog-group-faults-center-for-links-to-oil-and-gas-industry/stories/201408060163>>.

¹⁷⁰ Marcellus Monthly, ‘April 2013’ www.marcellusprotest.org/sites/marcellusprotest.org/files/April_2013.pdf.

¹⁷¹ Kevin Begos, Associated Press, ‘Both sides agree on tough new fracking standards’ (20 March 2013) *U.S. News & World Report* <www.usnews.com/news/us/articles/2013/03/20/both-sides-agree-on-tough-new-fracking-standards>.

¹⁷² *American Petroleum Institute v. SEC* (2 July 2013) 1:12-cv-01668 (Dist. D.C.)

¹⁷³ European Commission, ‘Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance’ <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0034>>; see also Benjamin K Sovacool et al., ‘Energy Governance, Transnational Rules, and the Resource Curse: Exploring the Effectiveness of the Extractive Industries Transparency Initiative (EITI)’ (2016) 83 *World Development* 179.

have sought to expand certain disclosures under EITI practice.¹⁷⁴ It should be noted that the Dodd-Frank transparency rule was repealed in 2017.¹⁷⁵

Another example of government efforts to regulate self-regulation can be observed in an Economic Community of West African States (ECOWAS) harmonisation initiative. The ECOWAS harmonisation effort is intended to “[s]trengthen and consolidate the project to harmonize policies and mining codes in a context where the sub-region has the same mining resources and faces the same multinationals”.¹⁷⁶ EITI actions are among the standards included in the ECOWAS review.

Regulatory intervention by government may not always be a feasible option to address industry’s ineffective self-regulation. First, government must have the capability/expertise and appetite to enforce infringements, which it may not have, particularly in developing world nations where resources are a challenge.¹⁷⁷ Second, foreign investment liberalisation means many in-country resource companies are multinationals, and may be subject to minimal state control.¹⁷⁸ Corporate operations are often decentralised, with headquarters and stock exchange listings in countries different to that of the energy project operations, which has the effect of minimising accountability at the local level. The independence of multinationals may make regulatory enforcement (including sanctions) difficult, with the multinational entity having domestic domicile merely ‘on paper’.¹⁷⁹ Furthermore, one could criticise the SLO process itself and its usual application. For example, is too much focus placed on economic gains for local communities in lieu of strong protection of the natural environment?¹⁸⁰ The incompatible nature of economic development via resource extraction with environmental preservation provides a significant challenge to governments seeking to intervene as it could lead to disagreement, as seen between “market-centric and eco-centric perspectives.”¹⁸¹

What is the answer when self-regulation and government regulation are ineffective? Hybrid soft law regulatory models may provide solutions, such as those that involve the participation of industry and government, such as PPPs.¹⁸²

¹⁷⁴ EITI, ‘EITI statement on the SEC’s regulation on mandatory company disclosure’ (18 July 2016) <<https://eiti.org/news/eiti-statement-on-secs-regulation-on-mandatory-company-disclosure>>, EITI, ‘European Commission: Broader engagement with governance issues in natural resources’ (n.d.) <<https://eiti.org/supporter/european-commission>> accessed 11 June 2017.

¹⁷⁵ *H.J.Res.4, Providing for congressional disapproval under chapter 8 of title 5, United States Code, of a rule submitted by the Securities and Exchange Commission relating to "Disclosure of Payments by Resource Extraction Issuers* (P.L. 115-4); Roger Yu, ‘Trump signs legislation to scrap Dodd-Frank rule on oil extraction’ 14 February 2017 *USA Today* <<https://www.usatoday.com/story/money/2017/02/14/trump-scrap-dodd-frank-rule-resource-extraction-disclosure/97912600/>>.

¹⁷⁶ United Nations, Economic Commission for Africa, ‘Mainstreaming of International Initiatives in Mining Policies in West Africa’ (13 October 2015) <<http://www.uneca.org/stories/mainstreaming-international-initiatives-mining-policies-west-africa>>.

¹⁷⁷ *Ibid, Perks, 2012, 251, 252; see also Ibid, Vogel, 2008, 261, 263, citing Virginia Haufler A Public Role for the Private Sector* (Carnegie Endowment for International Peace, 2001).

¹⁷⁸ *Ibid, Perks, 2012, 251, 252; Elena Merino Blanco and Jona Razzaque, Globalisation and Natural Resources Law* (Edward Elgar Publishing 2011) chapter 5.

¹⁷⁹ *Ibid, Blanco and Razzaque, 2011, chapter 5*

¹⁸⁰ Marieke Evelien Meesters and Jelle Hendrik Behagel, ‘The Social Licence to Operate: Ambiguities and the neutralization of harm in Mongolia’ (2017) 53 *Resources Policy* 275

¹⁸¹ Claire Richert, Abbie Rogers and Michael Burton ‘Measuring the extent of a Social License to Operate: The influence of marine biodiversity in the oil and gas sector in Western Australia’ (2015) 43 *Resources Policy* 121

¹⁸² *Ibid, Perks, 2012, 251, 252*

5: Colombia: The SLO in the Mining-Energy sector.

The Mining-Energy sector has been one of the main drivers of the Colombian economy during the last thirteen years¹⁸³, particularly when the commodities prices were higher (2011-2014)¹⁸⁴. Although the Colombian Government has adjusted its macroeconomic strategy to incentivise other sectors of the economy to be less dependent on the hydrocarbons prices¹⁸⁵, they have still strongly supported the Mining-Energy sector, particularly the offshore industry¹⁸⁶ due to the limited oil reserves (*roughly five years more*)¹⁸⁷.

