Incorporating the Social License to Operate into International Investment Law: Taking Stock from the Brazilian Experience

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Abstract

The social license to operate can be broadly defined as the social acceptability of an investor’s business practices by local communities. This article argues that the social license to operate can be incorporated into international investment law by allowing for local communities’ participation. The Brazilian cooperation and facilitation of investments agreements (CFIA) are used as a benchmark to sustain this argument. I explain that the CFIA make room for the social license to operate at a procedural and at a substantial level. First, local communities can participate in the dispute prevention procedures provided for by CFIA. By this means, they bring a third party’s perspective into the investor-State relationship by voicing its concerns on the investors’ activities. Substantially, this can be supported by the detailed provisions on corporate social responsibility enshrined in the CFIA and which can be invoked by the local communities during the dispute prevention procedure.

Keywords

Brazil – cooperation and facilitation investment agreements – dispute prevention – investment agreements – investment – social license to operate
1 Introduction

This article delineates the possibilities and limits of incorporating the concept of the social license to operate (SLO) into international investment treaties. In doing so, I use the Brazilian cooperation and facilitation of investment agreements (CFIAs) as a case study of such incorporation. This is because CFIAs contain instruments that provide pathways for incorporating SLOs into international investment law.

In one of its reports entitled ‘Business and Human Rights: Towards Operationalizing the “protect, respect and remedy” framework’, the United Nations Human Rights Council noted that:

Companies know they must comply with all applicable laws to obtain and sustain their legal licence to operate. However, over time companies have found that legal compliance alone may not ensure their social licence to operate, particularly where the law is weak. The social licence to operate is based in prevailing social norms that can be as important to the success of a business as legal norms.1

The SLO is still a legally imprecise concept when it comes to attributing it a binding legal definition because its technical content has yet to be specified. The SLO can however be broadly defined – for the sake of a working definition – as a process aiming at guaranteeing the social acceptability of a given business activity or investment amongst the local communities and stakeholders2 on an ongoing basis.3 Stakeholders can be defined as ‘any group or individual who can affect or is affected by the achievement of [an] organization’s objectives’.4 They can have various degrees of salience depending upon

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the business operation. SLO was originally coined by Jim Cooney to foster the social acceptability of mining companies amongst local communities. SLOs aims at harmonizing the relationships between companies and local communities for the well-being of both parties and for building long term ties between them. SLO are designed to build a trust-based relationship between investors and local stakeholders. Some authors consider SLO to be an ‘implicit contract’ signed by companies with local communities to mitigate the negative externalities of their operations upon them. Others argue that SLO is a matter of public accountability resulting from ‘an intangible construct associated with acceptance, approval, consent, demands, expectations, and reputation’. It is commonly accepted that investment relations nowadays engulf non-economic parameters such as human rights, environmental, labor, health protection or climate change. SLO is one of the potential channels towards the bridge-building process between these parameters and the protection of foreign investments.

As a field, international investment law is a specialized law for the legal protection of foreign investors and companies. As such, it might not, at first sight, be the most appropriate venue to raise the SLO debate. However, investors and transnational companies’ activities sometimes trigger negative impacts

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8 Claire Richert, Abbie Rogers and Michael Burton, ‘Measuring the Extent of a Social License to Operate: The Influence of Marine Biodiversity Offsets in the Oil and Gas Sector in Western Australia’ (2015) 43 Resources Policy 121.
9 Sale (n 7).
10 Parsons, Lacey and Moffat (n 2).
11 Arnaud de Nanteuil, Droit international de l’investissement (Pédone 2017) 431.
on local communities\textsuperscript{13} whilst being protected by an array of international investment agreements during their investment operations. Considering that investors’ corporate social behavior has already been construed as a parameter of their legal protection,\textsuperscript{14} it is not totally incongruent that the SLO discussion has been raised within the ambit of international investment law. The challenge however lies in its incorporation in investment treaties and arbitration – and by extension, in the investment relations culture.

However, being new to the legal field,\textsuperscript{15} the technical substance and procedural contours of the SLO have yet to be defined. In legal terms, foreign investors only need a ‘legal license’ to operate. Once they obtain all necessary authorizations and permits from their host State, they can legitimately expect that their business activity is legally operational and that no further formalities will be required. If the SLO is not provided for in the applicable investment agreement or by the domestic laws, it cannot be eventually invoked as a requirement to invest. To require an SLO may under certain conditions be construed as frustrating the investor’s legitimate expectations and legal security.

As undefined as it is,\textsuperscript{16} the social license to operate has been invoked in investment arbitration.\textsuperscript{17} As a result it has become of interest in doctrinal discussions.\textsuperscript{18} In the \textit{Bear Creek v Peru} case, for example, the SLO colored the debates before the arbitral Tribunal. The Canadian Company Bear Creek had received all authorizations from Peru to settle a mining activity close to indigenous lands. The foreign company had established consultations with some of the indigenous communities, namely those which were closest to the mining operations but had failed in its outreach to those which were indirectly

\textsuperscript{13} Kate Miles, \textit{The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital} (CUP 2013) 125 ff; Federico Suárez Ricaurte, ‘Two Tiers and Double Standards: Foreign Investors and the Local Community of La Guajira, Colombia’ (2022) 19 Globalizations 854.

\textsuperscript{14} Metal-Tech Ltd v Uzbekistan, ICSID Case No ARB/10/3, Award (4 October 2013) para 422; Inceysa v El Salvador, ICSID Case No ARB/03/26, Award (2 August 2006) para 244 and 339; Europe Cement Investment v Turkey, ICSID Case No ARB(AF)/07/2, Award (13 August 2009) paras 171–72. See also Nitish Monebhrunn, ‘The Corporate Duty to Contribute to Sustainable Development from the Perspective of Investment Arbitration’ (2021) 17 Asian Intl Arb J 97 ff.

\textsuperscript{15} Bienzenbos (n 2); Barnes (n 7) 328, 329; Martin Brueckner and Marian Eabrasu, ‘Pinning Down the Social License to Operate (SLO): The Problem of Normative Complexity’ (2018) 59 Resources Policy 217; Raúl F Zúñiga Peralta, ‘The Judicialisation of the Social License to Operate: Criteria for International Investment Law’ (2021) 22 JWIT 93.

\textsuperscript{16} Brueckner and Eabrasu (n 15) 1; Bear Creek \textit{v} Peru, ICSID Case No ARB14/21, Award (30 November 2017) para 406.

\textsuperscript{17} ibid.

\textsuperscript{18} Barnes (n 7).
impacted by the investment. According to the participating *amicus curiae* in the arbitral proceeding, the tentative community outreach organized by Bear Creek had failed to consider some important aspects of the local indigenous (Aymara) culture, for instance, in terms of collective decision making\(^{19}\) or consultations in a language easily understood by them.\(^ {20}\) Nevertheless, the arbitral Tribunal ultimately considered that the investor had established the expected contacts with the local communities as per existing legal standards\(^ {21}\) and that the State had, in any case, approved the investor's operations at all levels. In so doing, it disengaged the legal debate on SLO which it unconvincingly associated to the free, prior, and informed consent as provided for the International Labour Organisation (ILO) Convention 169 – the Indigenous and Tribal Peoples Convention of 1989.\(^ {22}\) The Tribunal accordingly associated SLO to the legal license entrenched in the obligation to seek free, prior and informed consent of the said communities. Still, the *Bear Creek* case is one of the first to have given space to the direct invocation and treatment of the SLO, including a dissenting opinion which focused on this specific conundrum.\(^ {23}\)

As this example shows, the SLO has started to be invoked in international investment law. It is an instrument which can be used to inject local stakeholders’ concerns and interests in the traditional investor-State relationship whilst bringing more legitimacy to and acceptance of business operations vis-à-vis local communities. Incorporating the SLO to international investment law is however possible only if SLO is duly defined and if an incorporation method is designed for it to deploy an effective legal effect in the investment relationship. As stated, this is not yet the case. This article addresses the problematic question by taking stock from the Brazilian CFIA's to model an integration hypothesis of SLO in international investment law. After examining the potential incompatibility between SLO and investment law in Section 2, the article will argue that an integration of one into the other is technically possible if there exists an institutional framework as explained in Section 3. Section 4 will consider how to make SLO substantially operational. This argument will be grounded on a comparative method whereby the Brazilian CFIA's institutional framework for the governance of dispute prevention will serve as model. The article's hypothesis is that the CFIA's institutions have the capacity

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19 *Bear Creek v Peru* (n 16) para 261.
20 ibid para 225. The consultations were held in Spanish, but many local communities speak mostly Aymaran.
21 ibid para 412.
22 ibid.
23 ibid, Partial Dissenting Opinion of Philippe Sands.
to make the SLO legally operational by means of the CFIA’s corporate social responsibility (CSR) provision.

2 The Closure of International Investment Law to the Social License to Operate

International investment agreements do not generally provide for SLO. This comes as no surprise for at least two main pragmatic reasons. International investment law is, in principle, closed to stakeholders. It was not designed to protect their rights. Thus stakeholder, such as local communities, where investment takes place are not considered to be privy to the investor-State contractual relationship and their rights are therefore not protected within that relationship.

2.1 A Closure of International Investment Law to Local Communities

International investment law primarily aims at protecting and guaranteeing the rights of foreign investors against non-business-related risks. The international investment law system – with its normative structure and dispute settlement mechanism – was originally designed to safeguard the interests of investors. International investment agreements between developed and developing States became popular after the decolonization period. The rise of these agreements was set against the cold war context of the competing paradigms of free market, on the one hand, and socialism, on the other. Despite the fact that the decolonization process was ongoing as these agreements were


being entered into, many foreign private companies wanted to maintain their economic activities in the newly independent States. However, they did not fully trust their domestic legal system.\textsuperscript{29} The history of international investment agreements has been well documented in the legal scholarship\textsuperscript{30} and it is not useful to recall this entire history in the present article. Suffice it to say that at one period international investment agreements arose as a compromise between developed and developing (and ex-colonized) States to offer a reciprocal legal protection to their respective investors\textsuperscript{31} – even though, initially, investments flowed principally from the former States to the latter ones. The principle is that States sign and ratify investment agreements in order to offer legal protection to foreign investors. For that reason, international investment law can be thought of as \textit{lex specialis}.\textsuperscript{32} Therefore, from its origins, international investment law created an articulation between home and host States and foreign investors.\textsuperscript{33} These are and have always been the three main actors of the investment relationship.\textsuperscript{34} Conspicuously, international investment law was consolidated to facilitate the relationship between these actors to the benefit of foreign investors\textsuperscript{35} and was long closed to other considerations.