Nevertheless, it seems that the Mining-Energy sector does not have the acceptance of some part of the society and some local authorities (governments). From 2013¹⁸⁸, there have been a great number of consultation processes where local communities have rejected the exploitation of mines and hydrocarbons in their territories.¹⁸⁹ This issue has been further emphasised in highly unforeseen outcome where in Cajamarca's, the local community voted against perhaps one of the potentially largest gold mine in South America¹⁹⁰ in a striking outcome: 97,92 percent voted 'no' to the development in the polls¹⁹¹. This number is surprising given the pre-existing investment of USD \$19 million of Anglo Gold Ashanti's Corporate Social Responsibility expenditure in Cajamarca¹⁹² and the USD \$900 million invested by the same Company since 2006 in Colombia¹⁹³. After this precedent, 44 municipalities from 1101¹⁹⁴ have intentions to follow the same similar strategy, and ban

¹⁸³ Jorge Toro and others, 'El Choque Petrolero y sus Implicaciones en la Economía Colombiana', Banco de la República, Reportes del Emisor, <http://www.banrep.gov.co/docum/Lectura_finanzas/pdf/re_200.pdf> accessed on July 18 2017.

¹⁸⁴ Departamento Nacional de Planeación, 'Bases del Plan Nacional de Desarrollo 2014-2018', <<https://colaboracion.dnp.gov.co/cdt/prensa/bases%20plan%20nacional%20de%20desarrollo%202014-2018.pdf>> accessed on July 18 2017. Price data is available on Nasdaq <<http://www.nasdaq.com/markets/crude-oil.aspx?timeframe=7y>>

¹⁸⁵ Mauricio Cardenas, Minister of Finance and Public Credit, 'Economía colombiana en manos de todos' El Heraldo Journal <<https://www.elheraldo.co/mas-negocios/economia-colombiana-en-manos-de-todos-mauricio-cardenas-322927>> accessed on July 18 2017.

¹⁸⁶ Omar Ahumada, 'En Londres, el Gobierno busca impulsar búsqueda de petróleo en el mar', El Tiempo Journal <<http://www.eltiempo.com/politica/gobierno/agenda-de-la-visita-de-juan-manuel-santos-a-reino-unido-43777>> accessed on July 18 2017.

¹⁸⁷ Francisco Lloreda, 'Colombia podría comenzar a importar petróleo en 5 años: Francisco José Lloreda', Caracol Radio, <http://caracol.com.co/programa/2017/06/13/6am_hoy_por_hoy/1497360851_861533.html> accessed on July 18 2017

¹⁸⁸ Piedras, Municipality was the first municipality that rejected mining operations taking into account the arrival of Anglo Gold Ashanti. Angelica Cuevas, 'Hace un Año Piedras le dijo no a la minería: de que sirvió?' El Espectador Journal, <<http://www.elespectador.com/noticias/nacional/hace-un-ano-piedras-le-dijo-no-mineria-de-sirvio-articulo-512776>> accessed on 21 July 2017.

¹⁸⁹ Camilo Hernández, 'La minería va perdiendo 5 a 0 en las consultas populares, El Tiempo Journal', <<http://www.eltiempo.com/colombia/otras-ciudades/rechazo-a-la-mineria-en-las-consultas-populares-107078>> accessed on 21 July 2017. Cumaral, Cajamarca, Piedras, Tauramena and Cabrera are the municipalities that banned mining and petroleum projects.

¹⁹⁰ BBC Journal, 'Colombia minister in battle over Cajamarca mining ban', <<http://www.bbc.co.uk/news/world-latin-america-39425592>> accessed on 21 July 2017.

¹⁹¹ BBC Journal, 'Cajamarca, el pueblo de Colombia que le dijo no a la explotación minera', <<http://www.bbc.com/mundo/noticias-america-latina-39407877>> accessed on 21 July 2017

¹⁹² Juanita Velez, 'Los Errores de Anglo Gold Ashanti, La Silla Vacía website', <<http://lasillavacia.com/historia/los-errores-de-anglogold-ashanti-60365>> accessed on 21 July 2017.

¹⁹³ REUTERS, 'AngloGold suspends Colombia project after anti-mining vote', <<http://www.reuters.com/article/us-colombia-mining-idUSKBN17T3BH>> accessed in 21 July 2017.

¹⁹⁴ Departamento Nacional de Planeación (DNP) <<https://www.dane.gov.co/files/censo2005/provincias/subregiones.pdf>>

petroleum and mining projects in their territories through popular consultations; there are 15 initiatives to prohibit petroleum projects and 26 more to forbid mining activities.¹⁹⁵

However, a number of questions arise, why are these municipalities (i.e. local governments) appealing to a popular consultation to reject extractive industries in their territories? Are the Corporate Social Responsibility (CSR) or Sustainable Development Strategies (SDS) of the extractive companies not working? And why there is a constantly clash among the Central Government, Local Authorities and, also, the Judicial system regarding the extractive and petroleum regulation?