A quick look at any investment agreement will evidence that this legal instrument provides mostly rights to investors whilst imposing mostly obligations to States in the same way that – comparatively – the regional human rights systems grant rights to human beings which must be respected by States.\textsuperscript{36} True, when States sign investment agreements, they, at least, expect a return in terms of contribution to their development\textsuperscript{37} but this is not usually materialized as a duty of the foreign investors in the investment agreements.

\begin{thebibliography}{99}
\bibitem{29} Patrick Julliard, ‘L’évolution des sources du droit des investissements’ (1994) VI RCADI 108; Muchlinski (n 28) 5; Peter Muchlinski, \textit{Multinational Enterprises and the Law} (OUP 2021) 651 ff.
\bibitem{30} Julliard (n 29); Vandeveld (n 27); Jeswald Salacuse, ‘BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries’ (1990) 24 Intl Lawyer 655; de Nanteuil (n 11) 13–56; Rudolf Dolzer, Christoph Schreuer and Ursula Kriebbaum, \textit{Principles of International Investment Law} (OUP 2022) 1–12; Radi (n 26) 3.
\bibitem{31} Nitish Monebhurrun, \textit{La fonction du développement dans le droit international des investissements} (L’Harmattan 2016) 68.
\bibitem{33} Dolzer, Schreuer and Kriebbaum (n 30) 24.
\bibitem{34} Sornarajah (n 25).
\bibitem{35} Radi (n 26) pt 1 ‘On the History of International Investment Law and Arbitration’.
\bibitem{36} Dolzer, Schreuer and Kriebbaum (n 30) 25.
\bibitem{37} Monebhurrun (n 31).
\end{thebibliography}
Materially, these agreements are mostly made up of standards of protection and of treatment of foreign investors and their investments. If the agreements are violated and if a dispute arises, it is because the investors’ protected rights – and not a third party’s ones – have been potentially violated by their host States. These agreements provide investors with the right to initiate arbitration proceedings against host States to enforce these rights. Under these agreements only investors and States are parties to a dispute before arbitral tribunals.

For these reasons, international investment law operates in a closed circuit. Local communities are not represented in the investment relationship. The principal remedy available to local communities deeming that their rights have been violated by foreign companies is the classical recourse to domestic laws and tribunals. Sometimes, they can get a say in international arbitration, as amicus curiae for example. However, the participation of local communities in arbitrations proceedings involving investors and States has always been limited.

A primary reason for local communities being excluded in such arbitration proceedings is that their rights are not usually protected by investment agreements. As a result, they cannot, in principle, claim a SLO.

38 Dolzer, Schreuer and Kriebaum (n 30) 186 ff; Julien Chaisse and others (eds), Handbook of International Investment Law and Policy (Springer 2021) 233 ff.
40 See Julien Chaisse, Leïla Choukroune and Sufian Jusoh, ‘Investor-State Dispute Settlement (ISDS): An Introduction’ in Julien Chaisse and others (n 38) 605.
41 Lorenzo Cotula and Nicolás M Perrone, ‘Investors’ International Law and its Asymmetries: The Case of Local Communities’ in Ho and Sattorova (n 24) 71. For a study on the ‘voices’ which shape international investment treaties, see Chrysoula Mavromati and Sarah Spottswood, ‘Voices that Shape Investment Treaties: Inside, “Outside and Among States”’ in Catherine Titi (ed), Public Actors in International Investment Law (Springer 2021) 1.
42 Fernando Dias Simões, ‘Public Participation: Amicus Curiae in International Investment Arbitration’ in Julien Chaisse and others (n 38) 1371.
2.2 A Closure of International Investment Law to Local Communities’ Rights

The SLO is not a legal requirement to constitute and/or to operate an investment. The conditions for the admission or for the establishment of an investment activity are provided for by investment agreements and by domestic laws and regulations as determined by the host States. These do not generally make provision for a SLO. In other words, it is the host State and not local communities which validates the foreign investor’s right to operate within its territory. Once the host State grants all authorizations and permits to a foreign investor, the latter has reasonably no reasons to believe that additional licenses will be required for the investment to be legal and operational.

SLO must not be mistaken for the obligation to seek the free, prior, and informed consent (FPIC) of indigenous and tribal communities required by the ILO Convention 169. The FPIC is a legal requirement limited to indigenous and tribal peoples as a mechanism of their collective right to self-determination. As such, these people must be consulted when an economic activity can potentially cause a damage to their lands, resources, culture, environment, beliefs, food chain, amongst others. They must be made aware of such impacts, they must have reasonable time to deliberate the issue internally, within their communities and must give their consent without any coercion. This ILO requirement is addressed to States having signed and ratified the Convention. It is also limited to indigenous and tribal communities and is mostly a procedural part of the legal license to operate. This rule is, in general, accepted by economic agents; it has, for instance, been incorporated in the World Bank’s International Financial Corporation’s Performance Standards on Indigenous People.

The SLO is a much broader concept. It is not necessarily restricted to the establishment phase of an investment. Unlike FPIC, it does not appear in ILO Convention 169. The SLO is theoretically expected (or can be claimed)

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44 Dolzer, Schreuer and Kriebaum (n 30) 135.
45 ibid 132. For a critical vision, see Ibironke T Odumosu-Ayanu, ‘Local Communities, Indigenous Peoples, and Reform/Redefinition of International Investment Law’ (2023) 24 JWIT 792, 823 Section 3.2.1.
46 Barnes (n 7) 328, 344.
48 Barnes (n 7) 328, 343.
over the whole ‘life’ of an investment operation\(^{50}\) and can emanate from any impacted local community. Notably, FPIC on the part of indigenous and tribal communities is a State’s obligation while the SLO by contrast is incumbent upon private economic agents. If FPIC has an uncontested basis in international law, SLO still has a more fragile legal foundation.\(^{51}\) In the \textit{Bear Creek v Peru} case, for instance, the arbitral Tribunal confused the SLO with the FPIC. Considering that FPIC had been acquired,\(^ {52}\) the Tribunal noted:

While ... further actions by Claimant would have been feasible, on the basis of the continued coordination with and support by Respondent’s authorities, the Tribunal concludes that Claimant could take it for granted to have complied with all legal requirements with regard to its outreach to the local communities. Respondent, after its continuous approval and support of Claimant’s conduct, cannot in hindsight claim that this conduct was contrary to the ILO Convention 169 or was insufficient, and caused or contributed to the social unrest in the region.\(^ {53}\)

It is a mistake to consider that the SLO is tantamount to the FPIC and more so to conclude that an investment has received a SLO because it was approved after a FPIC as per the terms of ILO Convention 169.\(^ {54}\) If SLO was equivalent to FPIC, there would be no need to invent the very concept of SLO.

The SLO can consequently be problematic in the investment relationship in that it injects some legal uncertainty therein.\(^ {55}\) This is because the investor’s operations commence once it has received all permits to operate, yet if it can (still) be asked for a social license to operate because of a future local resistance to or a lack of community acceptance of the investment, the investor’s legal security can be at stake. Of course, such resistance is not a precondition for the SLO. On the contrary, the SLO aims at guaranteeing the social acceptance of the investment operation by the means of a dialogue with local communities. However, in practice, like in the \textit{Bear Creek} case, the SLO debate has been brought forward namely because of local opposition.

In addition, legal uncertainty is accentuated given the blurred legal foundations of the SLO. This situation can be construed as being inconsistent or as lacking transparency and security. In such situations an investor can claim a

\(^{50}\) Parsons, Lacey and Moffat (n 2).
\(^{51}\) Barnes (n 7) 328, 356.
\(^{52}\) \textit{Bear Creek v Peru} (n 16) para 412.
\(^{53}\) ibid para 412.
\(^{54}\) Barnes (n 7) 328, 344.
\(^{55}\) Zúñiga Peralta (n 15) 107.
frustration of its legitimate expectations which entails a violation of the fair and equitable treatment standard (when applicable). As such, the SLO is potentially in conflict with some of the provisions of international investment agreements and may seem incompatible with their main object, which is the protection of foreign investors. Introducing the SLO debate into international investment law is therefore of such a nature that it can be the cause of further disputes between States and investors, as it can be, for example, when climate change conundrums enter the field of investment law. In some sectors, like mining, SLO is a cost risk.

This criticism does not imply that it is impossible to incorporate SLO to international investment law. The latter faces much criticism and resistance because of the wide array of rights it bestows upon foreign investors without providing for corresponding obligations. This criticism has been heeded by some States. Correspondingly, some of the recent investment treaties make room for environmental, labor, and human rights concerns, for corporate social responsibility or for the State’s right to regulate. It is through this same opening that SLO can find a purposeful function in international investment law and arbitration in that it is a channel to bring therein third parties’ voice.

It is in the interest of foreign companies to be socially accepted locally – social acceptability being a parameter of economic success which entails more business legitimacy. At the same time, an SLO can potentially give local communities a say in an investment that may bring negative externalities to their


57 See Dolzer, Schreuer and Kriebaum (n 30) 186.

58 Olabisi D Akinkugbe and Adebayo Majekolagbe, ‘International Investment Law and Climate Justice: The Search for a Just Green Investment Order’ (2023) 46 Fordham J Intl L 172. See also Lorenzo Cotula, ‘International Investment Law and Climate Change: Reframing the ISDS Reform Agenda’ (2023) 24(4–5) JWIT 766. Many cases against Spain and Italy illustrate this conflict between domestic climate change regulation and international investors’ protection.

59 Brueckner and Eabrasu (n 15) 1.

60 Mavluda Sattorova, ‘The Foreign Investor as a Good Citizen: Investor Obligations to Do Good’ in Ho and Sattorova (n 24) 45.

61 See generally Ho and Sattorova (n 24); Radi (n 26) 218.

62 Parsons, Lacey and Moffat (n 2).
daily lives. An SLO can therefore nudge an investor to consider the interests of a local community where that may not part of its business culture.63

However, for such an incorporation to be successful, it must be done in legal terms and not only in the discourse or in the narratives. The existence of a legal framework is of utmost importance to enable an effective participation of other stakeholders, like local communities, in the investment relationship. In this context, the Brazilian CFIA's constitute a valuable laboratory to test how some of its techniques and instruments can be applied to draw a connection between IIL and an SLO. This will be discussed in the next sections of this article, starting by the institutional integration of SLO to international investment law.

3 An Institutional Integration of Social License to Operate to International Investment Law by Means of a Dispute Governance Framework

If Brazil had for long been an objector to international investment agreements, it changed its policy and perception since 2015 when it started signing its self-designed Cooperation and Facilitation of Investments Agreements (CFIA's).64 Brazil's CFIA's do not include some of the classical provisions of investment agreements – like fair and equitable treatment, full protection and security, indirect expropriation, investor-State arbitration. Instead, they are based on a cooperation philosophy65 and contain some innovative proposals, some of which are relevant for the SLO discussion in international investment law. One of these innovations is the dispute prevention mechanism provided for by all CFIA's.66 My argument is Brazil's investment (cooperation) agreement model facilitates the institutional integration of SLO by allowing stakeholders' participation in the dispute prevention proceedings as I argue

63 ibid.
64 Nitish Monebhurrun, ‘Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model’ (2017) 8 JIDS 79–100. Brazil has already signed 13 CFIA's.
below. This encourages a fertile partnering dynamic for the social acceptance of investment operations as I elaborate more fully by demonstrating that the Brazilian CFIA s make room for an institutional mechanism, called the Joint Committee, and a substantive mechanism formalized by a CSR provision which can be used to integrate SLO into international investment law.