The problem in Colombia is the lack of energy justice in the energy sector. The *use of the land* and the *subsoil*¹⁹⁶; environmental care¹⁹⁷; allocation of royalties¹⁹⁸; local content¹⁹⁹; mining informality²⁰⁰; sustainable development and extreme poverty²⁰¹; and legal stability²⁰² are all part of the main reasons for the problems in the Mining-Energy sector in Colombia. Some communities in Colombia in essence want to see more the application of justice principles of distribution, procedural, and recognition in their energy sector and the application of restorative justice during the lifespan of an energy project. These communities are claiming that the national energy policies shall include their principal needs, interests and concerns. For instance, some experts²⁰³ argued that the feeling of local people is that the Government does not involve and include them from the beginning of the projects and, also, that there is a disconnection between the licensing process of a mining right and the planning of the use of the land. As a result, communities want their own agreement in place before energy development occurs. In essence what they advocate for as will be demonstrated in below in the section is a SLO with the company engaging in the activity.

In this section, the development of a SLO system in the energy sector is explored. Its background is through the law and the Constitutional High Court positions as is identified below and a number of key stages in its development are outlined in the proceeding sections.

5.1. Stage 1 - Legal structural division between the land and the sub-soil

¹⁹⁵ María Paula Rubiano, 'Así explotó el "boom" de las consultas populares', El Espectador Journal, <<http://www.elespectador.com/noticias/medio-ambiente/asi-exploto-el-boom-de-las-consultas-populares-articulo-695826>> accessed on 21 July 2017.

¹⁹⁶ BBC News, 'Colombia minister in battle over Cajamarca mining ban' <<http://www.bbc.co.uk/news/world-latin-america-39425592>> accessed on July 18 2017

¹⁹⁷ Camilo Hernández, 'La Minería va perdiendo 5 a 0 en las consultas populares', El Tiempo Journal, <<http://www.eltiempo.com/colombia/otras-ciudades/rechazo-a-la-mineria-en-las-consultas-populares-107078>> accessed on July 18 2017.

¹⁹⁸ *Ibid*, Rubiano, '2017

¹⁹⁹ Oscar Villadiego, 'Se equivocó Cajamarca?', El Tiempo Journal, <<http://www.eltiempo.com/opinion/columnistas/oscar-villadiego-medina/se-equivoco-cajamarca-104488>> accessed on July 18 2017.

²⁰⁰ Centro Regional de Empresas y Emprendimientos Regionales, CREER, 'Evaluación Integral Sectorial de Impactos en Derechos Humanos, La Minería que no se vé', Institute for Human Rights and Business, 2016, 73.

²⁰¹ United Nations Development Program, 'Programas en beneficio de las comunidades implementados por el sector de Hidrocarburos en Colombia, Línea de Base', Agencia Nacional de Hidrocarburos website <<http://www.anh.gov.co/Seguridad-comunidades-y-medio-ambiente/Documents/L%C3%ADnea%20de%20base%20PBC.pdf>> accessed on 18 July 2017.

²⁰² El Tiempo Journal, <<http://www.eltiempo.com/economia/sectores/consultas-populares-en-colombia-que-tienen-en-vilo-la-explotacion-minera-y-petrolera-95600>> accessed on July 18 2017.

²⁰³ Luis Alvaro Pardo Becerra, Economist and Mauricio Cabrera, World Wildlife Fund WWF, El Tiempo Journal <<http://www.eltiempo.com/colombia/otras-ciudades/rechazo-a-la-mineria-en-las-consultas-populares-107078>> 19 August 2017.

Contrary to the United States, in Colombia, oil and gas does not belong to the owner of the land or to the person that is capable to capture the hydrocarbons.²⁰⁴ The ownership of petroleum lies with the *State*. However, the State, in this context, is an abstract concept because it does not specify the public entity that is entitled to claim dominion over the non-renewable natural resources.²⁰⁵ This lack of clarity is still more problematic in a polarised country where there is a constant tension between the Local Governments (Territorial Entities) and the Central Government over the benefits (royalties) gained by the exploitation of natural resources even though both public entities are obliged to cooperate to fulfil their goals. This tension is better illustrated due to the negotiation power that each entity has over the other. Hence, this first stage will briefly address how the political division in Colombia can affect the ownership of hydrocarbons in Colombia.

Territorial Entities are completely independent to manage and govern their territories. Colombia is a social state organised as a “unitary decentralized republic with policy centralization and administrative decentralization”²⁰⁶. Thus, the Territorial Entities (*Departments, Regions, Municipalities and Indigenous territories*) are completely autonomous of the political centralisation power of the executive branch at central level²⁰⁷. For instance, the definition of the use of the land is a competence exclusively delegated to Territorial Entities²⁰⁸. Even more, is because of such independence that the allocation of competences between both levels requires a specific procedural law (*ley orgánica de ordenamiento territorial*)²⁰⁹.

The ownership of the non-renewable resources and the sub-soil belongs to the State²¹⁰. However, what is the meaning of the State? Is it similar to the Nation? The *State* includes all the public entities whereas the *Nation* is associated exclusively with Central Authorities²¹¹. Bearing in mind these concepts, it is important to emphasise that the Constitution interestingly avoided granting the benefits of the natural resources exploitation either in favour of the Executive Branch at Central Level (*Nation*) or Territorial Entities²¹². Notwithstanding, the National Congress is entitled to regulate the exploitation of the natural resources and delegate *by law* the direction or intervention of the sub-soil in the Central Government²¹³.

As a result, it is clear that the constituent assembly of 1991 did not want to gather all the wealth of the natural resources exploitation neither in the Nation nor in the Local Authorities because the decentralised spirit of the Constitution. By contrary, the constituent assembly expressly made a structural separation between the governance of the land and the

²⁰⁴ Bruce Kramer and Owen Anderson, ‘The rule of capture – an oil and gas perspective’, Environmental law, 2005, <<https://ttu-ir.tdl.org/ttu-ir/bitstream/handle/10601/582/Kramer%2035%20Envtl.pdf?sequence=1>>

²⁰⁵ Corte Constitucional de Colombia, c-006/1993, M.P. Eduardo Cifuentes Muñoz

²⁰⁶ Procolombia, “Investment Booklet 2015, growth, confidence and opportunities to invest”, <<https://www.slideshare.net/pasante/investment-booklet-2015>> accessed on 20 July 2017.