3.1 An Integration by the Means of Local Communities’ Institutional Participation

To make SLO operational, community acceptance and support is fundamental and therefore local communities’ participation is conspicuously the first stepping-stone. In most investment cases, local communities’ concerns are peripheral in investment arbitration. By contrast, the Brazilian CFIA s follow an alternative model and make provision for a comprehensive dispute prevention governance structure, based on an institutional framework which includes stakeholders’ participation.


68 Brueckner and Eabrasu (n 15) 2; Richert, Rogers and Burton (n 8) 121; Hillary A Sale (n 7) 788; Smits, Leeuwen and Tatenhove (n 2) 111.

69 Paolo Vargiu, ‘Stakeholders of Investment Arbitration: Establishing a Dialogue Among Arbitrators, States, Investors, Academics and Other Actors in International Investment Law’ in Fach Gomés (n 4 5) 7; Karsten Nowrot and Emily Sipiorski, ‘Towards a Republicanisation of International Investment Law? Conceptualising the Legitimatory Value of Public Participation in the Negotiation and Enforcement of International Investment Agreements’ in ibid 163.

70 CFIA Brazil/India (signed 25 January 2020) arts 13 and 14; CFIA Brazil/Morocco (signed 13 June 2019) arts 14 and 15; CFIA Brazil/Colombia (signed 9 October 2015) arts 16 and 17; CFIA Brazil/Chile (signed 24 November 2015) arts 18 and 19; CFIA Brazil/Ethiopia (signed 11 April 2018) arts 17 and 18; CFIA Brazil/Suriname (signed 2 May 2018) arts 18 and 19; CFIA Brazil/Guyana (signed 13 December 2018) arts 18 and 19; CFIA Brazil/United Arab Emirates (signed 15 March 2019) arts 18 and 19; CFIA Brazil/Ecuador (signed 25 September 2019) arts 18 and 19; CFIA Brazil/Mexico (signed 26 May 2015, entered into force 7 October 2018) arts 14 and 15; CFIA Brazil/Mozambique (signed 30 March 2015) arts 4 and 5; CFIA Brazil/Angola (signed 1 April 2015, entered into force 28 July 2017) arts 4 and 5; CFIA Brazil/Malawi (signed 25 June 2015) arts 3 and 4. See Fabio Morosini and Michelle Raton Sanchez Badin, ‘Navigating Between Resistance and Conformity with International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments’ in Fabio Morosini and Michelle Raton Sanchez Badin (eds), Reconceptualizing International Investment Law from the Global South (CUP 2018) 22.

71 Monebhurrun (n 64) 86–87.
One of the CFIAs’ bodies for the governance of dispute prevention is the Joint Committee. The Joint Committee has overarching prerogatives in the general administration of the CFIAs and acts specifically as the general coordinator of the dispute prevention mechanism. For such purposes, its competences are to be combined with those of an ombudsperson instituted by the CFIAs. Agents of the States’ parties to an CFIA sit as members of the Joint Committee. It is worth noting that the Brazilian CFIAs – as compared to most investment agreements – are limited to State-State relationships in matters of dispute prevention and arbitration. However, within this institutional configuration, a space has been created for and dedicated to the participation of other stakeholders, amongst which are local communities. For instance, Article 18(4) of the Brazil/India CFIA states that: ‘[w]henever relevant to the consideration of the measure [in breach of the agreement], the Joint Committee may invite other interested stakeholders to appear before the Joint Committee and present their views on such measure.’

More generally, the Joint Committee can also consult additional stakeholders on matters related to its work. These stakeholders can include any impacted or concerned local communities. The Joint Committees have no obligation to consult. Instead, the option to engage in consultation rests within their discretionary powers. Still, this setting offers the institutional opening for the SLO because it allows the partnering and cooperation of interested parties.

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72 A Joint Committee is also provided for by the Morocco–Nigeria BIT (signed 3 December 2016) art 4.
73 Monebhurrun (n 64) 84; Morosini and Raton Sanchez Badin (n 70) 226.
74 See supra n 70.
75 CFIA Brazil/India (n 70) art 13; CFIA Brazil/Morocco (n 70) art 14; CFIA Brazil/Colombia (n 70) art 16; CFIA Brazil/Chile (n 70) art 18; CFIA Brazil/Ethiopia (n 70) art 17; CFIA Brazil/Suriname (n 70) art 18; CFIA Brazil/Guyana (n 70) art 18; CFIA Brazil/United Arab Emirates (n 70) art 18; CFIA Brazil/Ecuador (n 70) art 18; CFIA Brazil/Mexico (n 70) art 14; CFIA Brazil/Mozambique (n 70) art 4; CFIA Brazil/Angola (n 70) art 4; CFIA Brazil/Malawi (n 70) art 3.
76 See Monebhurrun (n 64) 82; Nitish Monebhurrun, ‘What Would Change in Brazil’s Practice with the Adoption of an Investor-State Dispute Settlement Mechanism in Its Investment Agreements?’ (2019) 39 Nomos 76.
77 ibid art 18.4. Note that the CFIAs do not give a list of stakeholders.
78 ibid art 18(4)(d); CFIA Brazil/Morocco (n 70) art 14 (4) (d); CFIA Brazil/Colombia (n 70) art 16(4)(d)(i); CFIA Brazil/Chile (n 70) art 18(4)(d); CFIA Brazil/Ethiopia (n 70) art 17(4)(d); CFIA Brazil/United Arab Emirates (n 70) art 18(4)(d); CFIA Brazil/Ecuador (n 70) art 18(4)(d)(i); CFIA Brazil/Mexico (n 70) art 14(4)(d); CFIA Brazil/Mozambique (n 70) art 15(3)(b); CFIA Brazil/Angola (n 70) art 4 (4)(iv); CFIA Brazil/Malawi (n 70) art 3(4)(d).
beyond the investor and the host and home States. Promoting the participation of third parties as per this multi-actor model\textsuperscript{79} is a channel to build in an institutionalized trust\textsuperscript{80} in investment relations. Giving a voice and a say to parties traditionally excluded from these relations can help consolidate their level of trust in the institutions of the CFIA\textsubscript{s} before which they might appear more readily, with less resistance. Through its institutional dispute governance mechanism, the CFIA\textsubscript{s} have given a platform to stakeholders thereby allowing them to stand nearer to both the investors and the States. In my view, this institutionalized participation is one of the means to institutionalize the SLO, to give it a form and a structure within the very investment agreements.

3.2 An Institutional Integration by Partnering with Stakeholders in the Investment Relationship

Through this institutionalized stakeholders’ participation option offered by the CFIA\textsubscript{s}, communities affected by the investment can be called to intervene in the dispute prevention procedure when relevant.\textsuperscript{81} It is not clear whether local communities can ask \textit{propio motu} to have a say in the procedure. This mechanism is a new one and must still be tested. We cannot therefore evidence how efficient is the local community’s participation. However, the aim of this article is to anticipate the Brazilian practice whilst upholding that the institutional framework which has been set is original enough in that local communities are given an opportunity to voice their concern vis-à-vis the State and the investor. This does not imply that the community interests will be given the upper hand in the investment relationship; yet the sole possibility to participate is a means to give flesh to the concept of SLO.


\textsuperscript{80} Smits, Leeuwen and Tatenhove (n 2) 111.

\textsuperscript{81} CFIA Brazil/India (n 70) arts 13(4)(d) and 18.4; CFIA Brazil/Morocco (n 70) arts 14(4)(d) and art 19.4; CFIA Brazil/Colombia (n 70) arts 16(4)(d)(i) and art 22(3)(c)(ii); CFIA Brazil/Chile (n 70) art 18(4)(d) and 24(3)(c); CFIA Brazil/Ethiopia (n 70) art 17(4)(d) and 24(4); CFIA Brazil/Suriname (n 70) arts 18(4)(d) and 24(4); CFIA Brazil/Guyana (n 70) arts 18(4)(d) and 24(4); CFIA Brazil/United Arab Emirates (n 70) arts 18(4)(d) and 24(4); CFIA Brazil/Ecuador (n 70) arts 18(4)(d)(i) and 24(3)(c)(i); CFIA Brazil/Mexico (n 70) arts 14(4)(d) and 18(3)(c)(i); CFIA Brazil/Mozambique (n 70) arts 4(4)(iv) and 15(3)(b); CFIA Brazil/Angola (n 70) art 4(4)(iv) and 16(3)(iii); CFIA Brazil/Malawi (n 70) art 3(4)(d) and 13(3)(c)(ii).
By offering a forum where the home and the host States, the investor and a potentially impacted community as concerned stakeholder can meet, the Joint Committee promotes the conditions for partnering. It does so by bringing together conflicting and antagonistic parties with the aim of avoiding the escalation of a given disagreement or problem. Due to the CFIA’s platform designed for a multi-party discussion and negotiation, all interested participants have an opportunity to communicate their concerns under one umbrella. Depending on how intricate the conflict over a particular investment is and how the partnering is conducted, the concerned parties may strive to harmonize their relations in their common interest. The Joint Committee has the institutional capacity to measure, calibrate and encourage the social acceptability of the investment via the partnering instrument by integrating the stakeholders to the debate. This is so because: (i) it has the capacity of consulting and of bringing together all the concerned parties of an investment relationship; (ii) it can engage in an amicable dialogue with the investor to find a solution to ongoing problems or disputes; (iii) it can also organize working groups to work on specific issues, which could include SLO if need be.

In this process, the decision-makers become more easily aware of the existing objections to an investment operation and by hearing the local communities they get the opportunity to understand and remediate to their opposition. Likewise, the concerned local communities can better explain their position and substantiate the conditions according to which the investment would be socially acceptable. The economic agents gain a better position to know what is lacking for their investment project to acquire a social license to operate and to pursue a harmonious relationship with the local communities.

By this means, the CFIA’s institutional framework is a model which enables to bring in more structure to the SLO. It is also a useful and pragmatic instrument considering that SLO is not discussed within a context of litigation whereby damages have already occurred. In the proceedings before the Joint Committee, seeking an SLO is a way to make the investor’s operations possible without infringing community interests. By this means, the SLO could be

83 See eg CFIA Brazil/India (n 70) art 13(4)(d)(e) and art 13.5.
sought simultaneously together with other permits and could be maintained throughout the investment’s life by the partnering structure of the Joint Committee. It is important to note that the CFIA are rather recent agreements and that we are still waiting a sample of the Joint Committees’ experience to test the hypothesis of their purposeful function in facilitating the SLO.