²⁰⁷ Constitución Política de Colombia, artículo 287 <<http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=4125>> accessed on 20 July 2017.

²⁰⁸ *Ibid*, Constitución Política de Colombia, artículo 286, 287 and 298

²¹⁰ *Ibid*, Constitución Política de Colombia article 332

²¹¹ Corte Constitucional de Colombia, C-221 de 1997 cited on judgment T/445-2016, M.P. Jorge Ivan Palacio Palacio, August 19 of 2016.

²¹² Corte Constitucional de Colombia, Sentencia C-273/16, Gloria Stella Ortiz Delgado, May 25 of 2016, 31 point.

²¹³ Corte Constitucional de Colombia, *ibid* 29-38 but particularly the 30 and 31 points.

governance of the sub-soil. The former (*land*) is delegated to Territorial Entities whereas the latter (*sub-soil*) is transferred to the Congress, which in turn, can delegate it to the Central Level. Nonetheless, constitutionally, both public entities (*Local and Central*) are obliged to cooperate in order to reach their objectives regardless of any disparity of functions²¹⁴. In essence, one cannot operate without the other's permission.

However, is this structural division sustainable in practice when, for instance, extracting mineral resources can affect the 'surface'?²¹⁵ This is addressed in the next section.

5.2. Stage 2 - An attempt to regulate the Territorial Entities competences through a Mining Code: it was necessary?

Arguably, a key point of this controversy about the *surface* and the *sub-soil* regulation emerged with the Article 37 of the Mining Code introduced in 2001. This provision pointed out that no regional, sectional or local authority can exclude permanently or provisionally from their territories mining activities; in other words, Territorial Entities were not entitled to ban mining activities through the planning of the use of the land. This provision favoured energy development without considering the interests of Territorial Entities. Consequently, a great number of a constitutional citizen actions emerged against this provision.

Since then, the Constitutional Court has explored the constitutionality of this provision on three occasions with different outcomes. In 2012, the provision was declared as valid in the context that it was in the public interest that there is mining activity. In 2014, however, there was a trend that marked the beginning of the development of the equivalent of a SLO: the provision would still remain valid but on the basis that a settlement shall be agreed between the National Government and the Local Authorities (*administrative coordination principle*) regarding the environmental activities and protection from the mining activity.²¹⁶

In 2016, the Constitutional Court, however, abolished the provision on the basis of two major points: (1) the need to protect the competence of Territorial Entities and (2) the obligation to preserve the rights of the society as well as the environment.

The high court concluded that the Mining Code article limited the autonomy and competences of Territorial Entities and was inconsistent with procedural law. The Mining Code was not the appropriate law to regulate or affect the competences of Territorial Entities. This is because Territorial Entities competences can only be affected or regulated by a particular law (*ley orgánica*) which is almost at the same level of the *constitution* and its provisions shall remain *permanent* in the time. The Mining code, in contrast, was passed as a law of lower category (*ley ordinaria*) into the Congress.²¹⁷ Subsequently, the Mining code could not abolish and took over the competences of a law of higher hierarchy i.e. '*ley orgánica*'²¹⁸. One of the main reasons for this special protection is that the Congress when is

²¹⁴ Constitución Política de Colombia, artículo 113 <<http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=4125>> accessed on 20 July 2017.

²¹⁵ Corte Constitucional de Colombia, Sentencia C-035 de 2016 that is cited on Sentencia C-273/16, both with same M.P. Gloria Stella Ortíz Delgado May 25 of 2016, 32 point.

²¹⁶ Milton Fernando Montoya, Minería y Desarrollo: Los Nuevos Retos Jurídicos del Desarrollo Minero a partir del Empoderamiento de las Autoridades Territoriales, Externado University of Colombia, 2016, <<http://www.camaramedellin.com.co/site/Portals/0/Documentos/Memorias/2016/Dr-%20Milton%20Montoya.pdf>> accessed on 23 July 2017

²¹⁷ Corte Constitucional de Colombia, sentencia C-273/16, M.P. Gloria Stella Ortíz Delgado May 25 of 2016

²¹⁸ Corte Constitucional de Colombia, sentencia C-037/2000, Vladimiro Naranjo Mesa

regulating the competences of Territorial Entities by a '*ley orgánica*' makes a stronger and robust democratic process (*for example absolute majority*) than when is issuing a '*ley ordinaria*' (*Mining code.*)²¹⁹

In addition, another pivotal point of the High Court to abolish the provision of the Mining Code was that the Central Government through the national mapping mining activity can impact the competences of Territorial Entities to regulate the economic activity of their territories.

Environmental care and society rights supported also the decision to abolish the Mining Code provision. Taking into account a former judgment (C-123/2014), the Court interestingly reaffirmed that during the licensing mining process the Central and the Local Government shall harmonise their interests and agree measures to protect the environment; the water reservoirs; the sustainable development of communities; the constitutional rights of indigenous people; the individuals; the economic activity of territories; and lastly but not less important it should preserve the autonomy of the Territorial Entities.²²⁰

In conclusion, until May 2016, one should arguably conclude that the Central Government and Local Governments shall first make efforts to reach an agreement on the measures of environmental protection and sustainable development during the process of issuing a mining right.²²¹ If there is still a collision of competences between both entities (*no settlement*), the Congress shall then resolve the controversy by issuing a particular law (*ley organica*).