The participating stakeholders cannot argue in favor of their concerns and cannot put forward the SLO argument on abstract and non-technical grounds. They must be able to ground their interests in participating in the proceedings on a legal basis. For such purposes, all Brazilian CFIAs contain a detailed provision on corporate social responsibility (CSR) which, I argue, is the substantial backbone to make SLO operational.

4 A Substantial Integration of Social License to Operate in International Investment Law by Means of Corporate Social Responsibility Provisions

Brazil’s CFIAs are innovative in that they systematically contain a comprehensive article on CSR. If the innovation further rests on the fact that the CSR provision is directly addressed to the investors, it is nonetheless upset by a couple of features which make it ineffective in practice, at least at first sight. This section of the article discusses how the apparent ineffectiveness can be faced and overcome namely by engaging the CRS provision in the SLO argument. I discuss each of these claims below.

85 CFIA Brazil/India (n 70) art 12; CFIA Brazil/Morocco (n 70) art 13; CFIA Brazil/Colombia (n 70) art 13; CFIA Brazil/Chile (n 70) art 15; CFIA Brazil/Ethiopia (n 70) art 14; CFIA Brazil/Chile/Guyana (n 70) art 15; CFIA Brazil/United Arab Emirates (n 70) art 15; CFIA Brazil/Ecuador (n 70) art 14; CFIA Brazil/Mexico (n 70) art 13; CFIA Brazil/Mozambique (n 70) art 10 and Annex II; CFIA Brazil/Angola (n 70) art 10 and Annex II; CFIA Brazil/Malawi (n 70) art 9. See also Nitish Monebhurrun, ‘Mapping the Duties of Private Companies in International Investment Law’ (2017) 14 Brazilian JIL 57–58.
4.1 The Apparent Ineffectiveness of Corporate Social Responsibility Provisions

The CSR provisions of the Brazilian CFIA s are interesting and novel because of the number of details they provide on investors’ duties and commitments. Quite originally, the CFIA s propose a legal framework for SLO. They mention the investor’s commitment to “encourage local capacity building through close cooperation with the local community” and to ‘develop and implement effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the societies in which their operations are conducted’. Such engagement with local communities or societies – and not only with indigenous or tribal people – amounts to a requirement or strong nudge that an investor has to seek an SLO in order to

86 For an example, see CFIA Brazil/India (n 70) art 12.1: ‘Investors and their investments shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article and internal policies, such as statements of principle that have been endorsed or are supported by the Parties’ and 12.2. ‘The investors and their investments shall endeavour to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State: a) contribute to the economic, social and environmental progress, aiming at achieving sustainable development; b) respect the internationally recognized human rights of those involved in the companies’ activities; c) encourage local capacity building through close cooperation with the local community; d) encourage the creation of human capital, especially by creating employment opportunities and offering professional training to workers; e) refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives, or other issues; f) support and advocate for good corporate governance principles, and develop and apply good corporate governance practices, including anti-corruption measures; g) develop and implement effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the societies in which their operations are conducted; h) promote the knowledge of and the adherence, by workers, to the corporate policy, through appropriate dissemination of this policy, including professional training programs; i) refrain from discriminatory or disciplinary action against employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or corporate policy; j) encourage, whenever possible, business associates, including service providers and outsourc es, to apply the principles of business conduct consistent with the principles provided for in this Article; and k) refrain from any undue interference in local political activities’. See generally Nitish Monebhurrun and Priscila Pereira de Andrade, ‘Mapping Investors’ Environmental Commitments and Obligations’ in Ho and Sattorova (n 24) 275–76.

87 Monebhurrun (n 64) 95–99.

88 See eg CFIA Brazil/India (n 70) art 12.2(c)(g).
commence investing. The trust-based relationship with local communities is specifically highlighted. If SLO is not, as such, explicitly mentioned in the CFIA's, it does appear implicitly in the CSR provision. The difficulty however rests in the apparent ineffectiveness of the CFIA's articles on CSR. This is explicable because the CSR articles are not binding and are, additionally, not arbitrable.

Firstly, even though they are addressed directly to investors and companies, the CFIA's articles on CSR are formulated in a soft, non-mandatory language.\(^89\) The investors are expected to deploy their best efforts to adopt a responsible social and environmental conduct. They must strive to comply with voluntary CSR standards.\(^90\) The ineffectiveness is hence related to the CSR provision being anchored in the realm of soft law. Most CFIA's provide that: '[t]he investors and their investment shall endeavor to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State receiving the investment'.\(^91\)

A list of standards and principles are then stated in the same article. At the very best, a duty of diligence can be construed from the treaty language which uses the verb 'shall' – as in 'shall strive' or 'shall endeavour'.\(^92\) In this sense, investors have a duty of means and not of results. The duty lies in that they must evidence that they put in all their efforts and used all their resources to achieve a socially responsible behavior, including obtaining an SLO. Even in such a case, the CFIA's CSR provision has been crafted with another feature which gives it an aspect of a 'dead letter'.