5.4. Stage 3 - The state of the art: people are choosing but do they have the last world?

Strikingly, in August 2016, the Constitutional High Court made a new judgment where expressly gave the power to Territorial Entities to forbid mining projects as part of the communities right to be consulted where there is an initiative of developing a mining project. Therefore, this sub-chapter will explain how the Social License to Operate could be accepted or rejected through popular consultations.

There has been a constitutional shift in Colombia which is best encapsulate by the following quote: "*The former constitution declared that sovereignty rested on the Nation while the new one states that sovereignty lies on the People*".²²² This further supports the use of popular consultations to define the economic activities of territories. For instance, Cajamarca's people opted for agricultural activities instead of gold whilst Cumaral's people opted for stockbreeding of livestock instead of hydrocarbons. However, are these outcomes legally binding? This subsection considers legal cases that have arisen.

Popular consultation's outcome is binding and they are enforceable by law. From 1994, the authorities are obliged to respect the results of popular consultation. Indeed, Territorial Entities are particularly obliged to conduct a popular consultation when a mining project transforms the economic activity of a territory.²²³ However, what is a popular consultation

²¹⁹ Corte Constitucional de Colombia, sentencia C-273/16, M.P. Gloria Stella Ortíz Delgado May 25 of 2016.

²²⁰ *Ibid*, M.P. Gloria Stella Ortiz Delgado, Corte Constitucional de Colombia, Sentencia C-273/16, 2016, 29-38 points.

²²¹ *Ibid*, M.P. Gloria Stella Ortiz Delgado, Corte Constitucional de Colombia, Sentencia, 2016, C-123/2014 and C-273/16

²²² Bechara Alvaro, Colombian Business Law, Temis S.A. 2006, 8.

²²³ Ley 136 de 1994 article 33

and why its outcome is binding? Popular consultation is a constitutional citizen democratic right²²⁴, in which, the people express their consent or not regarding to a specific question that is related with affairs of the Central or Local level, respectively.²²⁵ If the outcome in the polls is positive, another public entity is *obliged* to adopt the people's decision in an independent law which can be subject of further constitutional analysis. Therefore, the people's decision in a popular consultation is binding on the basis of the fulfilment of the minimum legal requirements.²²⁶

Particularly, the outcome of popular consultations in mining projects are binding not only by law but also because the hazards that mining projects can have on the environment and society. In August 2016, the Constitutional Court in a judgment issued in August 2016 – 'Liliana Mónica Flores Arcila' against 'Tribunal Administrativo del Quindío'²²⁷- confirmed the binding and enforceability of these actions regarding a specific popular consultation against mining activities (Pijao municipality). Two main reasons supported the decision. First, the binding nature of the people's decision as was explained in the paragraph above, and, second, the need to protect specific rights (*agricultural workers and the environment*) against the almost certain damages that result from mining activity²²⁸. In the judgment mentioned above, the Constitutional Court declared that mining activities affect significantly communities rights; the supply and right to food²²⁹; the public order within one municipality²³⁰; other industries²³¹; the environment of the municipalities; and the economic industry of the territory.²³²

Consequently, the Court²³³ expressly returned the decision-making power back to communities. As the development of a mining project can impact the competences of local territories and directly impacts local communities²³⁴, communities are entitled to participate and express its opinion about the allowance or not of mining activities²³⁵. Consequently, Territorial Entities are nowadays entitled to ban mining projects.²³⁶

However, can this decision promote more adversarial and extreme positions between Central Government and Local Governments?

As was explained in the stage 2, the same Constitutional Court (C-123/2014 and C-273/16) highlighted the cooperation principle between public entities as well as the procedural law (*ley organica*) to overcome any collision of competences to balance two tensions: on the one

²²⁴ Constitución Política de Colombia, artículo 287, <<http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=4125>> accessed on 24 July 2017.

²²⁵ Ley 134 de 1994 article 8, <<http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=330>> accessed on 24 July 2017

²²⁶ Corte Constitucional de Colombia, Sentencia T-445/16 M.P. Jorge Ivan Palacio Palacio, August 19 of 2016. Also, see the articles 41 and 42 of the law 1757 of 2015

²²⁷ *Ibid*, M.P. Jorge Ivan, Corte Constitucional de Colombia, Sentencia, T-445/16, 2016

²²⁸ *Ibid*, M.P. Jorge Ivan, Corte Constitucional de Colombia, Sentencia, T-445/16, 2016

²²⁹ *Ibid*, M.P. Jorge Ivan, Corte Constitucional de Colombia, Sentencia, T-445/16, 2016, 10.1 point

²³⁰ *Ibid*, M.P. Jorge Ivan, Corte Constitucional de Colombia, Sentencia, T-445/16, 2016, 10.2 point; it also points to the case C-123/ 2014 of the same Court.

²³¹ *Ibid*, M.P. Jorge Ivan, Corte Constitucional de Colombia, Sentencia, T-445/16, 2016, 10.3 point.

²³² *Ibid*, M.P. Jorge Ivan, Corte Constitucional de Colombia, Sentencia, T-445/16, 2016, 10.4 point.