Secondly, the CSR provision – which includes the SLO duty – is not arbitrable. The arbitration clause of the CFIA expressly states that the CSR provision cannot be the object of an arbitration.\(^93\) This frustrates its legal effectiveness and raises a question about its legal purpose.\(^94\) To quote an example, article 25 (3) of the arbitration clause of the Brazil/Guyana CFIA states, 'the following may not be subject to arbitration: ... Article 15 – Corporate Social Responsibility ...'.\(^95\) This is a pattern in the CFIA's. It can however be argued

\(^{89}\) Monebhurrun and de Andrade (n 86) 77.
\(^{90}\) See supra nn 25 and 26.
\(^{91}\) This excerpt of the CFIA Brazil/United Arab Emirates (n 70) art 15.2 is also a feature of most CFIA's.
\(^{92}\) See for example CFIA Brazil/India (n 70) art 12; CFIA Brazil/United Arab Emirates (n 70) art 15.
\(^{93}\) For instance CFIA Brazil/Chile (n 70) Annex 1, art 1(2); CFIA Brazil/Guyana (n 70) art 25(3); CFIA Brazil/United Arab Emirates (n 70) art 25(3).
\(^{94}\) Monebhurrun (n 14) 93.
\(^{95}\) CFIA Brazil/Guyana (n 70) art 25(3).
that the CSR provision’s purposeful function is not limited to arbitration. Considering that the CFIA’s have been designed to value dispute prevention over litigation, the CSR clause – and the SLO duty – do have a legal function therein as discussed in the next section.

4.2 The Substantial Parameters of Social License to Operate Determined by the Corporate Social Responsibility Provision

It would be incongruent and frustrating if the detailed provision on CSR of the CFIA’s were to be condemned to inertia. Its non-arbitrability is not a sufficient reason to not delve into the legal purpose behind its existence, especially because this is a means to give a legal foundation to the SLO. The Brazil/Morocco CFIA hints at what is the provision’s finality in stating one of Joint Committee’s function: it supervises the agreements’ execution by giving due consideration to the CSR article.\textsuperscript{96} If both dispute prevention and the observation of CSR matters are juxtaposed in the Joint Committees’ list of competences, a legal correspondence can be established between them; at least, researching this connection belongs to the jurist. In this regard, local communities participating in a dispute prevention proceeding before the Joint Committee may refer to the CSR provision as the material basis of their arguments. The CSR provision reflects the minimum standard of corporate conduct and diligence expected from the investors, namely in their engagement with local communities. Foreign investors are minimally expected to respect the human rights of those who are potentially impacted by their activities,\textsuperscript{97} to engage in capacity building with local communities\textsuperscript{98} or to develop a trust-based relationship with the latter.\textsuperscript{99} These do not \textit{per se} define the content of the SLO, but they represent concrete indicators provided for the investment agreements. Investors are expected to be aware of the CSR provision found in an investment agreement which they intend to invoke to be granted a legal protection. It can be argued that the protection due to the investors is to be construed considering the diligence they showed in following the CSR standards, in showing their best level of due diligence in dealing with local communities.\textsuperscript{100} The communities’ participation will thus help establish to which extent the investor engaged with local communities to seek a SLO according to the CFIA’s criteria.

\textsuperscript{96} CFIA Brazil/Morocco (n 70) art 14(4)(a).
\textsuperscript{97} For instance, CFIA Brazil/India (n 70) art 12.2(b).
\textsuperscript{98} ibid art 12.2(c).
\textsuperscript{99} ibid art 12.2(g).
\textsuperscript{100} Monebhurrun (n 14) 9.
In other words, the CSR provision contains the operational parameters and material content of the SLO. It thereby offers a set of guidelines which can be used both by the local communities and by the Joint Committee to assess the efforts deployed by the foreign investor to seek a SLO. It can also be used by the investors to plan their operations. They cannot ignore the CSR provision merely because of its non-arbitrable nature. In the *Bear Creek* case, SLO was discussed on abstract grounds, making it difficult for the investor, the State, and the local communities to justify why the investment was granted SLO or not. This problem can be tackled by including a consolidated CSR provision in investment treaties, as illustrated by the Brazilian investment agreement model. The CSR provision is useful in that it standardizes the method of establishing the SLO for all the concerned and interested parties.

5 Conclusion

Together with other works quoted in the present contribution\(^\text{101}\), this article modestly falls within the doctrinal range of efforts to contribute to the study of the SLO. The article’s object was to extract SLO from an abstract, intangible narrative to provide it – minimally – with a technical structure and a material content. This was undertaken by taking stock from the experience of Brazilian CFIAs. Its main findings were that SLOs can be incorporated in the investment relationships and in the business culture if it is allowed a space in the investment agreements. Further, it argued that such an incorporation also requires an institutional framework which enables the investors, the State, and the impacted stakeholders to sit at the same table. This is possible when the investment agreement provides for a dispute governance mechanism characterized by competent bodies, like the Joint Committees of the CFIAs. Thirdly, discussing SLO is more efficient at the dispute prevention level – and not necessarily during an arbitration. This makes room for a multi-actor partnering possibility. Lastly, this partnering for SLO is effective when the investment agreements contain provisions which can be used by stakeholders in the dispute prevention process – as illustrated by the CFIAs. The article proposed a methodological contribution to the debate in classifying the criteria which have the potential to successfully integrate SLO in the investment relationship.

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\(^{101}\) Kristen Can de Bienzenbos, *The Rebirth of The Social Licence* (2018) 14 McGill J Sustainable Dev Law 160; Smits and others (n 2) 110; Parsons, Lacey and Moffat (n 2) 84; Howard-Grenville, Nash and Coglianese (n 7) 73, 77; Barnes (n 7) 333; Sale (n 7) 789; Bağlayan (n 7) 92.
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