²³³ *Ibid*, M.P. Jorge Ivan, Corte Constitucional de Colombia, Sentencia, T-445/16, 2016, 10.1 point

²³⁴ *Ibid*, M.P. Jorge Ivan, Corte Constitucional de Colombia, Sentencia, T-445/16, 2016. Also, in mining projects it is mandatory to carry out a popular consultation according to the Law 136 of 1994, article 33

²³⁵ Corte Constitucional de Colombia, (n 34).

²³⁶ *Ibid*, M.P. Jorge Ivan, Corte Constitucional de Colombia, Sentencia, T-445/16, 2016.

hand, the need to allocate or spread the economic benefits of an extractive project in all the Colombian territories and, on the other, the need to preserve the self-governance of Local Authorities over their territories.²³⁷ Nonetheless, with the new judgment of the High Court (*August 19 of 2016*), Local Authorities are entitled to forbid the development of mining projects. Therefore, one should conclude that until a new bill is passed into the Congress, mining companies shall have a previous consent from the community to start exploration activities in one territory.

Nowadays, there is government initiative to regulate at the earliest consultation to avoid eventual suspension of the Mining-Energy activity, as a result of some investors claiming for damages and legal stability.²³⁸ For example, TobieMining-Cosigo (Canada) filed an international arbitration claim of USD 16.500 million arguing that they have not received any compensation due to the impossibility to develop a mining right in the ‘Yaigojé-Apaporis’ natural reserve, which is a special protected area of 1 million hectares of virgin jungle and a sacred place for Indigenous people (*origin of life*)²³⁹. Additionally, AngloGold Ashanti has argued the need for having legal stability as a result of the decisions made by Local Authorities in which the latter have banned mining projects.²⁴⁰

5.5. Gaining a Social License to Operate

Generally, extractive industries develop their “Sustainable Development” or “Corporate Social Responsibility” (CSR) strategies under the concept that “*without private sector wealth creation there can be no significant reductions in poverty*”²⁴¹. However, extractive industries arguably “often fail to emphasise why resource companies might want to contribute in such a way (*poverty reduction*)”²⁴².

In Colombia, contract law has become a quintessential device to perform social public policy and to deliver Corporate Social Responsibility (CSR) programs to reduce poverty with enormous investments. These social programs are performed through inter-administrative agreements or by public and private association agreements with non-profit organisations. For instance, in 2012, two different memorandum of understanding were signed by the Colombian Central Government, the Mining Industry and the Hydrocarbons sector to overcome extreme poverty in Colombia under an ‘*ethical and social mandate*’ to tackle it²⁴³. Furthermore, from 2012 to 2016, the National Oil and Gas Company, Ecopetrol, had invested £ 261.866.750 in social investment programs in health, education, productive projects,

²³⁷ *Ibid*, M.P. Gloria Stella Ortiz Delgado, Corte Constitucional de Colombia, Sentencia C-273/16, 2016,

²³⁸ El Tiempo Journal, “Otras consultas populares que tienen en vilo la minería y el petróleo” <<http://www.eltiempo.com/economia/sectores/consultas-populares-en-colombia-que-tienen-en-vilo-la-explotacion-minera-y-petrolera-95600>> accessed on 24 July 2017.

²³⁹ Semana, ‘La minera que pide 16.500 millones de dólares de indemnización a Colombia’ <<http://www.semana.com/nacion/articulo/16500-millones-de-dolares-demanda-tobie-mining-contra-colombia-por-apaporis/528264>> accessed 18 August 2017.

²⁴⁰ AngloGoldAshanti, ‘comunicado oficial sobre decisión del concejo de jericó’ <<http://www.anglogoldashanticolombia.com/noticia/comunicado-oficial-decision-del-concejo-jerico/>> accessed 18 August 2017>

²⁴¹ Sayer (2005) who is cited by Bruce Harvey, “Social development will not deliver social licence to operate for the extractive sector”, *The Extractive Industries and Society Journal*, 2013, 1.

²⁴² *Ibid*, Harvey, 2013, 1

²⁴³ Ministerio de Minas y Energía, ‘Firma del Pacto para la Superación de la Pobreza Extrema’ <<https://www.minminas.gov.co/historico-de-noticias?idNoticia=441411>> accessed on July 24 2017.

infrastructure and environmental care²⁴⁴ Despite this noticeable investment and this CSR's strategies, communities and indigenous people are still protesting against extractive industries.²⁴⁵

Harvey suggests a shift from 'Outreach' (*particularly the bad-outreach*) to 'In-reach' approach – see below in Table 4.²⁴⁶ Applying an out-reach approach imply that the Social License to operate is an external affair of the company. In contrast, an in-reach approach involves that the Social License to operate is a “business-connected” activity that it is in the business core. This shifting generates a change within the conventional transactional Corporate Social Responsibility (CSR) or analogously concepts, from a transactional model of compensation or kind of gifts to a process where “trust”, “respect” and “local induction” are the main foundations of a lasting relationship between communities and industries²⁴⁷.

One can restate Harvey's key points in the following terms below in Table 4:

Table 4: Harvey's In-reach and (Bad) Out-reach Approach

In- reach approach	Bad Out-reach approach
<ul style="list-style-type: none"> • 'Local Induction Course' delivered by educators with high people participation should be a compulsory module to be taken by each employee of an Extractive Industry • Gaining the TRUST of communities: listening, thinking, discussing and learning from them • Showing respect to communities • Social Licence must be in the heart of Managers • Changing the behaviour of employees in extractive industries 	<ul style="list-style-type: none"> • Unilateral delivery of social programs that do not have a business connection • Transactional social investment as a manner of compensation • Delivery of gifts that create dependency and resentment • Social programs managed by third-parties non-aligned or not connected with the business

Source: Constructed by the Authors (2017).²⁴⁸

Consequently, Harvey's proposal is to create a kind of a partnering between the communities and the extractive industries to work “on a face to face basis” on the major concerns of the people; the goal is that these fears or issues are highly connected with business activity of the Company instead of being as an external affair.

²⁴⁴ Ecopetrol, 'Reporte integrado de gestión sostenible 2016', <http://www.ecopetrol.com.co/wps/portal/es/ecopetrol-web/relacion-inversionistas/para-el-accionista/asamblea-general-accionistas/reunion-ordinaria/reporte-integrado-gestion-sostenible/!ut/p/z0/04_Sj9CPyKssy0xPLMnMz0vMAfljo8ziLf0N3d09gg28_Z3cjAwcA80tnPycHA3dg8z1C7IdFQFhJ16p/> accessed 24 August 2017.

²⁴⁵ Noticias RCN, 'Por protesta indígena, Ecopetrol suspende parcialmente producción en Campo Rubiales', <<http://www.noticiasrcn.com/nacional-regiones-sur/protesta-indigena-ecopetrol-suspende-parcialmente-produccion-campo-rubiales#>> accessed 24 July 2017; also see Noticias RCN, 'Protesta afecta producción petrolera en campo de Ecopetrol ubicado en el Meta' May 17 2017 <<http://www.noticiasrcn.com/nacional-regiones-centro/protesta-afecta-produccion-petrolera-campo-ecopetrol-ubicado-meta>> accessed on 24 July 2017.

²⁴⁶ *Ibid*, Harvey, 2013, 1

²⁴⁷ *Ibid*, Harvey, 2013, 1

²⁴⁸ Author's elaboration taking into account Bruce Harvey, “Social development will not deliver social licence to operate for the extractive sector”, *The Extractive Industries and Society Journal*, 2013,

5.6. Conclusion

Constitutionally, the regulation of the sub-soil and the governance of the surface is allocated in two public entities; the former (*sub-soil*) relies on the Congress which can delegate it to the Central Government whereas the latter (*surface*) relies on Territorial Entities. However, the Constitutional Court has challenged, in practice, this division mostly in the mining sector due to environmental concerns and the potential change of economic productivity in territories.

This challenge arises due to the lack of coordination to govern the exploitation of non-renewable natural resources inside the State, at both central and local levels. Therefore, this tension has likely activated the people's sovereignty as a manner of solve this collision of competences²⁴⁹, which has been expressed through more than five popular consultations to forbid mining-petroleum activities and 44 intentions to follow the same tendency.

The challenge now is to harmonise not only the competences of the State over the natural resources as well as to consider the people's right to be considered in the decisions that may affect their territories. As a result, until the Congress introduce a new law (ley organica) solving the tension between the Central Government and Local Governments, one thesis is arguably emerging in Colombia: *community consent is a condition to being awarded a mining right as well as a hydrocarbon license*. Despite that there is not a legal provision that expressly requires community acceptance to exploit non-renewable natural resources, i.e. a "Social License to Operate" as an equivalent to the Environmental License, this consent will be required if there is a potentially impact or hazard that affect the society, the environment and the economic activity of one territory²⁵⁰. This consent can be achieved whether by a popular consultation promoted by communities or local authorities or by individual negotiation among the oil companies, the State and communities.

However, there is also an important role that extractive industries and petroleum enterprises can develop in this scenario: self-regulation of their power.

It seems reasonable to suggest that actually in Colombia the SLO should be the first point in the agenda in the 'Check List' of an Energy Project. The profitability of a project will be significantly affected by whether it obtains an SLO or not. For instance, 92 of Ecopetrol's production wells were suspended in May 2017 due to community protests and other 81 production wells also were ceased in June 2017 with a loss of 9.500 oil barrel per day because of an incident with indigenous people.²⁵¹ Furthermore, Anglo Gold Ashanti has suspended operations in Cajamarca due to the outcome of the popular consultation.²⁵²

Subsequently, it seems a fair suggestion that extractive industries and petroleum companies should have obtained and retained a "Social License to Operate" for the lifecycle of their projects; the same outcome will happen whether the company is under public or private

²⁴⁹ *Ibid*, M.P. Jorge Ivan, Corte Constitucional de Colombia, Sentencia, T-445/16, 2016.

²⁵⁰ *Ibid*, M.P. Jorge Ivan, Corte Constitucional de Colombia, Sentencia, T-445/16, 2016. (*particularly 11 and 15.3.1.3 points*). This case cites two other constitutional cases: C-891 de 2002 and T-348 de 2012

²⁵¹ Noticias RCN, 'Protesta afecta produccion petrolera en campo de Ecopetrol ubicado en el Meta' May 17 2017 <<http://www.noticiasrcn.com/nacional-regiones-centro/protesta-afecta-produccion-petrolera-campo-ecopetrol-ubicado-meta>> accessed on July 24 2017.

²⁵² Anglo Gold Ashanti, 'AngloGold Ashanti acepta resultados de la consulta popular y reduce al mínimo sus actividades en Cajamarca' <<http://www.anglogoldashanticolombia.com/noticia/comunicado-oficial-la-colosa/>> accessed on July 24 2017.

ownership. It is important that energy companies are more proactive on the SLO issue, and that they disclose, discuss and consider their interest to intervene a territory at the earliest stage possible of the project. Ensuring the company has an SLO before committing huge investments in exploration activities meet a company's other obligations to sustainable development or corporate social responsibility, all key strategies for a company to realise when engaging in new energy activities.

To restate, nowadays the society is entitled to accept or reject an extractive project in Colombia as a result of the disconnection inside the State. This participation right is supported by the Constitutional Court²⁵³ that returned the decision-making power back to communities until the Congress through a particular law will balance the tension of gaining royalties from the extractive industry to be allocated in all the Country or preserving the autonomy of Territorial Entities to decide the future in their territories.

6. Conclusion

SLO is an emerging necessary tool for achieving effective and sustainable outcomes for both the extractive industries as well as affected communities.²⁵⁴ It needs a clearer definition to give it more prominence. The proliferation of terms that cover SLO's as set out in table 1 require consolidation. This would provide greater clarity in understanding the necessary role of SLO's for energy companies. The increasing contractual nature of SLO's leads us to the supposition that this consolidation is inevitable. Companies can no longer assume that the introduction of their activities will be perceived as uniquely benefiting communities in the form of financial incentives or employment.²⁵⁴ The SLO mechanism recognises that energy-related industries and communities must enter into a deeper negotiated understanding as early as possible.

The Colombia example raised in this paper demonstrates the risks in assuming that communities will accept readily energy-related activities undertaken by energy companies. It also points the important role played by courts or other intermediaries where rights of communities can usurp the needs of energy companies as we see in stage three of the Colombia study. The SLO can provide a helpful framework for avoiding international disputes if implemented in a comprehensive manner²⁵⁵. It reminds us that the social and legal licence to operate cannot exist separately. They are unavoidably interconnected. An energy company must therefore consider both dimensions when proposing an energy project to avoid the experience outlined in Colombia or indeed in other Latin American countries.²⁵⁶ Failure to do so will lead to similar outcomes to Colombia.

The SLO is a key instrument for achieving energy justice.²⁵⁷ The foundational principles of distributional, procedural and recognition justice underpin the SLO framework. It demands a more comprehensive appreciation of energy-related impacts as well as the preventative measures needed for successful mitigation. The focus of these principles is not to thwart

²⁵³ *Ibid*, M.P. Jorge Ivan, Corte Constitucional de Colombia, Sentencia, T-445/16, 2016.10.1 point

²⁵⁴ *Ibid*, Jijelava and Vanclay, 2017,

²⁵⁵ N. Hall et al., "Social Licence to Operate: Understanding How a Concept Has Been Translated into Practice in Energy Industries," *ibid*.86 (2015).

²⁵⁶ Maria Ehrnström-Fuentes and Markus Kröger, "In the Shadows of Social Licence to Operate: Untold Investment Grievances in Latin America," *ibid*.141 (2017).

²⁵⁷ *Ibid*, Heffron and McCauley, 2017

energy activities.²⁵⁸ It is to ensure the long-term sustainability of energy investments. The ignorance of energy justice principles results in short-term unstable negative experiences with resisting communities.²⁵⁹ The contractual nature of a SLO can embed a two-way understanding of a fair and meaningful interaction between the energy company and the community leading to mutual benefits.²⁶⁰ The increasing level of energy investments makes this process invaluable.

Procedural justice is enhanced through the application of a SLO. The establishment of mechanisms for allowing community engagement with energy companies is in keeping with the demands of a wide range of legal interventions in this area, the most prominent being the Aarhus convention. This reminds us that the participation of affected communities in decisions made by energy companies must be accompanied by the right to access relevant information as well as ultimately recourse to justice in environmental matters. We highlighted the expansion of such rights through the consideration of impact assessment within a European context. In order to come in line with such advances, the SLO must reflect on all dimensions when considering what procedural justice means.²⁶¹

The second component of energy justice is the adoption of a comprehensive approach to human rights. We outline above the ways in which such recognition could be expanded further when considering the implications of a given energy project. The current approach is to adopt the existing FPIC framework which remains too narrow in focus. Human rights must be considered more widely than indigenous considerations, as well as over the lifetime of a project (instead of the current “rubber stamp” understanding). The Voluntary Principles on Security and Human Rights offers a more private company mechanism (rather than the state centric perspective of FPIC). This is a step in the right direction. A robust understanding of a SLO could further enhance this approach by expanding such considerations throughout the life-cycle of a company’s energy activities.

Distributional justice is a final consideration in our paper. It is a common principle established in the energy justice literature. It often argues for the redistribution of benefits for affected communities. We argue that the standardisation of SLO terminology, alongside its increasingly contractual nature, could help communities understand where SLO’s have been successfully enacted. Its current opacity hinders the adoption of best practice. The current use of multiple terms leads to an unawareness of its potential for both companies and communities. This has led to an unequal distribution of rights to access SLO as a useful mechanism for avoiding the dispute. Individual components of the SLO framework are currently implemented in a piecemeal approach. To achieve distributional justice, we must allow for the comprehensive and transparent adoption of best practice in SLO’s.

²⁵⁸ Benjamin K. Sovacool et al., "Energy Decisions Reframed as Justice and Ethical Concerns," *Nature Energy* 1, no. 5 (2016).

²⁵⁹ McCauley, *Energy Justice: Re-Balancing the Trilemma of Security, Poverty and Climate Change*.

²⁶⁰ Lucy Mercer-Mapstone et al., "Conceptualising the Role of Dialogue in Social Licence to Operate," *Resources Policy* (2017).

²⁶¹ L. Mercer-Mapstone et al., "Meaningful Dialogue Outcomes Contribute to Laying a Foundation for Social Licence to Operate," *ibid.*53.